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INTOXICATING LIQUORS

*The Law Relating to the Traffic in
Intoxicating Liquors and
Drunkenness*

BY

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CHAPTER XVIII.

SEARCHES AND SEIZURES.

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Sec. 596. Constitutionality of search and seizure laws.

Certain articles, for instance, intoxicating liquors, which are treated as property while used for lawful purposes, may be subject to forfeiture and destruction, under proper statutory provisions, if their use is deemed pernicious to the best interests of the community. And when such articles are attempted to be used for unlawful purposes, or in an unlawful manner, and the attempts are so concealed that ordinary diligence fails to make such discovery as to enable the law to

declare the forfeiture, statutes authorizing searches and seizures have been held legitimate, notwithstanding the Constitution of the United States and of many of the States provide that "the right of the people to be secure in their houses, papers and effects against unreasonable searches shall not be violated."¹ It has been held that the term "unreasonable" as used in the Constitution of the United States, has allusion to what had been practiced before the revolution and especially to general search warrants, in which the person, place or thing was not described, and the Supreme Court of Iowa has held that "no search warrant is unreasonable, in the legal sense, when it is for a thing obnoxious to the law and of a person and place particularly described and is issued on oath of probable cause. It is upon this right of search and seizure that laws of the States generally concerning the searching of gaming houses and seizures of persons and implements, for the search and seizure of base coin and counterfeit tools, devices and implements, of lotteries and tickets, and of obscene books, prints and pictures are sustained."² Such State laws have never been objected to on constitutional grounds although they have existed from the beginning of our State governments. The supposed doubt as to the right of search and seizure seems to have arisen only with statutes adopting a prohibitory or restrictive plan of liquor legislation and authorizing the issuance of warrants to search for liquors alleged to be illegally kept for sale, and directing their seizure when found and their forfeiture or destruction when the substance of the offense is established, after notice to and hearing of claimants have been called in question, and, as we have already said, such statutes are generally sustained.³ The exercise of this power, however, must be properly guarded so that abuses of it may be prevented, and a citizen may not be deprived of his property without having an accusation against him, setting out the nature and charge thereof, a trial by his peers and a judgment according to the laws of the land, and he shall thus

¹ Gray v. Kimball, 2 Me. 299; Fisher v. McGirr, 67 Mass. (1 Gray) 1, 61 Am. Dec. 381; Lincoln v. Smith, 27 Vt. 328; Gilt v. Parker, 31 Vt. 610.

² Santo v. State, 2 Iowa, 165; 63 Am. Dec. 487.

³ State v. Brennan's Liquors, 25 Conn. 277; Oriatt v. Pond, 29 Conn. 479; Sullivan v. Oneida, 61

Ill. 242; Allen v. Staples, 72 Mass. (6 Gray) 491; Commonwealth v. Intoxicating Liquors, 107 Mass. 396; Hibbard v. People, 4 Mich. 126; State v. Snow, 3 R. I. 64; State v. Fitzpatrick, 16 R. I. 54; 11 Atl. 773; *In re Horgan's Liquors*, 16 R. I. 542; 18 Atl. 279; Lincoln v. Smith, 27 Vt. 328; Gill v. Parker, 31 Vt. 610.

be secure in his person, houses, papers and possessions from unreasonable searches and seizures. Statutes when enacted with due regard to such guaranteed rights will not conflict with the constitutional prohibition that "private property shall not be taken for public use without just compensation" and generally they are held to be valid.⁴ Upon this point the Supreme Court of Vermont said that conceding "that there is a well recognized right of property in intoxicating liquors, that they are not *malum in se*, and that their use is not by law prohibited to citizens of this State, these propositions are nevertheless clearly subject to the qualification that *when kept and intended for unlawful use* such liquors fall at once under the ban of the law and become subject to seizure and confiscation by such methods as are provided by law in conformity with the Constitution * * * under the police powers delegated to the Legislature." Of this power Chief Justice Shaw has admirably said: "We think it is a settled principle, growing out of the nature of a well ordered civil society, that every holder of property, however absolute and unqualified may be his title, holds it under the implied liability that his use of it shall not be injurious to the equal enjoyment of others having an equal right to the enjoyment of their property, nor injurious to the rights of the community. All property in this Commonwealth * * * is held subject to those general regulations which are necessary to the common good and general welfare. Rights of property, like all other social and conventional rights, are subject to such reasonable limitations in their enjoyment as shall prevent them from being injurious, and to such reasonable restraints and regulations established by law as the Legislature, under the governing and controlling power vested in them by the Constitution, may think necessary and expedient. This is very different from the right of eminent domain—the right of a government to take and appropriate private property whenever the public exigency requires it, which can be done only on condition of providing a reasonable compensation therefor. The power we allude to is rather the police power, the power vested in the Legislature by the Constitution to make, ordain and establish all manner of wholesome and reasonable laws, statutes and ordinances, either with penalties or without, not repugnant to the Constitution, as they shall judge to be for

⁴ State v. O'Neil, 58 Vt. 140; 94 N. W. 675.
State v. Stoffels, 89 Minn. 205;

the good and welfare of the Commonwealth, and the subjects of the same." ⁵ It has been contended that such a law conflicts with that clause of Section 8, Article I, of the Federal Constitution, which confers upon Congress the exclusive right to regulate commerce among the States. In answer to this contention it was said: "If an express company, or any other carrier or person, natural or corporate, has in possession within the State an article in itself dangerous to the community, or an article intended for unlawful or criminal use within the State, it is a necessary incident of the police powers of the State that such article should be subject to seizure for the protection of the community. * * * If it were competent for persons or companies to become superior to State laws and police regulations, and to override and defy them under the shield of the Federal Constitution, simply by means of conducting an interstate traffic, it indeed would be a strange and deplorable condition of things." ⁶ That such a right does not exist has been settled by the Supreme Court of the United States. ⁷ Nor is such a law violative of a constitutional provision inhibiting cruel and unusual punishments, or excessive fines or bail, when by its provisions one who violates the law, can be punished for each violation. In such case if a defendant has subjected himself to a severe penalty it is his fault and not the fault of the law. It cannot be material in such case that cumulative punishments are imposed for distinct offenses in the same prosecution. The objection might be urged if the penalty was unreasonably severe for a single offense. ⁸ Nor is it violative of a constitutional provision that "the right of trial by jury shall remain inviolate" if it provides for an appeal in all cases, ⁹ and the fact that no time is stated in such a statute in which to procure sureties and perfect the recognizance in perfecting such an appeal will not make the statute unconstitutional; ¹⁰ if, however, the statute in such case provides that a condition of such recognizance shall be that the defendant will not violate any provision of the statute pending the appeal, such provision will be unconstitutional. ¹¹ In Massachusetts a statute ¹² which authorized

⁵ Commonwealth v. Alger, 61 Mass. (7 Cush.) 84.

⁶ State v. O'Neil, 58 Vt. 140.

⁷ License Cases, 5 How. (U. S.) 577.

⁸ State v. O'Neil, 58 Vt. 140.

⁹ State v. Brennan's Liquors, 25

Conn. 277; State v. Snow, 3 R. L. 64.

¹⁰ Liquors v. McLoly, 15 R. I. 608.

¹¹ Saco v. Wentworth, 37 Me. 165; Liquors of McLoly, 15 R. I. 608.

¹² Statute of 1855, c. 12, sec. 25.

officers, without a warrant, to arrest any person found in the act of illegally selling or transporting liquors, and seize the liquors, vessels and implements of sale in the possession of such person, and detain them in some place of safekeeping until warrants can be procured for the trial of the person and the seizure of the liquors, has been held constitutional.¹³

Sec. 597. Federal and State jurisdictions, conflict.

We live under two separate and distinct governments. One of the difficult problems in this polity has always been to define the limits of these and keep each in its true orbit. In this dual system, there are two judicial organizations—the Federal and the State—for the most part independent of each other. These courts have exercised their judicial function side by side, over the same people and territory, in cases mostly of concurrent jurisdiction, with but little discord, jarring or conflict. For this most desirable harmony we are indebted beyond doubt to the wisdom of the Supreme Court of the United States in planting deeply in our legal system the principle that where a court of either jurisdiction has, by legal process, custody of persons or property, the courts of the other jurisdiction shall not attempt to wrest such persons or property from the court first obtaining possession of the same. Again and again has this principle been laid down by that court, and in doing so it has based its decisions upon the ground that the possession of the officer of a court under legal process is the possession of the court, and that an attempt to wrest persons or property from the custody of such an officer is an

¹³ Jones v. Root, 72 Mass. (6 Gray) 435; Mason v. Gray, 73 Mass. (7 Gray) 354.

If the complaint does not allege that the liquors are kept for sale in violation of law, the proceedings are illegal under the Constitution. State v. Spirituous Liquors, 68 N. H. 47; 40 Atl. 398.

In South Carolina liquors car-

ried as personal baggage are exempt from seizure if they were purchased outside the State. State v. Pope, 79 S. C. 87; 60 S. E. 234.

In Indiana a statute withholding a trial by jury is valid. Campbell v. State, 171 Ind. 702; 87 N. E. 212. In this case it is held that the proceedings are strictly *in rem*.

invasion of the jurisdiction of the court. The creation and existence of this principle is well stated by Mr. Justice Campbell of the Supreme Court of the United States as follows:¹⁴ "The legislation of Congress in organizing the judicial power of the United States exhibits much circumspection in avoiding occasions for placing the tribunals of the States and the Union in collision. A limited number of cases exists in which a party sued in a State court may obtain a transfer of the cause to a court of the United States, by an application to the State court in which it was commenced, and this court, in a few well-defined cases by the twenty-fifth section of the Act of 1789, may revise the judgment of the tribunal of last resort of a State. In all other respects the tribunals of the State and the Union are independent of one another. The courts of the United States cannot issue an injunction to stay proceedings in any court of a State, and the judiciary act provides that writs of *habeas corpus* shall in no case extend to prisoners in jail unless where they are in custody under and by color of the authority of the United States, or are committed for trial by some court of the same, or are necessary to be brought into court to testify."¹⁵ Accordingly, it has been held that where the jurisdiction of a State court has attached to certain liquors seized by an officer of that court, by virtue of process under the prohibitory law of the State, such officer cannot be by a Federal court attached for contempt for refusing to obey the command of a writ of replevin issued out of the Federal court. And the fact that a statute of the State provides that in civil actions, under certain circumstances, replevin may be maintained for property in the possession of an officer holding it by legal process, will not warrant the taking by the Federal courts of property within the jurisdiction of the State courts. Where the court under

¹⁴ *Slocum v. Mayberry*, 2 Wheat. (U. S.) 1; *Hagan v. Lucas*, 10 Pet. (U. S.) 400; *Ex parte Dorr*, 3 How. (U. S.) 104; *Peck v. Jenness*, 7 How. (U. S.) 624; *Ableman v. Booth*, 21 How. (U. S.) 506; *Freeman v. Howe*, 24 How.

(U. S.) 450; *Buck v. Colbath*, 3 Wall (U. S.) 334; *Covel v. Heyman*, 111 U. S. 176; 4 Sup. Ct. 355.

¹⁵ *Taylor v. Carryl*, 20 How. (U. S.) 597.

one of these jurisdictions holds property in *custodia legis* conflicts of both decision and force can be averted only by abstinence of all interference by the other jurisdiction.¹⁶

Sec. 598. Due process of law, statute violating.

A statute directing the seizure and confiscation of intoxicating liquors kept or deposited for sale, which neither requires the name of any person keeping or depositing the liquors with intent to sell to be named in the complaint or in the search warrant for the liquors, nor limits the officer's authority and right of seizure to the liquors described in the complaint, nor those intended for sale, but directs him to seize any liquors found in the place described in the complaint, violates a constitutional provision which declares the right of the subject to be free from unreasonable searches and seizures, and is void, and likewise all proceedings had under it. Such a statute also violates other precautions and safeguards for the security of persons and property inasmuch as it provides for the destruction of private property and the punishment of its owner or keeper, without his being duly charged with any offense, or being summoned to appear before the magistrate, and without giving him an opportunity to defend himself and meet the witnesses against him face to face, and providing for legal proof of the offense of keeping the liquors with intent to sell.¹⁷ In Iowa it is held that a complaint in such a case must charge some specific person as the owner or keeper of the liquors with the illegal intent to sell them in violation of law.¹⁸

Sec. 599. Seizure, power to make—Ministerial and judicial power distinguished.

A man's property cannot be seized except for a violation of law, and whether he has been guilty of such violation cannot be left to police officers or constables to determine.¹⁹ The acts

¹⁶ *Senior v. Pierce*, 31 Fed. Rep. 625.

¹⁷ *Fisher v. McGirr*, 67 Mass. (1 Gray) 1; *Hibbard v. People*, 4 Mich. 125.

¹⁸ *State v. Harris*, 36 Iowa 136; *State v. Intoxicating Liquors*, 64 Iowa 300.

¹⁹ *Darst v. People*, 51 Ill. 286.

of such officers are purely ministerial, and such acts are defined to be such as a person performs in a given state of facts, in a prescribed manner, in obedience to the mandate of legal authority, without regard to, or the exercise of his own judgment upon the propriety of the act being done.²⁰ Such an act is none the less ministerial because the person performing it may have to satisfy himself that the state of facts exists under which he has power to perform the act.²¹ Under this construction of the law it has been held that the clerk of a court may be authorized by the Legislature to receive a complaint for the seizure of intoxicating liquors and issue a warrant for their seizure and that in doing so his acts will not encroach upon the judicial power contemplated by the Constitution, and that an officer acting under the authority of such a writ will be justified in seizing intoxicating liquors intended for sale within the State in violation of a law by virtue of which the warrant was issued.²² A judicial duty, within the meaning of the Constitution, is such a duty as legitimately pertains to an officer in the department designated by the Constitution as the judicial. By this designation is meant the judiciary in the true sense of the term.²³ The phrase "judicial power" is commonly employed to designate that department of government which it was intended should "interpret and administer the laws and decide disputes between or concerning persons."²⁴ Acts done out of court, in bringing

²⁰ *Flourney v. City of Jeffersonville*, 17 Ind. 169; 79 Am. Dec. 468; *Pennington v. Streight*, 54 Ind. 376; *Longfellow v. Quimby*, 29 Me. 196; *State v. LeClair*, 85 Me. 522; 30 Atl. 7.

²¹ *Betts v. Divine*, 3 Conn. 107; *State v. Knowles*, 8 Me. 71; *State v. LeClair*, 86 Me. 522; 30 Atl. 7; *Gates v. Lansing*, 5 Johns. (N. Y.) 282.

²² *State v. LeClair*, 86 Me. 522; 30 Atl. 7.

²³ *Betts v. Dimon*, 3 Conn. 107; *Crane v. Camp*, 12 Conn. 463; *Wilkins v. State*, 113 Ind. 514; 16

N. E. 192; *State v. Hovey*, 118 Ind. 350; 21 N. E. 244.

²⁴ *Cooley's Const. Lim.* 4th ed. p. 110; *Marbery v. Madison*, 1 Cranch (U. S.) 137; *Beebe v. State*, 6 Ind. 515; *State v. LeClair*, 86 Me. 522; 30 Atl. 7; *King v. Dedham*, 15 Mass. 454; *Daniels v. People*, 6 Mich. 381; *Merritt v. Sherburne*, 1 N. H. 199; *People v. Supervisors, etc.*, 16 N. Y. 432; *Cincinnati, etc. R. Co. v. Commissioners, etc.*, 1 Ohio N. S. 81; *Greenough v. Greenough*, 11 Pa. St. 494; *Taylor v. Place*, 4 R. I. 324.

parties into court, are, as a general proposition, ministerial acts; those done by the court in session, in adjudicating between the parties, or upon the right of one in court *ex parte*, are judicial acts.²⁵

Sec. 600. Nature of search and seizure proceedings.

In New Hampshire it is held that the proceeding under the New Hampshire law of 1855, for the forfeiture of liquors, is not a criminal proceeding. In so deciding the court said: "This is a proceeding *in rem* for the condemnation of the liquor and vessels; no penalty or fine is to be imposed upon the person who keeps the liquor with intent to sell under this proceeding. All that is done and that can be done, under this complaint, is to settle the question whether the liquor and vessels shall be condemned as forfeited to the country or shall be delivered to the claimants, or restored to the place from whence they were taken. It is a proceeding that cannot be commenced by an indictment and the complaint which is made in the first instance is not in the nature of a criminal complaint against any person but is merely a proceeding *in rem* against the liquors."²⁶ But in Michigan it is held that such a proceeding "is clearly a criminal proceeding." In so deciding the court said: "That this is clearly a criminal proceeding within the meaning of the Constitution, we can entertain no doubt. It is instituted for the purpose of forfeiting the property on the ground that it is kept for an illegal purpose. The party must be tried and convicted of an offense which the statute declares to be a misdemeanor before judgment of forfeiture can be declared and such forfeiture is imposed as part of the punishment for such offense. It makes no difference in its character that the form of proceeding for the recovery of the pecuniary penalty is similar to

²⁵ 3 Blackstone Com. 25; People v. Hayne, 83 Cal. 111; 23 Pac. 1; State v. Board, etc., 45 Ind. 501; Underwood v. McDuffee, 15 Mich. 361; Allor v. Wayne Co. Auditors, 43 Mich. 73; 4 N. W. 492.

²⁶ State v. Barrels of Liquors, 47 N. H. 369; Osborne v. State, 77 Ark. 439; 92 S. W. 406. So in Connecticut, State v. Burrows, 37 Conn. 427; Hine v. Belden, 27 Conn. 384.

that of a civil action. The issue is guilty or not guilty, and the penalty is imposed as a punishment of an offense.”²⁷ In Vermont it has been held that, “The proceeding in question was created by statute for the purpose of condemning property that is dangerous to the public safety, and disposing of it so that it can do no harm. It is not a suit between one party and another according to the course of the common law and would not either in ordinary or technical language be classed among civil actions.”²⁸ In Massachusetts the proceedings are held to be criminal in their nature as to jurisdiction of courts;²⁹ as to challenging of jurors;³⁰ as to burden of proving license, authority or appointment;³¹ as to the proof of averments in a complaint notwithstanding default has been taken;³² as to burden of proving the offense;³³ as to the matter of the costs of the action.³⁴ Like decisions have been made in Iowa and Maine.³⁵ Notwithstanding the weight of authority seems to hold that such proceedings are criminal proceedings, yet it cannot be rightfully said that they are purely and simply such. Rather may they be called *quasi* civil and criminal proceedings. In such a prosecution it is

²⁷ Hibbard v. People, 4 Mich. 125; Robinson v. Minor, 68 Mich. 549; 37 N. W. 21.

So in Iowa. Part of Lot 294 v. State, 1 Clarke (Iowa) 507; State v. Arlen, 71 Iowa, 216; 32 N. W. 267; State v. Intoxicating Liquors, 40 Iowa 95. In New Hampshire it is a civil proceeding. State v. Barrels of Liquor, 47 N. H. 369; State v. Tufts, 56 N. H. 137. In Maine, see State v. Larned, 47 Me. 426; State v. McCann, 67 Me. 372. In Vermont, State v. Jabour, 72 Vt. 22; 47 Atl. 107; Clement v. Harden, 62 N. Y. Misc. Rep. 31; 114 N. Y. Supp. 751.

²⁸ State v. One Bottle of Brandy, 43 Vt. 297.

²⁹ Commonwealth v. Intoxicating Liquors, 13 Allen (Mass.) 561.

³⁰ Commonwealth v. Intoxicating Liquors, 107 Mass. 216.

³¹ Commonwealth v. Intoxicating Liquors, 122 Mass. 8.

³² Commonwealth v. Intoxicating Liquors, 113 Mass. 23.

³³ Commonwealth v. Intoxicating Liquors, 105 Mass. 595.

³⁴ Commonwealth v. Intoxicating Liquors, 14 Gray (Mass.) 375.

³⁵ State v. Brown, 4 Iowa 349; State v. Intoxicating Liquors, 40 Iowa 95; Weir v. Allen, 47 Iowa 482; Fries v. Poreh, 49 Iowa 351; State v. Arlen, 71 Iowa 216; 32 N. W. 267; State v. Robinson, 49 Me. 285; State v. Intoxicating Liquors, 80 Ma. 57; 12 A. 794; State v. Intoxicating Liquors, 80 Me. 91; 13 A. 403.

immaterial what sentence is passed upon the liquors.³⁶ And conversely a conviction of the person is not a bar to a proceeding against the goods.³⁷ In other words, such a proceeding is entirely distinct from any prosecution which may be instituted against the person who had the liquors unlawfully in possession. As was well said by the Supreme Court of Maine: "When an officer seizes intoxicating liquors, upon a warrant issued therefor, he is required also to arrest the person in whose custody they are alleged in the complaint to be and have both the person and the liquors before the magistrate who issued the warrant. At this point the proceedings are divided and constitute thenceforth two distinct cases. The person is put on trial for having such liquors in his possession with the intent to sell the same in this State in violation of law. And the liquors are libeled, as intended for illegal sale; whether by one person or another is immaterial. So that the acquittal of the person does not entitle him to a restoration of the liquors; nor does a condemnation of the liquors necessarily result in a conviction of the person. The two cases are entirely separate."³⁸

Sec. 601. Jurisdiction of inferior courts—Presumption.

Search and seizure proceedings are criminal in their nature,³⁹ and in the first instance, as a rule, are commenced in courts of limited and inferior jurisdiction. Nothing is to be presumed in favor of the jurisdiction of such courts, and their judgments have no force unless it be affirmatively shown that jurisdiction was acquired. They have only such jurisdiction as the statute gives to them, and in such case the facts

³⁶ State v. McCann, 61 Ia. 116.
So in Arkansas, White v. State,
80 Ark. 598; 98 S. W. 377.

³⁷ Sanders v. State, 2 Iowa 230.

³⁸ State v. Miller, 48 Me. 576.

Effect of Wilson Act (26 U. S. Stat. 313) on liquor brought into the State. Board v. South Carolina Ry. Co., 57 Fed. 485; *In re*

Langford, 57 Fed. 570; Tinker v. State, 90 Ala. 638; 8 So. 814; State v. Aiken, 42 S. C. 222; 20 S. E. 221; 26 L. R. A. 345.

In Arkansas the proceeding is a civil action. Kirkland v. State, 72 Ark. 171; 78 S. W. 770.

³⁹ State v. Allen, 71 Iowa 216; 32 N. W. 267.

necessary to constitute jurisdiction must affirmatively appear.⁴⁰ Thus, if a statute requires the insertion in the complaint for a search warrant the allegation of probable cause, such allegation cannot be safely omitted.⁴¹ Nor has a magistrate jurisdiction in Maine to issue a warrant to search a *dwelling house* for intoxicating liquors to be kept for illegal sale, on the complaint of three persons competent to be witnesses, unless it is first shown to him by the testimony of such witnesses, reduced to writing and verified by oath, that they have reasonable ground for believing that such liquors are *there* kept for illegal sale.⁴² And where a statute provides that "no warrant shall issue for the search of a dwelling house, unless a tavern, store, eating room or place of common resort, is kept therein," a description of a dwelling house as a "place of common resort" merely is not sufficient, the court saying that "the statute contemplates a place *kept* for the purpose of common resort, *i. e.*, appropriated to such purposes by the occupant, keeper or person having the control of the premises."⁴³

Sec. 602. Affidavit based upon belief.

A statute of Connecticut provides among other things that a complaint for a warrant to search for and seize intoxicating liquors kept for unlawful sale should be verified by three persons of good moral character, and that they should "make oath or affirm that they have reason to believe, and do believe, to be substantially true the allegations of said complaint." The statute was assailed as being violative of the constitutional

⁴⁰ *Wiley v. Strickland*, 8 Ind. 453; *Amery v. Royal*, 117 Ind. 299; 20 N. E. 150; *Granite Bank v. Treat*, 18 Me. 340; *State v. Staples*, 37 Me. 228; *Guptill v. Richardson*, 62 Me. 257; *State v. Intoxicating Liquors*, 80 Me. 91; 13 Atl. 403; *Bridge v. Ford*, 4 Mass. 641; *Cleveland v. Rogers*, 6 Wend. (N. Y.) 438.

⁴¹ *Commonwealth v. Intoxicating Liquors*, 105 Mass. 178.

⁴² *State v. Staples*, 37 Me. 228;

State v. Sanborn, 38 Me. 32; *McGlinchey v. Barrows*, 41 Me. 74.

⁴³ *Commonwealth v. Intoxicating Liquors*, 97 Mass. 332.

Police courts in Boston and Worcester, under Massachusetts St. 1869, c. 415, had jurisdiction. *Commonwealth v. Certain Intoxicating Liquors*, 103 Mass. 448; 105 Mass. 176; and the Superior Court of Fitchburg. *Commonwealth v. Intoxicating Liquors*, 113 Mass. 13.

provision that "no warrant to search any place or seize any person or things shall issue, without describing them as nearly as may be, nor without probable cause, supported by oath or affirmation," but the statute was held to be constitutional, and a complaint verified according to the provisions was sufficient to authorize the issuing of a warrant without stating the facts upon which the affiants founded their belief.⁴⁴ Under the Massachusetts statute it has been held that an averment in such case that the affiant's belief is founded on common report is sufficient, the court saying, "The facts and circumstances are required to be stated, not as tending to convict the defendant when put upon his trial, but to satisfy the magistrate that there is sufficient cause for issuing a search warrant and to enable him to state with reasonable propriety that probable cause has been shown to him for issuing it. His decision is not subject to appeal and must be regarded as conclusive unless it appears to be utterly groundless. But common report may be of such a character as to convince any reasonable magistrate that an investigation ought to be instituted for that purpose, and as the magistrate is obliged to make an official statement that it appears to him that probable cause has been shown for issuing the search warrant, it would be his duty to inquire into the character of the report and ascertain the degree of its credibility. If it satisfies him, the statute is complied with and the warrant is legal."⁴⁵ In Indiana it is held that it is not necessary that an affidavit should show the statements are made from the affiant's knowledge but that it is sufficient if it appear that they are made upon information and belief.⁴⁶ In one case the court said: "No statement can go beyond the belief of the party making it. That belief may arise from personal observation, from sight or from sound, from information derived from others, or as the result of a logical conclusion from other known facts. But we know that sight or sound may deceive,

⁴⁴ *Lowry v. Grigly*, 30 Conn. 450.

⁴⁵ *Commonwealth v. Leddy*, 105 Mass. 381.

⁴⁶ *Simpkins v. Marlatt*, 9 Ind. 543; *State v. Ellison*, 14 Ind. 380; *Franklin v. State*, 85 Ind. 99; *Toop v. State*, 92 Ind. 13.

as information derived from other persons may, indeed. They can, at most, when united, produce but one result: conviction of the mind; or in other words, belief. When, therefore, one states his belief in the truth of a statement the assertion is as strong as language can make it.”⁴⁷ “It was formerly thought,” says Roscoe, “that an oath was not perjury unless sworn to in absolute or direct terms, and that if he swore according to his belief he could not be convicted of perjury. But the modern doctrine is otherwise. Belief is to be considered an absolute term; hence, to swear that he believes a thing to be true is equivalent to swearing that it is true.”⁴⁸

Sec. 603. What seizable—Justification.

An officer seizing, under a search warrant duly issued for intoxicating liquors, liquors not described in the warrant is a trespasser and is liable to an action by the owner thereof, notwithstanding the existence of a statute which provides that “no action shall be had or maintained against any sheriff, etc., for executing any warrant or order issued under this act by any justice or court competent to try the same; nor shall any action be had or maintained against any officer for seizing or destroying any intoxicating liquor or vessels containing it, unless such liquor and vessels were legally kept by the owner.”⁴⁹ But where an officer under such process seizes several separate articles, some of which he can lawfully seize and some not, the seizure is illegal only as to those which he has no right to seize, and legal as to others, and in such case an officer cannot be made a trespasser as to the whole property seized. In an early case where several barrels of beer were distrained for rent, the distrainer drew beer out of one of them, “which,” said Lord Holt, “made him a trespasser *ab initio* as to that barrel only.”⁵⁰ And likewise in Massachusetts it has been held that the seizure of bay water in connection with the seizure of intoxicating liquors did not make the officer a trespasser *ab initio* as to the intoxicating

⁴⁷ Gray v. Baker, 31 Ind. 151.

⁵⁰ Dod v. Monger, 6 Mod. 215;

⁴⁸ Roscoe's Crim. Ev. 814.

Harvey v. Peacock, 11 M. and W.

⁴⁹ Arthur v. Flanders, 76 Mass. 740.

(10 Gray) 107.

liquors and did not affect or invalidate their seizure.⁵¹ And in Connecticut where a warrant for the seizure of liquors, after describing the place to be searched and the liquors to be seized, used the following language with regard to the latter—"and are owned or kept by the said G, and are intended by him to be sold in violation of the act"—it was held that this language was merely that of averment and not of description, and that it was, therefore, not essential to the justification of the officer serving the warrant that the liquors seized should in fact be owned or kept by G. In so deciding the court said: "The designation of the place, indeed, operates to circumscribe, by visible, tangible and certain boundaries, the limits of the search and so makes an element in, or, more properly, aids, the description of the thing sought for. But the allegation regarding ownership, custody and criminal intent are of an entirely different character. They are averments of the existence of facts, but not directly, or by operation, in any sense descriptive of the thing to which these facts relate."⁵² An iron safe cannot be seized unless it contains liquors, under

⁵¹ Commonwealth v. Intoxicating Liquors, 113 Mass. 13.

⁵² Gray v. Davis, 27 Conn. 447; State v. Smith, 54 Me. 33.

Liquor in the hands of an interstate carrier cannot be seized. Bound v. South Carolina Ry. Co., 57 Fed. 485; *In re Langford*, 57 Fed. 570. *Contra*, State v. U. S. Express Co., 70 Iowa 271; 30 N. W. 568; State v. Creden, 78 Iowa 556; 43 N. W. 673; 7 L. R. A. 295; State v. Intoxicating Liquors, 50 Me. 506; Jaro v. Holstein, 73 S. C. 111; 52 S. E. 870.

Under Maine laws, 1851, c. 211, while liquor kept could be seized, the casks containing it could not. Black v. McGilvery, 38 Me. 287. In that State liquors purchased by a town agent from any person other than the State commissioners is liable to seizure and for-

feiture. State v. Intoxicating Liquors, 68 Me. 187. In New Hampshire a beer faucet was held liable to seizure. Collins v. Noyes, 66 N. H. 619; 27 Atl. 225.

In Massachusetts a warrant may issue to seize liquors already taken by and in the possession of an officer from a person illegally transporting them. Allen v. Staples, 6 Gray 491.

Liquor owned and kept by a corporation, intended by the directors to be lawfully sold, but intended by its manager to be illegally sold may be seized. Commonwealth v. Intoxicating Liquors, 163 Mass. 42; 39 N. E. 348. The principle involved is that of a seizure of a piratical or smuggling vessel. Commonwealth v. Intoxicating Liquors, 107 Mass. 396.

a warrant directing a search of the premises described therein and seizure of the liquors described, with the casks and other vessels in which it is contained, and all implements of sale and furniture used, kept and provided to be used in the illegal sale or keeping of the liquor.⁵³ Property or articles to be used as evidence may be taken in connection with the liquor seized.⁵⁴

⁵³ *Blackmar v. Nickerson*, 188 Mass. 399; 74 N. E. 932.

⁵⁴ *Getchell v. Page*, 103 Me. 387; 69 Atl. 624.

In this case cork stoppers, funnels, measures, bottles and mugs were seized, although appropriate for use in a drug store in which they were found; but it was held that baskets could not be taken.

In Kansas prior to the "Hurrell Law" (Laws 1901, p. 416, c. 232) bar fixtures and refrigerators could not be seized until after judgment abating them as a nuisance. *J. D. Iler Brewing Co. v. Campbell*, 66 Kan. 361; 71 Pac. 825.

Liquor shipped from one State to another "C. O. D." cannot be seized while in the express agent's hands, unless, at least, if it be not intended for unlawful sale. *State v. Intoxicating Liquors*, 98 Me. 464; 57 Atl. 798.

In Arkansas, under act February 13, 1899, §§ 1, 3, liquor shipped from a point within the State to a prohibited district may be seized in the hands of the carrier and destroyed. *St. Louis S. W. Ry. Co. v. Gans*, 69 Ark. 252; 62 S. W. 738; *Osborne v. State*, 77 Ark. 439; 92 S. W. 406.

In Maine liquors in the hands of the agent of a city intended for an unlawful sale, or in casks or vessels not marked as the stat-

ute (Rev. Stat. c. 29, § 34) requires may be seized. *State v. Intoxicating Liquors*, 101 Me. 161; 63 Atl. 666; but if properly marked they are protected. *Ibid.*

In South Carolina if liquors be conveyed in a vehicle at night the vehicle may be seized. (Crim. Code, § 594); but if the owner of the vehicle did not consent to or have knowledge of or voluntarily permit his vehicle to be in the custody of another under such circumstances as he ought to have known it would be so used, it cannot be seized. *Moody v. McKinney*, 73 S. C. 438; 53 S. E. 543.

Liquor not kept by the accused, but which is in his possession in such a manner as he cannot sell or dispose of it unlawfully, and which is really in the rightful possession of another, cannot be seized. *O'Neil v. State*, 76 Neb. 44; 107 N. W. 119.

A statute authorizing a forfeiture of the liquors on the premises where an illegal sale thereof is made by the "occupier" does not apply to an employe or servant of another living upon the premises with the manager, for he is not the "occupier." *Yung Son v. Kemp*, 23 N. Z. 609.

A statute providing that the words "spirituous liquors" shall be intended to cover "intoxicat-

Sec. 604. Search and seizure laws of Maine.

A statute of Maine makes it an offense to deposit or have intoxicating liquor in possession, with intent to sell it within the State in violation of law, or with intent that the same shall be so sold by any person, or to aid and assist any person in such sale.⁵⁵ It has been held that under this statute a complaint was not sufficient to authorize a conviction of the person having such liquor in his possession without an allegation that they were intended by him for sale in the State of Maine in violation of law, or deposited and kept by him to be so sold by some other person, or with intent to aid or assist some person in the unlawful sale thereof.⁵⁶ Under that statute an officer, when he seizes intoxicating liquors upon a warrant issued therefor, is required also to arrest the person in whose custody they are alleged in the complaint to be, and to have the person and the liquor before the magistrate who issued the

ing liquors," extends to an instance of "malt liquors" admitted to be intoxicating. *State v. Lager Beer*, 68 N. H. 377; 39 Atl. 255.

The usual statute applies to sales made in local option districts of the State. *State v. Fulkerson*, 73 Ark. 163; 83 S. W. 934; 86 S. W. 817.

Although liquor is carried as personal luggage which has been purchased outside the State, it is, by statute, exempt from seizure in South Carolina, yet if the owner drinks from it, that remaining may be seized as contraband liquor. *State v. Pope*, 79 S. C. 87; 60 S. E. 234.

A warrant may issue to search a dwelling house for liquors. *Commonwealth v. Certain Intoxicating Liquors*, 108 Mass. 19. So to search a vehicle. *Commonwealth v. Certain Intoxicating Liquors*, 107 Mass. 386; 107 Mass. 392. *note*.

A seizure of a part only of the liquors does not render the officer liable, on the theory that his act was void, unless he seized all of them, especially where he left part of them with the claimant upon his request. *Kalloch v. Newbert (Me.)*, 72 Atl. 736.

Where the owner brought replevin to recover possession of the liquor from the city marshal who had seized it under a warrant from the city police court, it was presumed that he was acting under an ordinance passed in view of the prohibitory law authorizing its seizure and destruction. *Hines v. Stahl (Kan.)*, 93 Pac. 273; *Lake v. Stahl (Kan.)*, 93 Pac. 275.

Where liquor is seized to be used as evidence, it must be returned, after trial, to the owner. *Padgett v. Sturgis (Ga.)*, 65 S. E. 352.

⁵⁵ Acts of 1858, c. 33.

⁵⁶ *State v. Larned*, 47 Me. 426.

warrant. At this point the proceedings are divided, and constitute thenceforth two distinct cases. The *person* is put on trial for having such liquors in his possession, with the intent to sell the same in the State in violation of law. And the liquors are libeled, as intended for illegal sale; whether by one person or another, is immaterial. So that the acquittal of the person does not entitle him to restoration of the liquors, nor does a condemnation of the liquor necessarily result in a conviction of the person. The two cases are entirely separate. A stranger to the original process may claim the liquor under the libel. But, if it is otherwise, and the person arrested becomes the claimant under the libel, the matter is entirely distinct from the allegations of the complaint. The hearing may be at the same time for convenience, for there must be a separate decree and judgment in each. And either one may be appealed without the other. If the person arrested claims the liquors under the libel, and the magistrate decides against him upon the complaint, and also upon the libel, and he appeals from both decisions, they constitute two independent cases in the Appellate Court in which different verdicts must be rendered. *Upon the complaint* the jury must find the personal guilt or innocence upon the plea of "not guilty." *Upon the libel* they must find whether the liquors were intended *by any person* for unlawful sale, and if not, whether the claimant had the right to the custody of any part of them.⁵⁷ In such case it is sufficient to authorize the forfeiture of the liquors if it be shown that they are kept with such intent, although it is not alleged or proved by whom they are so intended for sale. But the person charged as thus keeping liquors cannot be convicted unless it be alleged and proved that they were *by him* unlawfully deposited or intended for sale in violation of law.⁵⁸

Sec. 605. Municipal power.

A charter empowering a city council to declare the selling, giving away, or keeping on hand for sale, of any spirituous

⁵⁷ State v. Larned, 47 Me. 426; McCann, 67 Mo. 372.

State v. Miller, 48 Me. 576; State v. McCain, 61 Me. 116; State v. ⁵⁸ State v. Learned, 47 Me. 426.

or intoxicating liquors within the city, a nuisance, is to be construed as applying to liquor kept to sell within the city and is not intended to prohibit the possession of liquors within the city designed for sale elsewhere. Under such a charter an ordinance which authorizes a search for and seizure of liquors within the city, whether the intention was to sell them or ship them elsewhere, might interfere with general commerce, and if confined to the ordinary traffic between the city and its neighboring towns and cities is unjust and illegal, and the ordinance will be *ultra vires* and void. And if such ordinance authorizes a police magistrate, on complaint that any person has such liquor for sale in a quantity not authorized by law, to issue his warrant for the search of his dwelling house, and if liquors are found to seize them and arrest the person and bring both before the magistrate, who at once shall proceed to try the person, and if he does not offer a satisfactory explanation and show that he had the liquors for a lawful purpose, he shall be fined and ordered to the common jail until the fine and costs are paid, and the liquors ordered sold on execution and the proceeds applied to the payment of the fine and costs, it will be objectionable; because it directs the seizure of all the liquors which may be found and that all shall be sold. Such a seizure and sale of property is unreasonable and in violation of the declaration of rights.⁵⁹ And a city incorporated under a charter which confers upon it the power "to regulate or prohibit the sale of intoxicating liquors not prohibited by the laws of the State," has no power to pass and enforce an ordinance authorizing the forfeiture or destruction of liquors kept for sale in violation of an ordinance of the city.⁶⁰

Sec. 606. Permit to sell, violation—Iowa statute.

In Iowa the keeping of intoxicating liquors by a person holding a permit, with the intent to sell them for unlawful purposes, subjects them to seizure and confiscation. It is not

⁵⁹ Sullivan v. City of Oneida, 61 Ill. 242.

⁶⁰ Hencke v. McCord, 55 Iowa 278.

necessary to allege in an information for a search warrant in such a case that the owner of the liquors has in fact made unlawful sales. The effect of the code is only to make actual unlawful sales evidence of the intent with which the liquors are kept. And in a proceeding under it to condemn liquors by one having a permit, on the ground that he kept them with intent to sell them contrary to law, the Supreme Court sustained the following instruction: "When the permit offered in evidence was issued to the defendant a trust was imposed on him, and by accepting it he was bound to exercise the privileges conferred by the permit honestly and in good faith; and if you find that he purposely evaded the law, then such a permit would be no protection to such sales. And in this connection you should consider the conversation established by the evidence at the times of the sale, whether or not he exercised due care in ascertaining whether or not the purchasers were, in fact, purchasing for an honest purpose, the business and occupation of the purchaser, and whether or not all the circumstances shown by the evidence establish the fact that the sales were honestly made. If honestly made the sales were protected by the permit; but if they were made with the intent to evade the law the permit is no protection." In sustaining the instruction the court said: "It amounts to no more than that the defendant was bound, before making a sale of intoxicating liquors, to exercise reasonable care to ascertain whether the purchaser in good faith intended to use the liquor for one of the purposes for which he might lawfully sell it; and very clearly the statute requires him to exercise that degree of care."⁶¹

Sec. 607. Replevin of liquors after seizure.

Replevin has been defined to be a remedy for any unlawful taking and detention, or detention alone, of per-

A city is not liable for the acts of a police officer in making an illegal search and arrest. *McCleave v. Moncton*, 32 Can. S. C. 106; *Buttrick v. Lowell*, 1 Allen 172.
⁶¹ *State v. Blair*, 72 Iowa 591; 34 N. W. 432.

sonal property.⁶² At common law the owner of a chattel might, by this action, take it from the possession of any person who unlawfully held it unless it was in the custody of the law. If wrongfully taken by virtue of legal process, the remedy of the owner was by action of trespass, or trover, against the officer, for the common law would not grant process to take from an officer goods which he had taken by legal process already issued.⁶³ In many of the States this rule of the common law has been changed by statute so that a person entitled to the present possession of personal property, wrongfully detained from him, on making oath that the property was not taken from him by any legal process, or if so taken, that it is exempt from seizure by such process, may have the possession restored to him.⁶⁴ It has been held, however, that notwithstanding such statutes, if proceedings are commenced under an act for the suppression of intemperance by the seizure of intoxicating liquors, alleged to be owned and kept for sale in violation of law, it is not competent for a party

⁶² Anderson's Law Dic. 880.

⁶³ Baltimore, etc. R. Co. v. Hamilton, 16 Fed. Rep. 181; Goodrich v. Fritz, 4 Ark. 525; Hogan v. Dewell, 24 Ark. 216; Tyson v. Bowden, 8 Fed. 61; Cooley v. Davis, 34 Iowa 128; Smith v. Huntington, 3 N. H. 76; 14 Am. Dec. 33; Buckley v. Buckley, 9 Nev. 373; Gardner v. Campbell, 15 Johns. (N. Y.) 401; Cromwell v. Dwings, 7 Har. & J. (Md.) 55; Powell v. Bradlee, 9 Gill & J. (Md.) 220; Isley v. Stubbs, 5 Mass. 280; Griffith v. Smith, 22 Wis. 646; 99 Am. Dec. 90; Allen v. Staples, 6 Gray 491; Cawthorne v. Campbell, 1 Anstr. 212.

⁶⁴ Richards v. Kirkpatrick, 53 Cal. 433; Carpenter v. Innes, 16 Col. 165; 26 Pac. 140; Samuel v. Agnew, 80 Ill. 553; Chinn v. Russell, 2 Blackf. (Ind.) 172; Miller v. Hudson, 114 Ind. 550; 17 N. E.

122; Seaton v. Higgins, 50 Iowa 305; Rankine v. Greer, 38 Kan. 343; 16 Pac. 680; Phillips v. Harris, 3 J. J. Marsh. (Ky.) 122; Monaghan v. Longfellow, 82 Me. 419; 19 Atl. 857; Perry v. Richardson, 75 Mass. (9 Gray) 216; Hauselman v. Kegel, 60 Mich. 540; 27 N. W. 558; Whitney v. Swensen, 43 Minn. 337; 45 N. W. 609; Garbrough v. Harper, 25 Miss. 112; Bruen v. Ogden, 11 N. J. L. 370; 20 Am. Dec. 593; Clark v. Skinner, 20 John. (N. Y.) 465; 11 Am. Dec. 302; Jones v. Ward, 77 N. Car. 337; Crittenden v. Lingel, 14 O. St. 182; 84 Am. Dec. 370; Deammon v. Blackburn, 1 Sneed (Tenn.) 390; 60 Am. Dec. 160; Angel v. Keith, 24 Vt. 371; Gallagher v. Bishop, 15 Wis. 276; Patton v. McDonald, 30 N. B. 523; Moore v. Eubanks, 66 S. C. 374; 44 S. E. 971.

to take the case away from the tribunal whose jurisdiction has attached, by instituting an action of replevin and regaining possession of the liquors.⁶⁵ In so deciding the Supreme Court of Iowa said: "To suffer a party in an action of replevin to take the liquors out of the hands of the officer seizing them would be an interference with the administration of justice in criminal proceedings and would defeat the whole object and intention of the prohibitory law. By that law the keeping of intoxicating liquors for sale is prohibited; the liquors so kept are declared a nuisance and must be forfeited and destroyed. It is easy to perceive that if they may be replevined out of the hands of the officer seizing them there will be very few instances in which the object of the statute will be attained by the destruction of liquors kept for sale contrary to law. * * * The liquors were in the custody of the law by virtue of process issued in a criminal proceeding, and were awaiting the action of the court under the law, by which it was to be ascertained whether or not they were liable to be forfeited, and to a judgment that they be destroyed. While such proceedings are in progress the liquors are not the subject of an action of replevin. An attempt of the owners to regain their possession by a writ of replevin would, at common law, be deemed a contempt of the jurisdiction of the court issuing the writ."⁶⁶ Intoxicating liquors, kept for illegal sale in violation of law, are not regarded as property. They are outside of the protection of the law, and unless the party suing avers and shows that they are in his possession with lawful intent, and that he has been illegally deprived of the same, no action can be maintained for their recovery or possession, whether they are in the custody of the law or not.⁶⁷

⁶⁵ *Musgrave v. Hall*, 40 Me. 498; *State v. Harris*, 38 Iowa 242; *Greentree v. Wallace*, 77 Kan. 149; 93 Pac. 598; *Ring v. Nichols*, 91 Me. 478; 40 Atl. 329; *O'Neal v. Parker*, 83 Ark. 133; 103 S. W. 165.

⁶⁶ *Funk v. Israel*, 5 Iowa 438; *Fries v. Porch*, 49 Iowa 351; *Weir*

v. Allen, 47 Iowa 482; *Fries v. Porch*, 49 Iowa 351; *Lemp v. Fullerton*, 83 Iowa 192; 48 N. W. 1034; 13 L. R. A. 408.

⁶⁷ *Funk v. Israel*, 5 Iowa 438; *State v. Pierce*, 55 Vt. 82; *Anheuser-Busch Brewing Co. v. Fullerton*, 83 Iowa 760; 50 N. W. 56; *Lord v. Chadbourne*, 42 Me.

Sec. 608. Officers, seizure when from, and liability.

Under the Massachusetts statute ⁶⁸ providing for the issuing of warrants to search for and seize intoxicating liquors, a warrant may be issued to search for and seize such liquors when they have already been taken by an officer from a person engaged in illegally transporting them, and they are still held by the officer. In such case the complaint and warrant need not state the fact that the liquors have already been taken and are in the custody of the officer; nor need the warrant name the owner of the liquor if it names the person in whose possession they were found.⁶⁹ In Maine ⁷⁰ the statute provides that the municipal officers of a city, town or plantation can only purchase such liquors from the State commissioner, or of such municipal officers as have purchased liquors of him, or of a manufacturer in the State who has complied with the requirements of the statute, and that the casks and vessels in which they are contained shall be plainly and conspicuously marked with the name of the city, town or plantation where they are kept for sale, and with the name of its agent. Intoxicating liquors purchased by such municipal officers, without authority and in contravention of this provision of the statute, are liable to seizure and forfeiture, and the officers so purchasing to indictment.⁷¹

429; 66 Am. Dec. 290; *State v. Barrels of Liquor*, 47 N. H. 369.

Jurisdiction in Texas of county court in a suit on a replevin bond. *Malone v. State* (Tex. Civ. App.), 107 S. W. 927; *Meyers v. State* (Tex. Civ. App.), 105 S. W. 48; *Dupree v. State* (Tex. Civ. App.), 107 S. W. 926.

In Texas liquor seized without a warrant may be replevined as soon as the officer has made an inventory of it, without waiting for the filing of a complaint.

Meyers v. State (Tex. Civ. App.), 105 S. W. 48.

Where the liquor seized is replevined from the officer before an adjudication for its destruction is rendered, who is entitled to possession? See *Loop v. Williams*, 47 Vt. 407.

⁶⁸ Stat. of 1855, c. 215, § 25.

⁶⁹ *Allen v. Staples*, 5 Gray. (Mass.) 491.

⁷⁰ R. S. c. 27.

⁷¹ *Androscoggin R. Co. v. Richards*, 41 Me. 233; *State v. Intoxicating Liquors*, 68 Me. 187.

Sec. 609. Seizure of liquors in Indian country.

Liquors formerly carried into the "Indian country," as defined by act of Congress,⁷² were liable to seizure as well as all other goods of the person so carrying them into that country, although not actually mingled with the liquor.⁷³ Under the United States statutes⁷⁴ an Indian agent may seize teams used in conveying liquor into an Indian reservation whether they be the property of the owner of the liquor or of a person not such owner.⁷⁵ But this section relates only to a "white man" or an "Indian" carrying liquor into the reservation, and an answer justifying a seizure of property must allege that the property seized belonged to such a person.⁷⁶ To give a right of seizure the liquors must have been carried into the reservation.⁷⁷ Under the United States statute^{77*} authorizing a seizure of any boat introducing liquor into such country, only the "superintendent of Indian affairs, an Indian agent or sub-agent, or the commanding officer of a military post" can make the seizure; and a United States marshal cannot do so. Therefore, a libel is fatally defective which shows merely a seizure by such a marshal.⁷⁸ A plea alleging merely that the claimant did not unlawfully introduce the liquor into the Indian country is insufficient, because it alleges a mere conclusion; and it is not rendered sufficient by the further allegation that he did not introduce it with the intention to sell or dispose of it to any Indian, for that does not render the introduction of the liquor lawful.⁷⁹

⁷² Act March 30, 1802.

⁷³ *American Fur Co. v. United States*, 2 Pet. 358; 7 L. Ed. 450.

⁷⁴ Rev. St. § 2140.

⁷⁵ *Webb v. Nickerson*, 11 Ore. 382; 4 Pac. 1126.

⁷⁶ *Webb v. Nickerson*, *supra*.

⁷⁷ *Palcher v. United States*, 11 Fed. 47.

^{77*} 13 Stat. at L. 290.

⁷⁸ *United State v. The Cora*, 1 Dak. 1; 46 N. W. 503.

⁷⁹ *United States v. 29 Gallons of Whisky*, 45 Fed. 847.

To allege that the claimant was then on his road from a town

named to another town not named, neither of such towns being in the Indian country, is not sufficient, because it does not show the liquor was in transit when seized, or that the town whose name was not given was not in the reservation. *Ibid*.

As to Indian reservations within a State, see *United States v. 43 Gallons of Whisky*. Fed. Cas. No. 15136, and introducing liquors into Alaska, see *United States v. 50 Cases of Distilled Spirits*, 83 Fed. 1000.

Sec. 610. Statutes forbidding recovery of damages.

It is well settled that the common law will afford no aid to a party whose claims can be successfully enforced only by a violation of its principles, or in direct contravention of a statutory enactment.⁸⁰ Lord Mansfield said: "The principle of public policy is this: *Ex dolo malo non oritur actio*. No court will lend its aid to a man who founds his cause of action upon an immoral or an illegal act. If, from the plaintiff's own stating or otherwise, the cause of action appears to arise *ex turpi causa*, or a transgression of a positive law of the country, there, the court says, he has no right to be assisted. It is upon this ground that the court goes; not for the sake of the defendant, but because they will not lend their aid to such a plaintiff."⁸¹ This rule of law has been applied in support of statutes which provide that no action shall be maintained for the recovery or possession of intoxicating liquors, or the value thereof, where such liquors are intended for sale in violation of law. It has also been held, upon the theory that a Legislature may pass laws altering or modifying or even taking away remedies, that such a statute may be passed without incurring a violation of the provisions of a Constitution which forbids the passage of *ex post facto* laws. It must be remembered, however, that the enforcing of such a statute hinges upon the unlawful purpose and intent for which such liquors are kept or sold. Such a statute does not strip such liquors of their character as property and prohibit actions for their recovery or their value, but solely to actions for liquors held and sold contrary to law. It is only when they are kept or sold contrary to law that they are regarded by the law as having no lawful value, or value for lawful purposes.⁸² In construing such a statute the Supreme Court

⁸⁰ Lord v. Calhoun, 42 Me. 429.

⁸¹ Holman v. Johnson, Cowper 241.

⁸² Oriatt v. Pond, 29 Conn. 479; Preston v. Drew, 33 Me. 558; Nichols v. Valentine, 36 Me. 322; Jones v. Fletcher, 41 Me. 255; Lord v. Chadbourne, 42 Me. 429; Robinson v. Barrows, 48 Me. 186;

Hamilton v. Goding, 55 Me. 419; Fisher v. McGinn, 67 Mass. (1 Gray) 33; Breck v. Adams, 69 Mass. (3 Gray) 569; Barrm v. Arnold, 16 R. I. 22; Home v. Stewart, 40 Vt. 145; Anheuser-Busch Brewing Co. v. Hammond, 93 Iowa 520; 61 N. W. 1052.

of Maine said: "We cannot decide by an application of the rules of the common law, or by the provisions of the act, that property cannot be acquired in spirituous and intoxicating liquors. The language of the act, which declares no action shall be maintained for the recovery or possession of such liquors or their value, is without limitation, and, by a literal construction, it would deprive one who has purchased them of a town or city agent, for allowable purposes, of the right to maintain an action to recover them or their value from a person who had taken them from his possession without any right or authority, or who had wantonly destroyed them. It would also deprive town and city agents of all right to maintain an action for the recovery of such liquors which had been purchased by them for sale according to the provisions of the act, and which had been unlawfully taken from them or destroyed. It would also deprive a person of all remedy for the protection of such property by action, when procured for his private use and not intended for sale, and when he was carrying it through the State without any intention of sale in the State. Can one conclude that an intelligent Legislature could have intended to hold out such temptations for the lawless subtraction or destruction of private property? The results are too extraordinary and unjust to allow an intelligent and considerate mind to believe that they could have been foreseen and approved. The general language must, therefore, be restricted so as to accomplish the general intent and declared purpose of the act without producing such results, or the provision, now under consideration, must be pronounced to be a plain violation of the provisions of the Constitution and void. The general intent and declared purpose of the act would in no degree be infringed by regarding the general language to be so limited as to forbid the maintenance of any action for the recovery or possession of such liquors or their value, which were liable to seizure and forfeiture, or intended for sale in violation of the provisions of the act."⁸³

⁸³ Preston v. Drew, 33 Me. 558.
The plaintiff must allege and prove
he did not keep the liquors for

unlawful sale. Walker v. Shook,
49 Iowa 264.

Sec. 611. Complainant.

As a rule, the complaint need not show that the complainant is a proper person to make the complaint, that being a question for the magistrate issuing the warrant to determine.⁸⁴ Thus, where the statute provided that "if any credible resident of any county" should make a written information a warrant should issue, it was held not necessary for the complaint to contain an averment that it was made by a resident of the county.⁸⁵ And where the statute required the complainant to designate his residence, it was held sufficient if it set forth the county wherein he lived.⁸⁶ Where the complaint began, "Come legal voters in the city of X and complain," and to it was appended the signatures of three persons, it was held that it contained a sufficient statement that such persons were legal voters.⁸⁷ A statute of Maine providing that no constable, sheriff, or his deputy should "appear before any court" "as attorney, or advising any party in a suit, or draw any writ" "for any other person," was held not to prevent an officer from drawing up a complaint and warrant in behalf of the State for the seizure of

The warrant of seizure protects the officer, although subsequent to the seizure it be ordered returned. *EWINGS v. WALKER*, 9 Gray 95.

Even though a statute undertaking to protect officers seizing liquors be void, yet if the liquors be in fact contraband goods that fact is a complete defense. *ANHEUSER-BUSCH CO. v. HAMMOND*, 93 Iowa 520; 61 N. W. 1052; *FERGUSON v. JOSEY*, 70 Ark. 94; 66 S. W. 345.

See *FISHER v. MCGIRR*, 1 Gray 1; 61 Am. Dec. 381; *KENT v. WILLEY*, 11 Gray, 368.

If the officer, on demand, produce the wrong warrant, that will not render the seizure illegal. *BROWN v. LAWRENCE*, 40 Nova Scotia 370.

In South Carolina under the general denial an officer sued for an illegal seizure may show that the plaintiff was engaged in the illegal sale of liquors and had that reputation in the neighborhood where he lived. *SMITH v. LAPAR*, 67 S. C. 491; 46 S. E. 332.

If the statute under which a warrant be issued is unconstitutional, the warrant is no defense. *BEAVERS v. GOODWIN* (Tex. Civ. App.), 90 S. W. 930.

⁸⁴ *State v. Thompson*, 44 Iowa 399.

⁸⁵ *State v. Blair*, 72 Iowa 591; 34 N. W. 432.

⁸⁶ *Commonwealth v. Intoxicating Liquors*, 113 Mass. 13.

⁸⁷ *State v. Intoxicating Liquors*, 44 Vt. 208.

liquors.⁸⁸ In Massachusetts the jurat to the complaint need not contain an averment that probable cause has been shown for the issuance of the warrant, and the warrant is not fatal for the omission of such a statement.⁸⁹ Under this statute the complaint is not defective by reason of a recital of facts and circumstances upon which the affiant's belief of the unlawful use is based; as, on a particular date, he had seen vessels, which he believed contained liquors, taken from the designated place by agents, neither named nor described, of the occupant of such place, to a nearby saloon of the occupant; nor is it by reason of the fact that the affiant affirms his belief upon such facts and circumstances, that the "house" and not specifically the cellar from which the liquors were taken was unlawfully used.⁹⁰

Sec. 612. Complaint, statutory form sufficient.

A complaint for a search warrant to search designated premises for intoxicating liquors illegally kept therein for sale which follows the statute and describes the offense sub-

⁸⁸ State v. McCann, 67 Me. 372.

In New Hampshire, in 1875, the attorney general or solicitor took charge of the case, and it was prosecuted at the expense of the county. State v. Tufts, 56 N. H. 137.

An apparent erroneous date in the *jurat* may be corrected by facts shown in the record, where such is the case. Commonwealth v. Certain Intoxicating Liquors, 128 Mass. 72.

⁸⁹ Commonwealth v. Certain Intoxicating Liquors, 110 Mass. 182; Commonwealth v. Intoxicating Liquors, 113 Mass. 13.

⁹⁰ Commonwealth v. Certain Intoxicating Liquors, 105 Mass. 181.

In this case it is held that the oath does not form a part of the complaint, and need not be drawn with technical accuracy.

In Michigan objections must be made to the complaint before the justice who tries the case, to raise any question touching the sufficiency of the complaint upon *certiorari*. People v. Heffron, 53 Mich. 527; 19 N. W. 170.

In Vermont the proceedings are *in rem*, and where the complaint is by a grand jury, complainant's authority depending on matters *dehors* the record can only be put in issue by a plea reciting such matters. State v. Intoxicating Liquors (Vt.), 73 Atl. 586.

An adjudication of the police court that there was probable cause to believe the complaint to be true, is conclusive and final. Commonwealth v. Certain Intoxicating Liquors, 103 Mass. 448.

stantially in the words thereof is sufficient to warrant a judgment of forfeiture of the liquors thus illegally kept. The strict and technical rules of criminal pleading need not, and ought not, to be held applicable in such cases. If the complaint is in the form required by the statute, and clearly and sufficiently charges an unlawful keeping by the defendant, and that he intended to sell liquors of a kind which, and in a place where, the law did not allow him to sell, it will withstand a demurrer. It need not particularly describe the kind of liquors which he intended to sell, nor negative any of the various modes and contingencies in which it might be lawful for him to sell them.⁹¹ If the proof in such a case fails to disclose all the circumstances necessary to make a case under the statute against such liquors, they cannot be condemned; but these circumstances need not be alleged in the complaint with a particularity of averment beyond what the statute declares sufficient.⁹² But a complaint which alleges that certain intoxicating liquors were kept in a specified place is not supported by a verdict which finds in the alternative that such liquor was owned *or* kept there.⁹³

Sec. 613. Videlicet, use and limitations of in complaint.

A complaint for the seizure of intoxicating liquors designated them as "certain intoxicating liquors, to-wit: several

⁹¹ State v. Welch, 79 Me. 99; 9 Atl. 348; Commonwealth v. Gillingland, 95 Mass. (9 Gray) 3; Commonwealth v. Purtle, 77 Mass. (11 Gray) 78; Commonwealth v. Dunn, 80 Mass. (14 Gray) 401; Commonwealth v. Intoxicating Liquors, 95 Mass. (13 Allen) 52; Commonwealth v. Lynn, 107 Mass. 214; Commonwealth v. Bennett, 108 Mass. 27; Commonwealth v. Grady, 108 Mass. 412; Liquors of Hoxie, 15 R. I. 24; State v. Intoxicating Liquor, 38 Vt. 387; Gill v. Parker, 31 Vt. 610; Meyer v. State (Tex. Civ. App.), 105 S. W. 48.

⁹² State v. Intoxicating Liquors, 38 Vt. 387.

⁹³ Commonwealth v. Intoxicating Liquors, 86 Mass. (4 Allen) 601.

It must be averred that the liquor was kept in the particular house described. Commonwealth v. Intoxicating Liquors, 116 Mass. 27.

In Maine a demurrer to the complaint reaches defects in the warrant. State v. Duane, 100 Me. 447; 62 Atl. 80. If the keeping of the liquor is illegal because of the adoption of local option, the fact of adoption must be averred. Meyers v. State (Tex. Civ. App.), 105 S. W. 48.

casks of French brandy, containing five gallons, more or less: several cases of gin, containing twenty-five gallons, more or less; and several casks of intoxicating wines, containing twenty-five gallons, more or less.” It was held that a warrant issued upon this complaint “authorized the taking of the liquors and casks specified under the *videlicet* only;” in other words, that an officer serving the warrant was not justified by it in seizing any “intoxicating liquors” other than “French brandy,” “gin” and “intoxicating wines.” This was upon the theory that the natural and proper use of a *videlicet* followed by words of special description, is to restrict and limit the meaning of words of general description preceding it, and that in the complaint and warrant in this case the *videlicet*, in the language of Lord Hobart,⁹⁴ is put to “her natural and proper use,” “to particularize that which is before general;” and its effect is to make a restriction of the meaning of the former words “intoxicating liquors,” though those former words by construction of law would have had a larger sense if the *videlicet* had not been used. But where a complaint alleged that a certain quantity of intoxicating liquors, to-wit: ten gallons of brandy, ten gallons of rum, were owned and kept by Martin Brennan upon his premises, for the purpose of being sold in violation of the statute, and by virtue of the warrant which recited the complaint the officer seized a hogshead containing thirty gallons of rum and a barrel containing eighteen gallons of rum, it was held that the specification of the kind and quantities of the liquors under the *videlicet* was intended as a description of them and not to limit their quantities, and that the authority of the officer was not limited to the quantity specified in the complaint.⁹⁵

Sec. 614. Description of person and liquors.

Where a statute authorized the destruction of liquors “owned or kept by any person named or described as particularly as may be, and intended by him to be sold in viola-

⁹⁴ *Stukeley v. Butler*, Hob. 172;
Mallet v. Stevenson, 26 Conn. 428.

⁹⁵ *State v. Brennan's Liquors*,
25 Conn. 277.

tion of" law, it was held that it must be alleged that some specific person owned them, the name being given;⁹⁶ but if the person who owns or keeps them be unknown, then by alleging that fact the giving of the name is excused.⁹⁷ Liquors described as "1 bbl. filled with intoxicating liquors, 1/5 keg filled with intoxicating liquors, marked to M. P. Cobath, North West Carry, Moorehead Lake, Maine," are sufficiently described.⁹⁸

Sec. 615. "Place" and "premises," meaning—Pleading.

Under a statute which provides that if any competent witness "shall make complaint * * * that he believes intoxicating liquors are unlawfully kept or deposited in any place in this State by any person or persons, and that said liquors are intended for sale within this State in violation of law," the complaint must allege a "place in this State" where such liquors are "unlawfully kept and deposited" by a person or persons and "intended for sale within this State in violation of law."⁹⁹ Such a statute will not authorize the search of a person for liquors. By its provisions the liquors are to be kept and deposited *by*, not kept and deposited *upon* a person or persons. The person or persons unlawfully keeping and depositing, and the place where the unlawfully kept and deposited liquors are to be found, are obviously separate and distinct. It is one thing to find such liquors in a place, and a very different thing to find them upon a person. A place to be searched is not a person to be searched. "Premises described and specially designated" in a complaint and warrant cannot, by any reasonable use of language, be held to apply to a person or persons. Nor will such a statute apply to intoxicating liquors captured by force from a respondent's wagon while he is traveling upon a public highway.¹ In such case the liquors are not at the time kept or deposited but are

⁹⁶ State v. Intoxicating Liquors, 64 Iowa 300; 20 N. W. 445.

⁹⁷ Commonwealth v. Intoxicating Liquors, 116 Mass. 21.

⁹⁸ Ring v. Nichols (Me.), 40 Atl. 329.

See construction of Oklahoma statute to make it conform to the Constitution. State v. Hooker, (Okla.), 98 Pac. 964.

⁹⁹ State v. Grames, 68 Me. 419.

¹ State v. Roach, 74 Me. 360.

being carried for the purpose of being afterwards deposited and kept in some place. The word "place" as used in such a statute refers to some fixed situation, spot, station or locality. It may be a stationary wagon upon some particular ground, but not one in motion and constantly changing its position upon the road. Accordingly, it has been held that under such a statute that the description of a place to be searched by a search and seizure process was sufficient where the complaint alleged that intoxicating liquors were left and deposited in a certain wagon on the fair grounds on the easterly side of Union Hall in Seaport, the court holding that the complaint so clearly described the place that an officer could readily locate the liquors and the alleged offender.²

Sec. 616. Description of premises—Rule of construction.

The usual constitutional provision is that no warrant to search any place, or to seize any person or thing, shall issue, without a specific designation of the place to be searched, and the person or thing to be seized. Under such a constitutional provision that cannot be considered as such a designation which if used in a conveyance would not convey the place, and which would not confine the search to one place.³ Affirmatively speaking, such a provision requires that the complaint and warrant shall contain as specific a description of the place to be searched as would be required to convey a specific piece of real estate in an instrument of conveyance,⁴

² State v. Knowlton, 70 Me. 200; Commonwealth v. Intoxicating Liquors, 107 Mass. 396.

A steamboat is a "place." State v. McNally, 34 Me. 210; 56 Am. Dec. 650.

Stating that the liquors are "in a valise in the possession of the said F in said Bangor" is not a description of a place where liquors are kept. The "place" must be definitely and certainly described. State v. Fezzette, 103 Me. 467; 69 Atl. 1073.

Under an allegation that the liquors were kept in the base-

ment of a "house," liquors may be seized in a cellar under the sidewalk in front of and adjacent to the house. Commonwealth v. Certain Intoxicating Liquors, 105 Mass. 181.

The allegation of the place where the liquors are kept is material, and must be proven as laid. Commonwealth v. Certain Intoxicating Liquors, 117 Mass. 427.

³ State v. Robinson, 33 Me. 564.

⁴ Jones v. Felther, 41 Me. 254; State v. Bartlett, 47 Me. 388; State v. Thompson, 44 Iowa 399.

and that the description in the complaint and warrant must be substantially alike. Such a rule of construction, however, is subject to another, and that is that in construing a deed, where several particulars are named, descriptive of the premises, if some be false or inconsistent, and the true be sufficient of themselves, they will be retained and the others rejected.⁵ Accordingly, it has been held that in a search and seizure proceeding the complaint and warrant must be construed together, and if the descriptive words are sufficient clearly to designate the place to be searched, independent of the repugnant words, the latter will be rejected.⁶ In Vermont a statute provided that in forfeiture proceedings the complaint should set out the "building or place" to be searched. Under this statute a complaint specified "The American Hotel," and "the barns, sheds and outbuildings adjacent thereto, in Burlington, and forming a part of the premises of said hotel," as the place where intoxicating liquor was believed to be kept and the complaint was held to be sufficiently specific. In so deciding the court said: "This is the description of a single establishment, and is sufficiently specific. To adopt a narrower view would not only render the statute ineffective, but would be entirely inconsistent with the idea of a search for which the statute is intended to provide. The complainants in such cases are not presumed to be familiar with the exact locality in the establishments where the liquor is kept, although they may be well satisfied that it is kept upon the premises. The statute requires the complainants to set out the suspected 'building or place.' The real place must receive a reasonable interpretation, not so broad as to encourage looseness of procedure, nor so narrow

⁵ *Commonwealth v. Intoxicating Liquors*, 109 Mass. 371; *Commonwealth v. Intoxicating Liquors*, 115 Mass. 145; *Commonwealth v. Intoxicating Liquors*, 105 Mass. 181; *Commonwealth v. Intoxicating Liquors*, 110 Mass. 499; *Commonwealth v. Intoxicating Liquors*, 122 Mass. 8; *Commonwealth v.*

Intoxicating Liquors, 122 Mass. 36.

⁶ *Wing v. Burgess*, 13 Me. 111; *Abbott v. Pike*, 33 Me. 204; *Vose v. Hundy*, 2 Mass. 322; *State v. Bartlett*, 47 Me. 388; *Commonwealth v. Intoxicating Liquors*, 146 Mass. 509; 16 N. E. 298.

as to prevent the search of any premises occupied and used by a person in the ordinary course of his business as inn-keeper." As to the locality where the hotel was located the court said: "It is evident that the description of a public hotel by its name accompanied by a statement of the town or municipality in which it is located is ordinarily no more likely to be misunderstood and no more susceptible of mistake than even a description by metes and bounds. It is a particular description. If the main hotel is described with sufficient particularity, it is clear the outbuildings are meant, being set out as adjacent to the hotel and forming a portion of the hotel premises."⁷ It is a sufficient description to allege the liquors are kept "in a certain wagon on the fair ground on the easterly side of Union Hall in S."⁸ If two buildings bear the same street number, a description by that number will be sufficient.⁹ Where the place to be searched was described as "a certain building, the cellar under the same, and the outbuildings within the curtilage thereof," it was held not to justify a searching of the basement of a building on adjoining lot, separated by a fence, although such basement was connected by a covered way with the basement of the building so specifically described.¹⁰ An allegation that the liquor is at the house of "A in Smithville, in the county of Randolph," is sufficient.¹¹

Sec. 617. Common resort, place—Averment.

Under a statute providing for the search of a tenement or dwelling or other building for intoxicating liquors, which pro-

⁷ *State v. Intoxicating Liquors*, 38 Vt. 387; *Horning v. Bailey*, 50 Conn. 40; *Commonwealth v. Intoxicating Liquors*, 110 Mass. 182; *Id.* 187, note; *Commonwealth v. Intoxicating Liquors*, 113 Mass. 13; *Commonwealth v. Intoxicating Liquors*, 113 Mass. 208; *Commonwealth v. Intoxicating Liquors*, 113 Mass. 455; *Commonwealth v. Intoxicating Liquors*, 117 Mass. 427.

⁸ *State v. Knowlton*, 70 Me. 200; *Commonwealth v. Intoxicating Liquors*, 107 Mass. 386.

⁹ *Commonwealth v. Intoxicating Liquors*, 6 Allen, 596.

¹⁰ *Commonwealth v. Intoxicating Liquors*, 140 Mass. 287; 3 N. E. 4.

¹¹ *Lincoln v. Smith*, 1 Wms. (Vt.) 328; *State v. Intoxicating Liquors*, 44 Vt. 208.

vides among other things that "no warrant shall issue for the search of a dwelling house unless a tavern, store, grocery, eating room or place of common resort is kept therein," an averment in a complaint and warrant for the search of a dwelling house that "the same is a place of common resort," is insufficient to describe that "a place of common resort is kept therein," for the reason that there may be a place commonly resorted to or of common resort which is not kept by any such person. Such a statute contemplates a place kept for the purpose of common resort; *i. e.*, appropriated to such purposes by the occupant, keeper or person having control of the premises.¹² The affirmative averment in such a complaint and warrant that the house was occupied by the defendant "as a common resort therein" is sufficient. In such case there is in substance an allegation that the building was appropriated and kept by the defendant for the purpose of a common resort, for the averment is that the building was occupied by him as such a place.¹³ If the complaint aver that the liquors were sold in a certain dwelling house by its occupant, it need not be averred that the place was one of common resort.¹⁴

Sec. 618. Place, description—Pleading—Evidence—Variance.

Under a statute which provides that in proceedings for the forfeiture of intoxicating liquors the complaint and warrant shall set out fully, plainly and substantially the place to be searched, such allegation in the complaint is a material traversible allegation, and a claimant of the liquors has the

¹² Commonwealth v. Intoxicating Liquors, 97 Mass. 332.

¹³ Commonwealth v. Leddy, 105 Mass. 381; Commonwealth v. Certain Intoxicating Liquors, 107 Mass. 216. See when it need not be averred the place was one of common resort. Commonwealth v. Intoxicating Liquors, 122 Mass. 14.

¹⁴ Commonwealth v. Intoxicating Liquors, 110 Mass. 182; *Id.*

187, note; Commonwealth v. Intoxicating Liquors, 116 Mass. 27.

Proof that the place was a shop for the sale of liquors and that persons went there unrestricted to buy liquors, supports the averment that the place is one of common resort, although conducted in a disorderly manner. Commonwealth v. Certain Intoxicating Liquors, 107 Mass. 216.

right to require proof of it and to submit this issue to the jury. In such case a complaint and warrant which avers that intoxicating liquors were kept in a certain building on a named street and numbered one hundred and ninety-five on said street, and in the basement of said building, and describes the place to be searched with sufficient particularity to identify it, but proof that the basement was under a shop numbered one hundred and ninety-seven on said street will not create a variance. If in such case the liquors are seized in a room under the sidewalk opening into the basement of the building by a door, it will be for the jury to say whether such room under the sidewalk was a part of the basement.¹⁵ And where a sheriff testified that he searched the "American Hotel premises," it was held that the jury had a right to understand that he searched the American Hotel premises in the town of B, which were described in the papers which he testified to having served.¹⁶

Sec. 619. Description of liquors, what sufficient.

Under a constitutional provision which declares that "no warrant to search any place or seize any person or thing shall issue without a special designation of the * * * thing to be seized," an article to be searched for may, in a warrant, be described simply by its generic name if it be destitute of any peculiar and known marks or qualities by which, in the description it can be distinguished from the articles of the same general name. Thus, a warrant for the search of "spirituous liquors" will not be considered unauthorized for want of a sufficient designation of the things to be searched for. In such case it need not be averred in the warrant that the property to be searched for is owned by a particular person, for it is no part of the description of an article to state by whom it is owned. The special description required by the condition in such cases does not require an historical account of the article to be included. It may often be found difficult, if not impossible, to describe liquors intended for sale so per-

¹⁵ Commonwealth v. Intoxicating Liquors, 117 Mass. 427.

¹⁶ State v. Intoxicating Liquors, 38 Vt. 387.

fectly that they can be easily distinguished by an officer having no previous knowledge of them, from others of a similar kind, not intended for sale. There may be different kinds of spirituous liquors which, to the eye of an observer, would present the like appearance, and if no warrant to seize them, when thus seen, could be issued without a designation of the particular kind of liquors, it would often be difficult, if not impossible, to execute the law.¹⁷ If liquors should be required to be designated by marks upon the casks, vessels or boxes containing them, searches and seizures of them might often be prevented by an obliteration or removal of the marks. If a designation by the species and not by generic terms were required, the difficulties alluded to might not be avoided, for others might be found in the same warehouse or place, of a like species and appearance. Such a constitutional provision must be construed as having been designed to prevent unreasonable searches and seizures, but not to prevent the accomplishment of any useful purpose by searches and seizures. It could not have been the intention of the framers of it to require a designation of the thing to be searched for to be so special and particular as to prevent the accomplishment of any beneficial purpose by a search warrant.¹⁸ In such warrant the usual form of description is, "a certain quantity of rum, or some specified kind of liquors, or several kinds, contained in certain barrels, kegs, jugs, jars, bottles, decanters or other vessels." The fact that some of the kinds of liquors specified are not found at all will not invalidate the seizure of those kinds which are found.¹⁹

¹⁷ *State v. Robinson*, 33 Me. 564; *Lincoln v. Smith*, 27 Vt. 328.

¹⁸ *Downing v. Porter*, 74 Mass. (8 Gray) 539; *Commonwealth v. Intoxicating Liquors*, 97 Mass. 63; *State v. Whisky, etc.*, 54 N. H. 164; *State v. Fitzpatrick*, 16 R. I. 54; 11 Atl. 773; *In re Norgan's Liquors*, 16 R. I. 542; 18 Atl. 279.

¹⁹ *Commonwealth v. Intoxicating Liquors*, 95 Mass. (13 Allen) 52; *Commonwealth v. Intoxicat-*

ing Liquors, 110 Mass. 416; *State v. Brennan*, 25 Conn. 278; *Mallett v. Stevenson*, 26 Conn. 428.

Where the statute construes "spirituous liquors" as "intoxicating liquors," "malt liquors" may be seized, it being shown they were intoxicating, under a statute merely providing that "spirituous liquors" may be seized. *State v. Lager Beer*, 68 N. H. 377; 39 Atl. 255.

Sec. 620. Unlawful intent, averments.

A complaint for the seizure and forfeiture of intoxicating liquors must charge the illegality of the keeping of the liquors or an intention to sell them in violation of law. A person thus charged cannot be convicted unless it is alleged and proved that the liquors were by him unlawfully kept or intended for sale in violation of law within the State.²⁰ In Maine it has been held that an averment in a complaint in such a proceeding that the "defendant has been before convicted * * * of unlawfully keeping and depositing in this State * * * intoxicating liquors with intent that the same should be sold in this State in violation of law" is a sufficient allegation that the liquors referred to were by him intended for unlawful sale, when accompanied with particular averments of the time and place and court in which convicted, that the liquors referred to were by him intended for unlawful sale.²¹ It has also been held that an averment that such liquor "was kept for the purpose of sale, without authority, within this State, against the statute," is sufficient;²² and likewise that they were kept by the defendant "for sale within this State in violation of law."²³ To justify the destruction of the liquors seized they must have been kept with the unlawful intention to sell them, and that intent must be found by the court or jury trying the case.²⁴ Under the statute in force in 1852 in Maine the intent must have been to sell them in the town where kept or deposited;²⁵ but not necessarily to be sold in the house where kept.²⁶ It is not necessary to allege and prove, in order to secure a judg-

²⁰ *State v. Learned*, 47 Me. 426; *State v. Miller*, 48 Vt. 576.

²¹ *State v. Langley*, 79 Me. 52; 7 Atl. 902.

²² *In re Liquors of Young*, 15 R. I. 243; 3 Atl. 3.

²³ *Commonwealth v. Intoxicating Liquors*, 86 Mass (4 Allen) 593; *In re Liquors of Hoxie*, 15 R. I. 241; 3 Atl. 1; *In re Liquors of Young*, 15 R. I. 243; 3 Atl. 3; *State v. Thompson*, 44 Iowa 399;

Commonwealth v. Intoxicating Liquors, 122 Mass. 8.

Sometimes statutes make proof of a sale evidence of a keeping with intent to sell. *State v. Blair*, 72 Iowa 591; 34 N. W. 432.

²⁴ *State v. Harris*, 36 Iowa 136; *State v. Learned*, 47 Me. 426.

²⁵ *State v. Gurney*, 33 Me. 527; *State v. Robinson*, 33 Me. 564.

²⁶ *State v. Robinson*, 33 Me. 564.

ment for their destruction, that the intent to sell the liquors illegally was entertained by any particular person,²⁷ though the fact that the mere bailee of their owner, without authority so to do, intended to sell them within the State will not work their forfeiture.²⁸ The illegal intent must exist at the time the action is begun for their destruction.²⁹

Sec. 621. Affidavit to complaint, sufficiency.

A statute of Massachusetts³⁰ provides that no warrant shall issue for the search of a dwelling house for intoxicating liquors unless one of the complainants makes oath or affirmation that he has reason to believe and does believe that such liquors have been sold therein or taken therefrom for the purpose of being sold contrary to law. Under this statute it has been held that such an affidavit does not form a part of the complaint, even though embodied in the complaint, and that it need not be framed with technical accuracy.³¹ In such a case a complaint is not invalid because, by the recital therein of the allegations of the complainant's oath, it appears that the facts and circumstances upon which his belief of the unlawful use of the premises are founded are, that at some time not specified, he had seen vessels which he believes contained intoxicating liquors carried therefrom by agents, not named or described, of the occupant to a neighboring saloon of the occupant, nor by reason of the fact that his oath affirms the complainant's belief, upon such facts and circumstances, that the "house," and not specifically "the cellar" was used.³² The warrant having been duly issued the only question to be tried is whether such liquors were, at the

²⁷ *State v. Learned*, 47 Me. 426;
State v. Hawley (Me.), 9 Atl.
620.

²⁸ *State v. Intoxicating Liquors*,
63 Me. 121.

²⁹ *State v. Malia* (Me.), 5
Atl. 562; *Commonwealth v. In-*
toxicating Liquors, 142 Mass.
470; 8 N. E. 421; *Commonwealth*
v. Intoxicating Liquors, 105 Mass.
595.

³⁰ Statute 1869, c. 415, § 45.

³¹ *Commonwealth v. Intoxicat-*
ing Liquors, 79 Mass. (13 Gray)
52; *Commonwealth v. Intoxicating*
Liquors, 105 Mass. 181; *Common-*
wealth v. Intoxicating Liquors,
142 Mass. 470; 8 N. E. 421.

³² *Commonwealth v. Intoxicat-*
ing Liquors, 105 Mass. 181.

time of making the complaint, kept for the purpose of being sold in violation of law.³³ A separate affidavit or oath is not necessary if the complaint be verified;³⁴ but if the complaint details more facts than is necessary to justify the seizure, such facts need not be proven.³⁵ Instead of swearing to the truthfulness of the complaint the person filing it may be affirmed to it when he has conscientious scruples against taking an oath, even though the statute provides that a warrant cannot be issued except upon a "sworn complaint."³⁶ The oath is sufficient if made upon belief that the facts averred are true.³⁷ Nor need it be averred that the affiant has "probable cause" to believe they are true.³⁸

Sec. 622. Power to search without a warrant.

No power exists at common law to make a search without a warrant,³⁹ and a seizure cannot be made without a warrant issued by competent authority upon a sworn complaint.⁴⁰ A seizure of liquor without a warrant, by an officer, renders him liable in damages.⁴¹ A warrant issued under an unconstitutional statute is no protection to the officer.⁴² But a statute may authorize an officer to make a search without a

³³ *Commonwealth v. Intoxicating Liquors*, 142 Mass. 470; 8 N. E. 421.

The oath is not a necessary part of the complaint. *Commonwealth v. Intoxicating Liquors*, 105 Mass. 181.

³⁴ *Downing v. Porter*, 8 Gray 539; *Allen v. Staples*, 6 Gray 491.

³⁵ *Commonwealth v. Intoxicating Liquors*, 142 Mass. 470; 8 N. E. 421.

³⁶ *State v. Welch*, 79 Me. 99; 8 Atl. 348; *State v. Devine (Me.)*, 13 Atl. 128.

In Iowa at one time a special affidavit was required when it was desired to search a dwelling house. *Saunders v. State*, 2 Iowa 230.

³⁷ *Lowrey v. Gridley*, 30 Conn. 450; *State v. Welch*, 79 Me. 99; 8 Atl. 348; *State v. Devine (Me.)*, 13 Atl. 128. *Contra*, *State v. Patterson*, 13 N. D. 70; 99 N. W. 67.

³⁸ *State v. Welch*, 79 Me. 99; 8 Atl. 348.

³⁹ *In re Swan*, 150 U. S. 637; 14 Sup. Ct. 225; 37 L. Ed. 1202.

⁴⁰ *Bound v. South Carolina Ry. Co.*, 57 Fed. 485; *Reed v. Adams*, 2 Allen 413.

⁴¹ *Reed v. Adams*, 2 Allen 413; *State v. Plunket*, 64 Me. 534; *Gaillard v. Cantini*, 76 Fed. 699; 22 C. C. A. 493; *Jaro v. Holstein*, 73 S. C. 111; 52 S. E. 870.

⁴² *Beavers v. Goodwin (Tex. Civ. App.)*, 90 S. W. 930.

warrant if there be reasonable grounds for it; yet to justify the officer in making the search reasonable grounds must exist and not mere reports.⁴³ When a statute authorizes a particular officer to make search without a warrant, he must himself in person make it, and it has been held that he cannot even take an assistant with him.⁴⁴

Sec. 622a. Sufficiency of warrant.

The service of the warrant need not be limited to the day;⁴⁵ and one warrant may authorize the search of several places.⁴⁶ If the warrant is legal on its face the officer may act upon it and he will be protected thereby, and no subsequent action of the magistrate issuing it can render him liable.⁴⁷ A mere irregularity will not render the warrant void.⁴⁸ But if the warrant be void it is no justification for the officer that the liquors seized were subsequently declared forfeited by the court.⁴⁹ A direction in the writ to the officer to "make due return of this warrant" is sufficient on that

⁴³ Regina v. Ireland, 31 Ont. Rep. 267; State v. Bradley, 96 Me. 121; 51 Atl. 816.

See Regina v. Hodge, 23 Ont. Rep. 450.

⁴⁴ Regina v. Ireland, 31 Ont. Rep. 267.

A city is not liable in damages if her police officer make an unlawful search. McCleave v. Monteton, 32 Can. S. C. 106; Buttrick v. Lowell, 1 Allen 172.

Whether or not an officer acted *bona fide* in making search is a question for the jury. Bell v. Lott [1905], 9 Ont. L. R. 114.

To gain entrance in order to make search no preliminary statement is necessary, a formal demand being all that is necessary. Regina v. Sloan, 18 Ont. App. 482.

A licensee is penally responsible for the refusal of his servant to admit an officer desiring to make a search. Regina v. Paten, 20 Ont. App. 516.

⁴⁵ State v. Brennan, 25 Conn. 278. See State v. Guthrie, 90 Me. 448; 38 Atl. 363.

⁴⁶ Gray v. Davis, 27 Conn. 447.

⁴⁷ Gray v. Davis, 27 Conn. 447.

⁴⁸ State v. McNally, 34 Me. 210; 56 Am. Dec. 650; Santo v. State, 2 Iowa 165; 63 Am. Dec. 487; Adams v. McGlinchy, 66 Me. 474; State v. Longley, 79 Me. 52; 7 Atl. 902.

⁴⁹ Guptill v. Richardson, 62 Me. 257; McGlinchy v. Barrows, 41 Me. 74; Guenther v. Day, 6 Gray 490; Jones v. Fletcher, 41 Me. 254; Adams v. Allen, 99 Me. 249; 59 Atl. 62.

point.⁵⁰ Under an early statute of Maine⁵¹ the warrant must contain a recital that it was issued by the magistrate upon testimony of witnesses, reduced to writing, showing reasonable grounds for the belief that the liquors were unlawfully kept in the place described;⁵² and if that fact did not appear in it the warrant was void.⁵³ It had to recite that the magistrate is satisfied with the evidence.⁵⁴ But in Massachusetts⁵⁵ it need not state "that probable cause has been shown for the issuing thereof."⁵⁶ A warrant must follow the statute which authorizes its issuance or it will be bad.⁵⁷

Sec. 623. Description in warrant of liquors and their ownership.

A description of the liquors to be seized must be inserted in the warrant;⁵⁸ but it would seem that words of a general

⁵⁰ *Commonwealth v. Intoxicating Liquors*, 97 Mass. 62.

For other minor questions of practice local to the State wherein the warrant is issued, see *Guenther v. Day*, 6 Gray 490; *Allen v. Staples*, 6 Gray 491; *Downing v. Porter*, 8 Gray 539; *Commonwealth v. Leddy*, 105 Mass. 381; *Commonwealth v. Intoxicating Liquors*, 135 Mass. 519.

⁵¹ Stat. 1853, c. 48, § 11.

⁵² *State v. Staples*, 37 Me. 228; *State v. Spirituous Liquors*, 39 Me. 262; *McGlinchy v. Barrows*, 41 Me. 74; *State v. Comolli*, 101 Me. 47; 63 Atl. 326.

⁵³ *Jones v. Fletcher*, 41 Me. 254.

⁵⁴ *State v. Whalen*, 85 Me. 469; 27 Atl. 348.

⁵⁵ Under St. 1855, c. 215, § 25, and c. 397.

⁵⁶ *Holland v. Seagrove*, 11 Gray, 207.

Contra, *Commonwealth v. Intoxicating Liquors*, 105 Mass. 178. See *Commonwealth v. Intoxicating Liquors*, 6 Allen 599; *Commonwealth v. Intoxicating Liquors*, 108 Mass. 19.

⁵⁷ *Ex parte Spratt*, 2 S. C. N. S. W. 254.

In Maine the warrant must command the arrest of the accused or it will be void. *Adams v. Allen*, 99 Me. 249; 59 Atl. 62. See also *State v. Bradley*, 96 Me. 121; 51 Atl. 816.

In New Brunswick a magistrate cannot issue a warrant when he is the prosecutor. *Ex parte McCleave*, 35 N. B. 100; *Condell v. Price*, 1 Hans. (N. B.) 333.

Until a charge be filed a warrant cannot be issued. A warrant cannot be issued to secure evidence, and then a charge be filed. *Regina v. Doyle*, 12 Ont. 347; *Regina v. Walker*, 13 Ont. 83; *Regina v. Hefferman*, 13 Ont. 616.

A judge has no discretion, but must issue the warrant if a proper complaint or information be filed before him. *State v. Fulkerson*, 73 Ark. 163; 83 S. W. 934; 86 S. W. 817.

⁵⁸ *Gray v. Davis*, 27 Conn. 447; *State v. Robinson*, 33 Me. 564.

description will be sufficient,⁵⁹ as "a certain quantity of gin, being about and not exceeding one hundred gallons."⁶⁰ The description in the warrant should correspond with that given in the complaint.⁶¹ The name of the owner or keeper should be given; but a statute may dispense with that.⁶²

Sec. 624. Description of place in warrant, sufficiency.

A search warrant for intoxicating liquors is not invalidated by so misnaming one street in the description of the place where the liquors are kept so as to make the application of the whole description impossible, if in other respects the place is described truly, and so as to identify it with the place described in the complaint.⁶³ And if a building is known by two numbers, and is as well known by one as by the other, it may be described by either in a complaint and warrant for a search of such liquors.⁶⁴ And likewise it has been held that where the only difference between the description in a complaint and warrant was that the former located the premises at No. 197 on a designated street, and the latter at No. 179, and it appeared that the person named in both occupied only No. 197 on that street, that a search of No. 197 was justified by the warrant.⁶⁵ And in a later case it was held that in a search and seizure proceeding a warrant against a dwelling house sufficiently described the premises by an averment that the house was occupied by the defendant and situated on the east side of Blake Street, when in fact the house was situated east of Blake Street, but not adjoining it and that there was another house between that of the defendant and the street, and access to the defendant's house was by an alley run-

⁵⁹ State v. Thompson, 44 Iowa 399.

⁶⁰ Downing v. Porter, 8 Gray 539; State v. Whisky, 54 N. H. 164; *In re Horgan*, 16 R. I. 542; 18 Atl. 279.

⁶¹ Commonwealth v. Intoxicating Liquors, 13 Allen 561.

⁶² Allen v. Staples, 6 Gray 491.

⁶³ Downing v. Porter, 8 Gray

539; Commonwealth v. Intoxicating Liquors, 150 Mass. 164; 22 N. E. 628.

⁶⁴ Commonwealth v. Intoxicating Liquors, 88 Mass. (9 Allen) 596.

⁶⁵ State v. Robinson, 49 Me. 285; State v. Minnehan, 83 Me. 310 22 Atl. 177; *Contra*, Commonwealth v. Intoxicating Liquors, 116 Mass. 342.

ning from the street past the other tenement. The court said that in such a case there was really no variance. At most there was a slight diminution of the description in the warrant, not misleading at all. The warrant did not necessarily call for a location of the house immediately upon the street but on the east side of it.⁶⁶ Under a constitutional provision requiring the warrant to "particularly describe" the place to be searched, a statute requiring it to be described "as particularly as possible" is constitutional.⁶⁷ If the complaint and warrant be issued together the description in the complaint may supply an insufficient description in the warrant.⁶⁸ A warrant stating "that intoxicating liquors were and still are kept and deposited by C, of S, in the story and one-half wooden, frame dwelling house now occupied by C and situated" at a certain place in a named town, is sufficient as to the place to be searched.⁶⁹

Sec. 625. Place, designation of, when sufficient.

Under a constitutional provision which declares that "no warrant to search any place, or seize any person or thing shall issue without a special designation of the place to be searched," the designation or description of the place cannot be considered as a special designation of the place, which, if used in a conveyance, would not convey it, and which would not confine the search to one building or place. The special designation of the place to be searched required by such constitutional provision must be such as would, if used in a deed, be sufficient to describe and convey it. Accordingly, it has been held that a warrant which commanded the officer hold-

⁶⁶ *State v. Minnehan*, 83 Me. 310; 22 Atl. 177.

⁶⁷ *Santo v. State*, 2 Clarke (Iowa) 165; 63 Am. Dec. 487; *State v. Snow*, 3 R. I. 64.

⁶⁸ *State v. Erskine*, 66 Me. 358.

⁶⁹ *State v. Comolli*, 101 Me. 47; 63 Atl. 326.

In Canada it has been held that a statute may dispense with

a description of the premises, *Sleeth v. Hurlbert*, 25 S. C. (Ont.) 620; but such a rule could not obtain under our State constitutions.

As to search of a "dwelling house" and "inn" under one warrant in Maine, see *State v. Bennett*, 95 Me. 197; 49 Atl. 867.

ing it to search for certain liquors mentioned therein, "in a certain dwelling house in said city of Augusta, situate in Winter Street, so called, and being the same *premises* occupied by said Jones," did not contain direct authority to search a barn belonging to said Jones.⁷⁰ On the other hand, it has been held that the designation in a warrant of a certain dwelling house and appurtenances occupied by the respondent was sufficient to authorize the officer to search an outbuilding on the same lot with the house, and near to it, but separate from it by an open space or passageway, when such outbuilding was occupied by the respondent mainly as a woodshed for the use of the house. In so deciding the court said that in the absence of anything to show an intent to limit the effect of a conveyance "there can be no doubt that the grant of a house, occupied by a certain person, with its appurtenances, would carry with it what is commonly termed the house, lot and the outbuildings thereon standing used by the occupant of the house for its convenience, whether connected with the house proper, or, as in the case at bar, separated from it by an open space or passageway." But a warrant which authorizes an officer to search the dwelling house in which a person lives will not authorize him to search a house hired and occupied by another, though owned by such person; and if he does so he will be guilty of trespass.⁷¹ Where the description in a warrant was a certain "dwelling house and appurtenances," it was held that a search could not be made under it of a stable on the same lot ten feet in the rear of the dwelling, used by the accused for storing coal.⁷² A search of rooms in the same building, occupied by tenants, has been held not illegal.⁷³ Where a barrel of ale was described as "in the house occupied by G," it was held that it could be

⁷⁰ State v. Robinson, 33 Me. 564; State v. Bartlett, 47 Me. 388; State v. Robinson, 49 Me. 285.

⁷¹ Jones v. Fletcher, 41 Me. 254; Flaherty v. Longley, 62 Me. 420; State v. Burke, 66 Me. 127; McGlinchy v. Barrows, 41 Me. 74.

A steamboat is a "place" and may be searched. State v. McNally, 34 Me. 210; 56 Am. Dec. 650.

⁷² State v. Woods, 68 Me. 409.

⁷³ Paquet v. Emery, 87 Me. 215; 32 Atl. 881; *Contra*, Commonwealth v. Newton, 123 Mass. 420.

seized in the room of L if its faucet passed through a partition into G's room.⁷⁴ Upon a warrant to search the basement and first story of a building, liquor may be seized on the first floor of the building off the sidewalk, being the floor of a shop with no basement beneath it, although the claimant of the liquors lived with his family in the rooms above it.⁷⁵

Sec. 626. Adjoining properties, sufficiency of warrant to search.

An officer acting under a search warrant which authorizes him to enter a house described as occupied by A and seize and remove intoxicating liquors kept there by A for sale in violation of law was held justified in entering B's room and removing a barrel of such liquors where it was proven that he found in the house a barrel of ale, belonging to A, in a room occupied by B, but having a faucet which, passing through a partition, opened into a room occupied by A. The court held that the use made of B's apartment implied access to it by A, as well as an exclusive possession of it by him, and that the search warrant would, therefore, extend to the room which contained the ale, including the doorway that led to it.⁷⁶ But in a later case it was held that an officer acting under a warrant authorizing him to enter a building described as occupied by A, but in fact occupied by A and B in separate tenements, and seize and remove liquors kept there by A for sale in violation of law, had no right to enter and search a closet which was a part of B's tenement, and was not used by A as a place of keeping liquors, although he believed that the closet was in A's occupation, and that B might resist his entry using reasonable force. The court said that the fact that the officer believed that the closet was in the occupation of A could not affect the rights of B.⁷⁷ Nor will a warrant to search premises "occupied by A," and describing by metes and bounds a block of two dwelling houses, separated by a partition wall,

⁷⁴ Commonwealth v. Leddy, 105 Mass. 381.

⁷⁶ Commonwealth v. Leddy, 105 Mass. 381.

⁷⁵ Commonwealth v. Certain Intoxicating Liquors, 122 Mass. 36.

⁷⁷ Commonwealth v. Newton, 123 Mass. 420.

and occupied one by A and the other by B, and to seize certain liquors if "there" found, authorize a search of B's house.⁷⁸

Sec. 627. More than one building may be searched.

A search warrant which directs the search of several places instead of being confined to one is not subject to an objection that it violates a constitutional provision "that the people shall be secure in their persons, houses, papers and possessions, from unreasonable searches or seizures, and [that] no warrant to search any place or seize any person or things shall issue without describing them as nearly as may be, nor without probable cause supported by oath or affirmation." Such a constitutional provision is obviously intended mainly for the security of the citizen, that his possessions may not be wantonly invaded, at the discretion, caprice or malice, either of private individuals or the ministers of the law. A separate warrant for each suspected place to be searched is not called for either by the letter or spirit of such a provision, nor requisite for the protection of the public peace or individual security. To require it would occasion useless delay and expense and tend to defeat the salutary objects of the law.⁷⁹ And where the place where the liquors were kept was described in a complaint and warrant as a brick store, it was held that the place was sufficiently described and that an officer was justified in seizing liquors which were found in an addition to it built of wood, the evidence in the case showing that the front and principal part of the store was of brick

⁷⁸ Flaherty v. Longley, 62 Me. 420; Commonwealth v. Intoxicating Liquors, 140 Mass. 287; 3 N. E. 4. Booth under building, Regina v. McGarry, 24 Ont. Rep. 52. A direction to "take and hold possession of all personal property found on such premises," where the direction is "to search the premises," does not authorize the officer to take personal property not in the particular ten-

ement or room where liquors were not kept. State v. Markuson, 7 N. D. 155; 73 N. W. 82. In Dakota where the officer must close the place where liquors are found, and his warrant is to search two places, but he finds liquors in only one of them, he can close only the one in which he finds the liquors. State v. Markuson, *supra*.

⁷⁹ Gray v. Davis, 27 Conn. 447.

and commonly called "the brick store," there being another store in the neighborhood built of wood, and it being common to distinguish the one in controversy from that by calling it "the brick store."⁸⁰ It has also been held that the designation of a certain dwelling house and appurtenances, occupied by the defendant, is sufficient to authorize an officer to search outbuildings on the same lot with the house near to it, but separate from it by an open space or passageway, and occupied mainly as a woodshed for the use of the house.⁸¹ In Massachusetts where the statute requires the complaint and warrant to "designate so as to identify the place to be searched," it has been held that a motion to quash a complaint and warrant which alleged that certain intoxicating liquors, describing them, "were and still are kept and deposited by Zephria Lucia, of Hudson, in a certain hotel and barn, situate on the north side of Main Street, in Hudson County, known as the 'Valley House,' and the barn in the rear thereof, next east of the bakery building occupied by George W. Davis," was rightfully overruled, and that the service of the warrant, according to its tenor, was justified, it not appearing "that the claimant occupied any other building in Hudson than the hotel and barn, which were together, upon the same premises."⁸² Where a statute provided that "no warrant shall issue for the search of a dwelling house unless a tavern, store, eating room, or place of common resort is kept therein," it was held not sufficient to describe the dwelling house as a "place of common resort;"⁸³ but a description as "at W, in a certain distillery there, situate about one and a half miles northeasterly from H furnace" was sufficient.⁸⁴

Sec. 628. Complaint and warrant, when not conflicting.

Under a statute which requires that a complaint and search warrant shall describe the place where intoxicating

⁸⁰ *Lowrey v. Gridley*, 30 Conn. 450.

⁸¹ *State v. Burk*, 66 Me. 127.

⁸² *Commonwealth v. Intoxicating Liquors*, 146 Mass. 509; 16 N. E. 298.

⁸³ *Commonwealth v. Intoxicating Liquors*, 97 Mass. 332.

⁸⁴ *Commonwealth v. Intoxicating Liquors*, 97 Mass. 334; *Commonwealth v. Intoxicating Liquors*, 109 Mass. 371; *Commonwealth v. Intoxicating Liquors*, 109 Mass. 373, note.

liquors are kept for sale contrary to law "with reasonable certainty," the complaint described the place as "near the corner of Elm Street, in the borough of Danbury * * * in a wooden building occupied by Jean Hornig, of said Danbury, consisting of a one-story building, and a garden thereto attached and occupied as a saloon and place of public resort; also another wooden building used as a saloon, and the cellar of the said wooden building described above, and used by the said Jean Hornig as a dwelling house, all of said buildings being within the town and borough of Danbury, and which said liquors were so owned and kept at said *place*." The warrant described the buildings substantially in the same words and following the description were these words, "in which said *places* it is said and complained and alleged that certain intoxicating liquors are now owned by said Jean Hornig and kept by him, and are intended by him to be sold contrary to law." The complaint and warrant were held sufficient. In so deciding the court said: "It will be noticed that in the complaint it is alleged that the liquors were kept in said *place*. If the word *place* refers to one of the buildings only there is uncertainty as to which one of them is intended, but if used in a broader sense, as including both

⁸⁵ Hornig v. Bailey, 50 Conn. 40. See Commonwealth v. Intoxicating Liquors, 128 Mass. 72.

A description in a warrant of the place as "a certain building situated in said Wendell at Wendell Depot (so called) kept in a store by William Putnam" is sufficient where the complaint describes the place as "a certain building situate in Wendell, at Wendell Depot, so called, kept as a store by William Putnam." Commonwealth v. Certain Intoxicating Liquors, 97 Mass. 63.

In a complaint the place was described as "a certain *house* building situate on Cherry Street, so called, in N., on the northerly

side of said street, *the same being* the second house from Market Street, *on* said Cherry Street and occupied by A as a dwelling and premises." The warrant described the place as a "certain *frame* building situate on Cherry Street, so-called, in N., on the northerly side of said street, *and is* the second house *east-erly* from Market Street, *in* said Cherry Street, and occupied by A as a dwelling and premises." It was held that there was no variance between the warrant and complaint. Commonwealth v. Certain Intoxicating Liquors, 116 Mass. 27.

buildings, a sense in which the word is often used, there is no uncertainty as to which. In the warrant in the same connection the plural is used—‘places.’ Even if we concede that the word is used in the same sense in both places, we do not think the uncertainty in the complaint vitiates the warrant, for aside from the fact that the allegation of the complaint clearly avers that the liquors were owned and kept ‘in a wooden building,’ etc., also ‘in another wooden building,’ etc., so that the words ‘at said place’ may be stricken out without vitiating the complaint. This being so, and the warrant being explicit and grammatically correct so far as this point is concerned the proceeding was not void.”⁸⁵

Sec. 629. Variance between warrant and complaint.

The description used in the warrant should follow that used in the complaint,⁸⁶ but an immaterial variance between them is not fatal.⁸⁷ But where a complaint alleged the liquor was kept “in a certain three-story brick building, with basement,” and its prayer was for a warrant to search “said three-story brick building, with basement, and all sheds and outbuildings belonging to said building,” and the warrant contained an order to search “the three-story brick building, with basement, and all outhouses and sheds belonging to said building,” it was held that the warrant was void.⁸⁸ Yet under an allegation that liquors were kept in a designated frame building, it may be shown they were kept in the cellar.⁸⁹ And where a statute provided that no warrant should be issued to search a dwelling house unless “a grocery is kept therein,” it is not a variance that the dwelling house was occupied as a grocery.⁹⁰ Where the description was sufficient without the allegation that the house had formerly been owned by A, and the warrant contained such description, but contained a recital they were formerly owned by B, the variance was held

⁸⁶ *Commonwealth v. Intoxicating Liquors*, 122 Mass. 14; *Commonwealth v. Intoxicating Liquors*, 107 Mass. 216.

⁸⁷ *State v. Robinson*, 49 Me. 285.

⁸⁸ *Commonwealth v. Intoxicating Liquors*, 115 Mass. 145.

⁸⁹ *Commonwealth v. Intoxicating Liquors*, 122 Mass. 14.

⁹⁰ *Commonwealth v. Intoxicating Liquors*, 13 Allen 52.

immaterial, for the statements in both the complaint and warrant as to who formerly owned the house was surplusage.⁹¹ So a command to search the person of the defendant, if there is no corresponding allegation in the complaint, is surplusage, and does not avoid such warrant.⁹² An alternative charge in the complaint that liquor "has been sold in the house above mentioned by the occupant of said house, or with the consent and permission of said occupant," is not a fatal defect.⁹³ A charge that the liquors were kept at one hundred and ninety-seven and one-half on "a certain street" "and in its basement" is sufficient to support a finding that they were kept in a house numbered 197 of the same street.⁹⁴ If the complaint allege alternative causes for seizure of liquors, and the officer seizes them for one of such causes, the court may condemn them upon either of the causes named in such complaint.⁹⁵

Sec. 630. Search warrants, when and how served.

By the common law a search warrant could not be executed in the nighttime. In reference to the reason for this rule Chitty says: "It is fit that such warrants for search do express that search be made in the daytime, and though I do not say they are unlawful without such restriction yet they are very inconvenient without it, for many times under pretense of searches made in the night robberies and burglaries have been committed, and at best it creates great disturbance."⁹⁶ In Massachusetts it has been held that the common law rule does not apply under a statute which contains full and explicit provisions as to the issuing of a search warrant for the search and seizure of liquors, and prescribes the form

⁹¹ State v. Bartlett, 47 Me. 388.

⁹² State v. Chartrand, 86 Me. 547; 30 Atl. 10.

⁹³ Commonwealth v. Intoxicating Liquors, 13 Allen 52.

⁹⁴ Commonwealth v. Intoxicating Liquors, 117 Mass. 427; Commonwealth v. Intoxicating Liquors, 122 Mass. 36. See Common-

wealth v. Intoxicating Liquors, 6 Allen 596; State v. Plunket, 64 Me. 534.

⁹⁵ State v. 25 Packages of Liquor, 38 Vt. 387; Garrett v. Poe County, 78 Iowa, 108; 42 N. W. 618.

⁹⁶ Chitty Crim. Law (15 Am. ed.) 65.

of warrant to be issued, and directs the officer to whom it is issued to "forthwith enter the premises herein described and make diligent and careful search," instead of to search in the daytime, the court saying: "The general rule is that process, civil or criminal, can be as well served in the nighttime as in the daytime, and a direction in a warrant to serve it, without limitation as to the hour of the day, is a discretion to serve it in the nighttime as much as in the daytime."⁹⁷ And in Connecticut it has been held that a warrant was not rendered invalid by the absence of a direction therein that the search should be limited to the daytime, the presumption being that the officer would execute the precept at a proper time and in a proper manner, although it contained no especial direction to that effect.⁹⁸ And in Maine it has been held that an officer under a warrant for the search of intoxicating liquors is justified in forcibly breaking and opening the depot of a railroad in which the liquors are stored, after the usual time for receiving and delivering goods at the depot, if such forcible entry is necessary to the execution of the warrant, and that in such case it is not necessary that the officer should first ask permission of the person having charge of the depot, if he is not present, to enter and search it.⁹⁹ Such a warrant may be served by an officer duly empowered to serve such warrants though it is not directed to him. If the incapacity of an officer to serve a warrant consists merely in the omission of the words appropriate to show that he is the proper officer to serve it, and the case is one in which, with proper words of direction, he could lawfully have acted, the objection will be merely to the form of process, and if the writ is served by the proper officer the omission may be amended on motion and leave granted to insert the proper direction.¹ If in serving such a warrant the officer making the

⁹⁷ *Commonwealth v. Hinds*, 145 Mass. 182; 13 N. E. 397.

⁹⁸ *State v. Brennan's Liquors*, 25 Conn. 278.

⁹⁹ *Androscoggin R. Co. v. Richards*, 41 Me. 233.

¹ *Converse v. Damariscotta Bank*, 15 Me. 433; *Rollins v. Rich*, 27 Me. 561; *Morrell v. Cook*, 35 Me. 211; *State v. Hall*, 78 Me. 37; 2 Atl. 546; *Hearsey v. Broadway*, 9 Mass. 95; *Wood v. Ross*,

service acts *colore officii*, but in fact is only an *officer de facto*, his acts are valid so far as the public or third persons having an interest in such acts are concerned, and their validity cannot be directly called in question in a suit to which he is not a party.² If the warrant be for the seizure of the liquors and arrest of their keeper, both must be taken before the magistrate issuing the warrant;³ but a failure to arrest the accused and to give any excuse for not arresting him will not warrant an arrest of the judgment of forfeiture.⁴ Where the liquors were seized in a wagon, to which was hitched a team of horses, in the public highway, it was held that the officer could unhitch the team and take them to his own stable for the purpose of saving the horses from injury until called for by the owner.⁵ Liquor may be seized in the nighttime.⁶ The fact that the officer seizing the liquors had not given an official bond for the faithful performance of his duties is no defense. If the warrant be in due form it is a justification for the officer making a seizure under it.⁸ The warrant remains in force for a reasonable time only and is not in force perpetually until served.⁹

11 Mass. 276; Aldrich v. Aldrich, 49 Mass. (8 Met.) 106; Bassett v. Howwith, 224; Brown v. Dudley, 33 N. H. 514; Parker v. Barker, 43 N. H. 36.

² State v. Brennan's Liquors, 25 Conn. 278. See *In re Moore*, 66 Fed. 947.

³ State v. Miller, 48 Me. 576.

⁴ Heath v. Intoxicating Liquors, 53 Me. 172.

⁵ Jones v. Root, 6 Gray 435; Mason v. Lothrop, 7 Gray 354.

⁶ Commonwealth v. Intoxicating Liquors, 97 Mass. 63; State v. Bennett, 95 Me. 107; 49 Atl. 867.

⁸ Sleith v. Hurlbert, 25 S. C. (Ont.) 620; King v. W. H. Townsend, No. 2; 39 Nov. Sco. 189.

⁹ State v. Guthrie, 90 Me. 448; 38 Atl. 368.

A three days' delay, unexplained, was held to be fatal to the warrant. See *State v. Brennan*, 125 Conn. 278.

In Minnesota, under laws 1901, c. 252, the search warrant and warrant for the accused's arrest may be in one instrument. *State v. Stoffels*, 89 Minn. 205; 94 N. W. 675. See also as to Maine, *Getchell v. Page*, 103 Me. 387; 69 Atl. 624; *State v. Connolly*, 96 Me. 405; 52 Atl. 908.

The fact the officer seized more liquor than his warrant described does not render the seizure invalid as to the liquor properly taken. *Commonwealth v. Intoxicating Liquors*, 89 N. E. 918.

Failure to summon the com-

Sec. 631. Warrant protects officer.

A complaint and warrant for the search and seizure of intoxicating liquors which in their details substantially conform to the requirements of the statute under which they are filed and issued will justify an officer who executes the warrant, provided the court issuing it had jurisdiction of the case, and the liquors seized may be condemned if they were kept for unlawful sale or distribution.¹⁰ In such case if the statute denounce the keeping of intoxicating liquors for illegal "sale or distribution," an officer can seize such liquors for either of the alternative causes, if both are named in the complaint, and the court may condemn for either, as the evidence may warrant.¹¹ And if intoxicating liquors which have been seized under such a warrant are described in the same way in the complaint, warrant and officer's return upon the warrant, it is immaterial whether the issue to the jury is whether the whole or any part of the liquors described in the complaint were unlawfully kept, etc., or whether the whole or any part of the liquors actually seized were so kept.¹² It will be presumed that the proper judgment will be ultimately rendered; and if there be a judgment of forfeiture it will be solely in reference to the liquors mentioned and described in the complaint.¹³

Sec. 632. False imprisonment—Evidence.

In an action for an assault and false imprisonment against an officer for arresting the plaintiff without a warrant, on the

plainant as witness does not avoid the proceedings. *Commonwealth v. Certain Intoxicating Liquors*, 97 Mass. 92; *Downing v. Porter*, 8 Gray 389

¹⁰ *Thurston v. Adams*, 41 Me. 419; *Commonwealth v. Intoxicating Liquors*, 88 Mass. (6 Gray) 596.

¹¹ *Garrett v. Pol County*, 78 Iowa 108; 42 N. W. 618; *State v. 25 Packages of Liquor*, 38 Vt. 387.

¹² *Commonwealth v. Intoxicating Liquors*, 88 Mass. (6 Allen) 596.

¹³ *Commonwealth v. Intoxicating Liquors*, 86 Mass. (4 Allen) 593.

It has been held that a complaint based upon information and belief is insufficient, being mere hearsay and not stating facts. *State v. Patterson*, 13 N. D. 70; 99 N. W. 67.

ground that he was illegally transporting intoxicating liquors, declarations of the plaintiff, made the day before the arrest, tending to show that he was at the time of the arrest actually so transporting said liquors, are admissible in evidence for the defendant, although not known to him when he made the arrest; so, also, is the warrant obtained the day after the arrest was made and the complaint on which it was issued. In such case a delivery and receipt of intoxicating liquors in payment for services rendered was held to be a sale within the meaning of the Massachusetts statutes prohibiting the unlawful sale of such liquors.¹⁴

Sec. 633. Return of warrant, sufficiency.

The return of an officer to a search warrant should show that the liquors seized were identical with those described in the complaint and warrant and that they were seized in the place to which the warrant was directed. If a complaint and warrant for a search for certain intoxicating liquors, which are described, designated the place to be searched as "a certain tenement on the south side of Washington Square in a brick building and numbered twenty-two on said square, said tenement consisting of two rooms on the first floor and the cellar under said rooms, said tenement being occupied by" the person named as keeper of the liquors, and the officer's return upon the warrant states that he searched the within described premises and seized therein certain intoxicating liquors, which were described in the same way as in the complaint and warrant, the return sufficiently shows that he seized the same liquors, and in the same tenement, which were referred to in the complaint and warrant. In such return the word "premises" is not to be construed as referring to the whole building. Such a construction would as reasonably extend it to the whole square.¹⁵ And a return that "by virtue of this warrant, I have seized the following described liquors," describing them as in the warrant, sufficiently im-

¹⁴ *Mason v. Lothrop*, 73 Mass. (7 Gray) 354.

¹⁵ *Commonwealth v. Intoxicating Liquors*, 88 Mass. (6 Allen)

596. A return is necessary. *State v. Spirituous Liquors* (N. H.), 73 Atl. 169.

ports the identity of the liquors.¹⁶ If the liquors cannot be seized because destroyed the officer should state that fact, and how, if he knows, and as near as he can ascertain the quantity destroyed, and arrest their keeper.¹⁷ The return to a warrant directed to "the constable of the Commonwealth or either of his deputies," may be subscribed as "deputy State constable."¹⁸ If the warrant command a search to be made of the person of the defendant when arrested, a failure to make such a search will not vitiate the warrant or the return; and after a plea filed to the complaint or information it is too late to object to the return.¹⁹ If the arrest be illegal, it can in no way affect the legality of the warrant and complaint, and the accused cannot take advantage of it when liquors are found in his possession.²⁰

Sec. 634. Officer's return to search warrant as evidence.

An officer's return upon a search and seizure warrant may be read before the jury as exhibiting what is to be proved, but not as any part of the proof itself, to sustain the prosecu-

¹⁶ *State v. Hall*, 81 Me. 34; 16 Atl. 329; *Stone v. Dana*, 46 Mass. (5 Met.) 98.

Parol evidence is not admissible to contradict the return. *State v. McCann*, 59 Me. 383.

¹⁷ *State v. Stevens*, 47 Me. 357.

¹⁸ *Commonwealth v. Intoxicating Liquors*, 97 Mass. 63; *Commonwealth v. Certain Intoxicating Liquors*, 97 Mass. 601.

In Maine a deputy enforcement commissioner of the liquor law may serve a warrant. *Kalloch v. Newbert* (Me.), 72 Atl. 736.

For other questions of local practice, see *State v. Robinson*, 33 Me. 564; *Commonwealth v. Intoxicating Liquors*, 4 Allen 593; *State v. 25 Packages of Liquors*, 38 Vt. 387.

The officer need not make a return as to the articles seized mere-

ly as evidence. He is required to make return only as to the liquor seized, the person arrested and the articles to be condemned and confiscated. *Getchell v. Page*, 103 Me. 387; 69 Atl. 624.

¹⁹ *State v. Connolly*, 96 Me. 405; 52 Atl. 908.

²⁰ *State v. Bradley*, 96 Me. 121; 51 Atl. 816.

The warrant is returnable to the court or officer issuing it. *Commonwealth v. Certain Intoxicating Liquors*, 97 Mass. 63; *Commonwealth v. Certain Intoxicating Liquors*, 130 Mass. 29.

The return of the officer showing he had seized more liquor than the warrant justified him in doing, does not avoid the warrant. *Commonwealth v. Intoxicating Liquors*, 89 N. E. 918.

tion. In fact, there can be no connection in such a proceeding without an officer's return. It is a part of the proceeding, without which an arraignment cannot be made. In such a case, nothing else appearing, the presumption is that the respondent did have in his possession all of the liquors described in the return, if there is a general verdict of guilty. The warrant contains nothing but a very general allegation. But the officer's return amounts to the presentment of a bill of particulars to which the proofs and the judgment must apply. The return limits the more general charge, and in this way becomes a part of the allegations. When a respondent pleads he does so as to the liquors thus described. He can plead guilty as to a part. And so can the record be. It partakes somewhat of the character of proceedings in the civil action of *replevin*. But where the conviction is a general one the implication is that all the allegations, as limited by the officer's return, were sustained.²¹ But when the warrant, besides directing the seizure of the liquors, authorizes the arrest of the keeper when such liquors are found, the fact that the liquors have been found must be proved by competent evidence under oath and not by the return of the officer.²² The officer seizing the liquors may testify as to the identity of the liquors seized and those described in the complaint and warrant,²³ and he may state on what day he made the seizure, notwithstanding he has stated the date of seizure in his return.²⁴ The warrant and the officer's return thereon is admissible as showing what must be proven, although not a part of the proof itself necessary to sustain the prosecution.²⁵

Sec. 635. Illegal keeping, evidence, sufficiency.

Evidence of the mere seizure, in the cellar of a dwelling house, of a barrel and bottle of whisky, of a barrel of rum,

²¹ *State v. Somerville*, 21 Mo. 20; *State v. Lang*, 63 Me. 215; *State v. Howley*, 65 Me. 100; *Commonwealth v. Stebbens*, 8 Gray 492.

²² *State v. Stevens*, 47 Me.

357; *State v. Robinson*, 33 Me. 564.

²³ *State v. Bartlett*, 47 Me. 396; *State v. 25 Packages of Liquor*, 38 Vt. 387.

²⁴ *State v. McCann*, 59 Me. 383.

²⁵ *State v. Howley*, 65 Me. 100.

partly full, with a faucet in it and lying on its side in a frame, and of bottles and demijohns which contained liquors, and in a sink in a room over the cellar, of a small tub, some orange peel and two small tumblers, such as are sometimes used in barrooms, was held insufficient to warrant a finding by the court that the liquors were kept by the occupant of the house for sale contrary to law. In so deciding the court said: "The intent to sell contrary to law, in which the whole criminality consists, must be proved beyond a reasonable doubt, according to the ordinary rule of criminal cases, before a decree of forfeiture can be had. The most that can be said of the evidence reported is that it is consistent with such an intent. It is, however, equally consistent with an intent to which the law attaches no criminality. The possession and use of intoxicating liquors are not prohibited by any statute. The description of the rooms and the articles found in them, shows very plainly that such liquors had been and still were kept and used there, but any inference from the evidence reported, of an intent to sell, appears to be wholly conjectural. There may or may not have been such an intent, but the facts reported are too scanty and indecisive to furnish any of the elements of certainty beyond a reasonable doubt."²⁶ In a later case, however, the same court held that at the trial of a charge of keeping intoxicating liquors on a certain day with intent to sell the same in violation of law, evidence of the condition of the room where the liquors were alleged to be kept, as to appointments and fixtures, at eight o'clock in the morning of the next day, was admissible as tending to connect the defendant with the offense charged.²⁷ And later it was held that on a charge of keeping intoxicating liquors for sale in violation of law, evidence that the defendant kept a public bar, provided with tumblers and a dripping pan, that the bar was reported to be open at all hours of the day and evening, and at times at very late hours of the night, and that at the time of his arrest at his place of

²⁶ *Commonwealth v. Intoxicating Liquors*, 105 Mass. 595; *Commonwealth v. Intoxicating Liquors*, 115 Mass. 142; *State v.*

Intoxicating Liquors, 109 Iowa 145; 80 N. W. 230.

²⁷ *Commonwealth v. Powers*, 123 Mass. 244.

business, three pint bottles containing liquors were found in his pocket, was competent and sufficient to authorize a jury in finding him guilty.²⁸ In other words, the finding of liquors upon the premises, especially if under suspicious circumstances, the presence of the materials and implements for pursuing the traffic, the discovery of jugs, decanters or glasses, evidence of recent drinking, attempts to hide the liquor when officers appear or secretly to remove it from the building, are all competent and admissible evidence, the weight of which is to be determined by the jury.²⁹ The action of the defendant in connection with the liquors may be given in evidence, as any directions concerning them he may have given.³⁰ There can be no judgment until the allegations of the complaint be proven.³¹ If the accused had a permit to sell for mechanical or medicinal purposes, and the charge is that the sales were made for other purposes, the circumstances and conversations of the purchasers at the times of the sales and their business may be shown, in order to determine whether the sales were honestly made.³² Evidence of sales to drunken men may be shown as bearing upon the intent with which the liquors were kept.³³ The evidence must show that the liquors were intoxicating at the time of the seizure.³⁴ Articles found

²⁸ Commonwealth v. Wallace (2 cases), 123 Mass. 400, 401, citing Commonwealth v. Hayes, 114 Mass. 282. See also White v. State, 80 Ark. 598; 98 S. W. 377.

²⁹ Roscoe Crim. Ev. (7th Am. ed.) 18; State v. Fertig, 70 Iowa 272; 30 N. W. 633; State v. Illsley, 80 Iowa 49; 46 N. W. 977; Commonwealth v. Kahlmeyer, 124 Mass. 322; Commonwealth v. Vahey, 151 Mass. 57; 23 N. E. 659.

It is not necessary to prove that the unlawful intent existed at time of seizure, for it is sufficient to show that it existed at the time of making the complaint. State v. McGowan (Me.), 5 Atl. 561; State v. Intoxicating Li-

quors, 85 Me. 304; 27 Atl. 178.

³⁰ Commonwealth v. Intoxicating Liquors, 110 Mass. 500; State v. McEvoy, 69 Iowa 63; 28 N. W. 437. *In re Hogan*, 16 R. I. 542; 18 Atl. 279. See *In re Liquors*, 15 R. I. 243; 3 Atl. 3.

³¹ Commonwealth v. Intoxicating Liquors, 113 Mass. 23.

³² State v. Blair, 72 Iowa 591; 34 N. W. 432.

³³ State v. Blair, *supra*.

³⁴ State v. Intoxicating Liquors, 92 Iowa 762; 60 N. W. 630.

See generally State v. McGowan (Me.), 5 Atl. 561; Commonwealth v. Intoxicating Liquors, 4 Allen 601; Commonwealth v. Intoxicating Liquors, 122 Mass. 36.

in connection with the liquors seized may be taken and put in evidence, such as are the usual outfit of bars or saloons, as whisky or beer glasses, strainers, bottles, flasks, kegs and barrels.³⁵ Before the liquors can be ordered destroyed the evidence must show that they were kept by some person who is a defendant, either as owner or keeper.³⁶

Sec. 636. Notice to claimants—Service and waiver of.

Those States which have statutes providing for search warrants for intoxicating liquors, as a rule, require notice of the hearing as to whether the liquors shall be forfeited must be given to the person from whose possession the liquor was taken and to all claimants of the same, and that the notice must be issued within twenty-four hours next after the

³⁵ Getchell v. Page, 103 Me. 387; 69 Atl. 624.

³⁶ State v. McMaster, 13 N. D. 58; 99 N. W. 58.

For evidence obtained under a search warrant illegally issued, see Regina v. Doyle, 12 Ont. 347; Regina v. Walker, 13 Ont. 83.

When evidence of previous raid under search warrant not admissible. Alderson v. State (Tex. Civ. App.), 111 S. W. 412.

It may be shown the accused kept a saloon, upon the question whether he intended the liquors for illegal sale. Commonwealth v. Certain Intoxicating Liquors, 107 Mass. 385; 107 Mass. 392, *note*.

That on a charge that liquors are held in a dwelling house and intended for unlawful sale, it need not be proven that sales were not intended to be made in the dwelling house. See Commonwealth v. Certain Intoxicating Liquors, 116 Mass. 24; 116 Mass. 27; Commonwealth v. McCluskey, 123 Mass. 406.

The jury may find that the liquors seized were those described in the complaint, even though the complaint testifies he had no knowledge when he made the complaint of the kind or quantity of the packages. Commonwealth v. Certain Intoxicating Liquors, 110 Mass. 182.

Evidence gained wholly by a search of the premises under the warrant is sufficient, without any actual knowledge on the part of the complainant. Commonwealth v. Welch, 110 Mass. 360.

A *prima facie* case is all the State is required to make out. Campbell v. State, 171 Ind. 702; 87 N. E. 212.

Where the liquors are seized in the possession of a carrier, and the proceedings are against him, evidence of his statement that he believed the consignee intended them for illegal sale is admissible. Commonwealth v. Certain Intoxicating Liquors, 107 Mass. 386; 107 Mass. 392, *note*.

seizure of the liquors. Also that the notice must specify the liquors seized and the place where they were found, so that the interested persons may be informed of the nature of the proceedings pending against them and their property; but great particularity in this regard is not required.³⁷ The neglect of a court to issue such a notice in compliance with the statute will not invalidate the previous proceedings and make the officer who seized the liquors a trespasser.³⁸ Such an omission without fault of the officer cannot convert him into a wrongdoer in what he has already done, or transform the law service of process into a trespass. The twenty-four hours within which such notice must issue are hours exclusive of the Lord's Day.³⁹ Sunday is not ordinarily to be reckoned in computing the time within which an act is to be done where the time limited is less than a week.⁴⁰ Nor is the issuing of notice and service of process on Sunday in such case required by the fact that criminal process may lawfully issue on that day.⁴¹ Defects in such a notice or its service must be specially pointed out before a general appearance to the action, as a cause for postponement and the giving of further notice. It is enough as against such a claimant, although not as to others, that, having had actual notice, he appeared in the case generally and presented his claim. Such an appearance is a waiver of defects in the notice and its service, and of the right to object that notice has been given to others.⁴² The issuing of such a notice is a mere ministerial act, like the issuing of an execution by a justice of the peace upon a judgment rendered by him, and need not be made a

³⁷ *Commonwealth v. Intoxicating Liquors*, 128 Mass. 72; *Commonwealth v. Intoxicating Liquors*, 146 Mass. 509; 16 N. E. 298; *State v. Snow*, 3 R. I. 64 (the Constitution requires a notice); *Graves v. Bet Jong*, 26 Austr. L. T. 101; 10 Austr. L. R. 217.

³⁸ *Voetsch v. Phelps*, 112 Mass. 407.

³⁹ *Commonwealth v. Intoxicating Liquors*, 97 Mass. 601.

⁴⁰ *Thayer v. Felt*, 4 Pick. (Mass.) 354; *Penniman v. Cole*, 8 Met. (Mass.) 496; *McInifee v. Wheelock*, 1 Gray (Mass.) 603.

⁴¹ *Commonwealth v. Intoxicating Liquors*, 97 Mass. 601.

⁴² *Commonwealth v. Intoxicating Liquors*, 88 Mass. (6 Allen) 596; *Commonwealth v. Intoxicating Liquors*, 97 Mass. 601; *Commonwealth v. Intoxicating Liquors*, 110 Mass. 187; *Commonwealth v. Intoxicating Liquors*, 13 Allen 561;

matter of record.⁴³ If a claimant of liquors which have been seized appeals from the judgment of the trial court he cannot object to defects in the monition and notice.⁴⁴

Commonwealth v. Intoxicating Liquors, 146 Mass. 509; 16 N. E. 298. See *Commonwealth v. Intoxicating Liquors*, 6 Allen 599.

⁴³ *Commonwealth v. Intoxicating Liquors*, 86 Mass. (4 Allen) 593.

⁴⁴ *State v. Brennan's Liquors*, 25 Conn. 278; *State v. Miller*, 48 Me. 576; *State v. Bartlett*, 47 Me. 388.

In order to be admitted as a party, courts have required a person applying to be admitted as a party to give bond for costs. *State v. Pecker*, 47 N. H. 369.

As to officer's fees where no liquor is seized, see *Byram v. Polk County*, 76 Iowa 75; 40 N. W. 102.

Failure of the magistrate to issue notice to persons interested will not make the act of seizure a trespass. *Voetsch v. Phelps*, 112 Mass. 407.

Failure to summons the claimants as witnesses does not invalidate the proceedings; for the summoning of them as witnesses is only for the benefit of the State. *Commonwealth v. Intoxicating Liquors*, 108 Mass. 290.

A recital in the notice that a certain court had issued the warrant for seizure of the liquors, when in fact it was another court was held not to invalidate the notice. *Commonwealth v. Intoxicating Liquors*, 128 Mass. 72.

In Vermont, notice to the keeper

was held sufficient, without notice to the actual owner. *Johnson v. Williams*, 48 Vt. 565.

Under the Vermont statute (§ 4490) the person arrested, without filing a written claim, may appear and cross-examine the State's witnesses in relation to any fact that would relieve him from liability for costs; and he may be heard in person, by witnesses and by counsel. *State v. Jabbour*, 72 Vt. 22; 47 Atl. 107.

Appearance is a waiver of any irregularity in the notice. *Commonwealth v. Certain Intoxicating Liquors*, 110 Mass. 182; *Campbell v. State*, 171 Ind. 702; 87 N. E. 212; *State v. Intoxicating Liquors (Vt.)*, 73 Atl. 586.

A notice to the keeper of liquors describing the place of seizure "at W., in a certain distillery, there situate about one and one-half miles northeasterly from H. furnace," is not sufficient. *Commonwealth v. Certain Intoxicating Liquors*, 97 Mass. 334.

A statute providing that if the owner of the liquors is unknown to the officer and no one is found in possession of the liquors, notice may be given to the owner or occupant of the building in which the liquor is found, is constitutional. *State v. Intoxicating Liquors (Vt.)*, 73 Atl. 586.

See generally *Loop v. Williams*, 47 Vt. 407.

Sec. 637. Warehousemen and bailees, liquors in their possession.

A statute of Maine provides that no person shall deposit or have in his possession any intoxicating liquors with an intent to sell in the State in violation of law, or with an intent that the same shall be sold by any person, or to aid or assist any such sale.⁴⁵ Under this statute it has been held that intoxicating liquors in possession of a warehouseman but intended by the owner for unlawful sale in the State, when they should reach their destination, were liable to forfeiture, and that the lien of the warehouseman was no bar to the forfeiture although he had no intention to violate the law.⁴⁶ In that case it was contended: (1) that, in order to render liquors liable to forfeiture there must be an unlawful intent "accompanied by the actual possession of the liquors;" and (2) that such intent of the person having actual possession renders such liquors liable to forfeiture "whoever may be the owner of them." In answer to this contention the court said: "The proposition that there can be no lawful intent without actual possession, is at variance with the most familiar principles of law. That a person does himself what he does by a servant or agent is not a legal fiction but a fact, which has almost universal application in civil, as well as in criminal matters. The possession of the servant or agent is the possession of the principal. There is no branch of jurisprudence in which this rule is not applied. * * * A person may not only have the unlawful intent, he may be guilty of the unlawful act without having actual personal possession of the liquors. As a person may be convicted of selling liquors himself, upon evidence of a sale by his agent, so he may be convicted of having them in his possession, with intent to sell, though they are in the possession and custody of his agent, he, the owner, intending to sell the same, either by himself, or by his agent; * * * it is entirely immaterial whether the owner does the depositing and keeping himself, personally, or employs a carrier, warehouseman, or

⁴⁵ Act of 1858, Sec. 12.

⁴⁶ *State v. Intoxicating Liquors*,
50 Me. 506.

other agent to do it. The innocence of the agent will protect him, personally, from punishment, but it will not save the liquor from forfeiture if the owner has the unlawful intent. If the liquors are in the possession of an agent, both he and the owner may be convicted if both have the unlawful intent. If the agent has no unlawful intent he cannot be convicted, but the owner, if known, may be." It would be strange, certainly, if the express provisions of a criminal statute could be nullified by the lien of a carrier, warehouseman, keeper, or other bailee. A bailee can acquire no better title than that of the bailor. If the latter is a *tort feasor*, the former has no lien upon the goods.⁴⁷ The bailor can confer no rights superior to his own. A liability to forfeiture for his unlawful acts relating to the goods, under State or national laws, annihilates all rights in him, or under him, as against the Government, in any legal proceeding for such forfeiture. But intoxicating liquors found in a railroad station in transit to a United States soldiers' home within the State for sale by the home storekeeper are not liable to seizure under such a statute.⁴⁸ This is so because the laws of a State do not reach beyond its own territory and liquors sold in territory ceded to the United States cannot be considered sold in violation of the laws of a State. The jurisdiction of the Federal courts is exclusive over all crimes or offenses committed within such ceded territory.⁴⁹ A design, however, on the part of one who is a mere bailee of the owner, without authority to make such sales, illegally to sell such liquors, will not work a forfeiture of such liquors. It is the intent of one having the title or authority to sell or dispose of the liquors in violation of law which is to be regarded, not that of a mere wrongdoer having no authority whatever to dispose of them.⁵⁰

⁴⁷ Robinson v. Baker, 5 Cush. (Mass.) 137; Clark v. Railroad Company, 4 Allen (Mass.) 231.

⁴⁸ State v. Cobaugh, 78 Me. 401; 6 Atl. 4. See State v. Creeden, 78 Iowa 556; 43 N. W. 673; 7 L. R. A. 295.

⁴⁹ Houston v. Moore, 5 Wheat.

(U. S.) 27; State v. Kelley, 76 Me. 333; Commonwealth v. Clary, 8 Mass. 72.

⁵⁰ State v. Intoxicating Liquors, 63 Me. 121; State v. Intoxicating Liquors, 109 Iowa 145; 80 N. W. 230.

Sec. 638. Claims to property.

Statutes provide that the owner of liquors seized may claim them by filing his written petition or claim therefor with the magistrate before whom the proceedings for their condemnation is pending. He must specifically set forth his rights and he can assert no right not specifically stated in his written claim.⁵¹ His ownership constitutes the foundation of his claim, and his right to their possession rests in such ownership, coupled with the intent to both keep and not sell them in violation of law.⁵² A person not a party to the proceedings may make application to be made a party thereto, and when so made a party may contest the claim to a right of forfeiture the same as if he was the original party.⁵³ In an action by the claimant of liquors which have been seized under a search and seizure statute, it is not necessary that the claimant should set forth in his claim nor prove upon the trial, the person of whom, the place where, or the time when, such liquors were purchased or obtained. The fact of his ownership constitutes the foundation of his claim, and his right to possession rests in such ownership with no intention to keep or sell such liquors in violation of law.⁵⁴

Sec. 639. Onus probandi—Prima facie case—Evidence.

An adjudication of a forfeiture of liquor must be grounded upon a keeping of it with an intent to unlawfully sell it, for it is the intent to sell that stamps the character of illegality upon the keeping, and it must be conceded that this intent must be the intent of the owner or some one in the possession of the liquor under his authority. Most naturally, then, the question arises, how is such intent to be proven? In Vermont

⁵¹ State v. Intoxicating Liquors, 61 Me. 520; State v. Barrels of Liquor, 47 N. H. 369; State v. Intoxicating Liquors (Vt.), 73 Atl. 586.

⁵² State v. Intoxicating Liquors, 69 Me. 524; State v. Intoxicating Liquors, 73 Me. 278; Commonwealth v. Intoxicating Liquors,

122 Mass. 8; *Id.* 36; Commonwealth v. Intoxicating Liquors, 150 Mass. 164; 22 N. E. 628.

⁵³ State v. Barrels of Liquor, 47 N. H. 369. See State v. Jabbour, 72 Vt. 22; 47 Atl. 107.

⁵⁴ State v. Intoxicating Liquors, 69 Me. 524.

it has been decided that the Legislature may provide that a probable cause for such a prosecution shall be sufficient to overcome the presumption of innocence, and that the finding of liquor by an officer furnishes evidence of a probable cause, if not *prima facie* evidence of an unlawful intent to sell it.⁵⁵ In a later case the same court held that in a case for the condemnation of intoxicating liquors under a statute which in substance provided that it must be shown "by satisfactory evidence" that the liquors were intended for sale or distribution contrary to law, the State was required only to make a *prima facie* case, and that the State had done so where the evidence consisted of the complaint, warrant, officer's return and the testimony of the officer himself by whom the seizure was made, the court saying, "The evidence here was clearly sufficient to make out a *prima facie* case and thus throw the burden of disproof upon the claimant."⁵⁶ A case decided by the Supreme Court of the United States has a strong bearing upon this question. The case involved a proceeding upon a libel or information, the object of which was to obtain a decree of forfeiture and condemnation of "a large quantity of ardent spirits" carried into the Indian country for the purpose of vending and distributing the same among the Indians contrary to law. On the trial the attorney for the Government requested the court to charge the jury that if they found from the evidence that the defendant as an Indian trader did carry ardent spirits into the Indian country, and that the same was found there among any part of his goods, that it was *prima facie* evidence of his having violated the acts of Congress, on which the prosecution was founded, so as to throw the burden of proof on the defendant. This instruction the district court gave the jury, but adding that an Indian trader might lawfully carry ardent spirits into an Indian country for some purposes, as for medical use. It was argued by the counsel for the claimants, in the Supreme

⁵⁵ Lincoln v. Smith, 27 Vt. 328.
See Fisher v. McGirr, 67 Mass.
(1 Gray) 1.

⁵⁶ State v. Intoxicating Liquors,
58 Vt. 594; 4 Atl. 902; State v.
Intoxicating Liquors, 109 Iowa
145; 80 N. W. 230.

Court, that it was incumbent on the Government not only to show that the spirits were carried into the Indian country, but that the same was done with an intent to sell them, and that the jury was to judge of the intention, and that this was taken from them by the instructions given. Justice Washington, who delivered the opinion of the Supreme Court, alluding to the instructions of the district court, said, "They meet our entire approbation."⁵⁷ In a case where the *onus probandi* is thrown on the claimant by a *prima facie* case, made out on the part of the prosecutor, and the claimant fails to explain the difficulties of the case, condemnation and forfeiture follow, from the defects of testimony on the part of the claimant.⁵⁸ Whether the evidence on the part of the prosecution is of such convincing character as to authorize an adjudication of forfeiture, under the statute, is purely a question of fact for the trial court to determine, and its decision upon that point is not reviewable in an appellate court if there be any evidence in the record upon which the trial court could base its decision.⁵⁹

Sec. 640. Forfeiture and fine, pleading and evidence.

Under a statute which provides that spirituous or intoxicating liquors which are kept or deposited and intended for sale in any store, shop, warehouse or other building or place in a city or town, by a person not authorized to sell the same, may be seized and declared forfeited to the State, to obtain such a forfeiture it is necessary to distinctly aver in the complaint, and prove on the trial, that such liquors were intended for sale in the city or town, in which they were kept or deposited, and by some person not authorized to sell the same in such city or town, but it is not necessary to aver or prove that they were intended for sale in the shop, or other building, wherein they were kept or deposited. In such case, legal proof that the liquors were kept for sale by the

⁵⁷ American Fur Co. v. United States, 2 Peter (U. S.) 358.

⁵⁹ State v. Intoxicating Liquors, 58 Vt. 594; 4 Atl. 902.

⁵⁸ The Luminary, 8 Wheat (U. S.) 407.

owner or keeper of them, is an essential prerequisite to a decree of forfeiture, where a claimant appears, and to the imposition of a fine; but the affidavit contained in the complaint, nor the recitals in the warrant, nor the officer's return, can be taken as evidence upon that point. To allow a fine to be imposed upon a person, without proof from witnesses introduced on trial, would be to permit an open violation of that constitutional provision, which declares that an accused shall have the right "to be confronted by the witnesses against him."⁶⁰

Sec. 641. Judgment—Review—Costs.

A decree of court that all vessels, furniture, fixtures and movable property on the premises used for the unlawful business shall be destroyed is sufficiently definite to secure their destruction and to protect the officer destroying them;⁶¹ but if the warrant for their destruction shows upon its face that no notice of the proceedings would have been given the owner, then it is no protection to him in destroying the articles as ordered therein.⁶² The person who filed the information against the liquors has the right to file a motion to vacate the judgment of forfeiture.⁶³ On a conviction of a sale with-

⁶⁰ State v. Gurney, 33 Me. 527; State v. Robinson, 33 Me. 564; State v. Certain Liquors (R. I.), 45 Atl. 552.

⁶¹ Craig v. Werthmueller, 78 Iowa 598; 43 N. W. 606. See State v. Certain Liquors (R. I.), 45 Atl. 552.

But a statute providing for the seizure of liquors unlawfully kept for sale and the vessels containing it is unconstitutional as to the vessels where the possessor of the liquor does not own them. Clement v. Rafbech, 62 N. Y. Misc. Rep. 27; 115 N. Y. Supp. 162.

⁶² Thurston v. Adams, 41 Me. 419.

⁶³ Fries v. Porch, 49 Iowa 351.

Effect of judgment ordering goods delivered to claimant upon the question of intent. Commonwealth v. Reed, 162 Mass. 215; 38 N. E. 364.

Review of judgment of forfeiture, and what may be reviewed. State v. Maxwell, 36 Conn. 157; State v. Burrow, 37 Conn. 425; State v. Thompson, 44 Iowa 399; State v. Miller, 48 Me. 576; State v. Robinson, 49 Me. 285; Commonwealth v. Intoxicating Liquors, 4 Allen 593; Leslie v. Commonwealth, 107 Mass. 215; Commonwealth v. Intoxicating Liquors, 110 Mass. 188; Lynch v. Crosby, 134 Mass. 313; *In re*

out a license, it is not necessary that the judgment of conviction should contain an adjudication of a forfeiture of liquors found in the defendant's possession.⁶⁴ If the proceedings be dismissed, or there be no judgment of forfeiture entered, the articles seized must be returned.⁶⁵ No judgment of forfeiture can be rendered unless it be shown that some part of the liquors seized were owned or kept deposited by the person charged therewith in the complaint.⁶⁶ Where the allegation in the complaint that a carrier of the liquor had reasonable belief that the person to whom it was carrying them intended to illegally sell them, there must be a finding that the carrier had cause for such belief to support a judgment of forfeiture.⁶⁷ Where the charge was that the liquors seized were worth \$2,600, part of which was in barrels and half barrels and the remainder in 141 half pint bottles and in between 700 and 800 bottles of various sizes, and containing more than half a pint; and the verdict was that the accused was guilty as charged "except as to the bulk liquors;" and the court ordered the liquor in the half pint bottles and soda fountain bottles destroyed and the remainder in pint and quart bottles and barrels returned to the owner, it was held that there was no error of which the accused could complain; the judgment, if otherwise different, should have been for the destruction of all the liquors, at least those in barrels.⁶⁸

Liquors of McSoley, 15 R. I. 608; 10 Atl. 659; State v. Intoxicating Liquors, 58 Vt. 594; 4 Atl. 229.

Costs and fees. Byram v. Polk County, 76 Iowa 75; 40 N. W. 102; Garrett v. Polk County, 78 Iowa 108; 42 N. W. 618; Nichols v. Polk County, 78 Iowa 137; 42 N. W. 627; Commonwealth v. Intoxicating Liquors, 14 Gray 375; Fay v. Barber, 72 Vt. 55; 47 Atl. 180; Clement v. Harden, 62 N. Y. Misc. Rep. 31; 114 N. Y. Supp. 751.

⁶⁴ *Ex parte* Eisenmonger, 21 L. R., Pt. iv; 17 W. N. (N. S. W.) 160. *Contra*, Patton v. McDonald, 30 N. B. 523.

⁶⁵ Tennant v. Belyea, 24 N. B. 238.

⁶⁶ Commonwealth v. Reed, 162 Mass. 215; 38 N. E. 364.

⁶⁷ Commonwealth v. Certain Intoxicating Liquors, 107 Mass. 386; 107 Mass. 392, *note*.

See also State v. Stanton's Liquors, 38 Conn. 233.

⁶⁸ Riggs v. State (Neb.), 121 N. W. 588.

Sec. 642. Disposition of property.

The liquors can only be destroyed in an action against their owner or keeper, under the North Dakota Code,⁶⁹ and not in an action against the liquors *in rem*.⁷⁰ Their destruction must be ordered by the court.⁷¹ They cannot be destroyed on a mere conviction of an illegal sale having been made.⁷²

Sec. 643. Seizure and arrest without warrant, when justifiable.

In some of the States the statutes provide that an officer may seize intoxicating liquors and arrest any person found in the act of illegally transporting them in the State, when under like circumstances he would be justified in searching for and seizing them, or arresting such offender, if armed with a warrant. Under such a statute, an officer, in justifications of his acts must be able to show either that such liquors were actually held for some illegal purpose, or that he was, at the time of the seizure of the property or the making of the arrest, able to obtain proof that the person arrested or his servant was keeping or transporting the liquors in violation of the provisions of the statute. In other words, an officer who seizes intoxicating liquors or arrests an illegal vendor of them, without a warrant must be able to show that he had done all that is required of him in order to complete and fulfill the duty imposed on him, by virtue of which he was authorized to act; otherwise, he will become a trespasser *ab initio*.⁷³ One of such requirements is that he must proceed within a reasonable time to procure a warrant, to retroactively justify the

⁶⁹ 1899, § 7605.

⁷⁰ *State v. McMaster*, 13 N. D. 58; 99 N. W. 58.

⁷¹ *Queen v. Hurlburt*, 27 Nov. Sco. 62; 26 Nov. Sco. 123; *Hurlburt v. Sleeth*, 27 Nov. Sco. 375; 25 S. C. C. (Nov. Sco.) 620; *McManus v. State*, 65 Kan. 720; 70 Pac. 700.

⁷² *Patton v. McDonald*, 30 N. B. 523.

Contra, Ex parte Eisenmonger, 21 L. R., Pt. iv; 17 W. N. (N. S. W.) 160.

⁷³ *Jones v. Rost*, 72 Mass. (6 Gray) 435; *Mason v. Lathrop*, 73 Mass. (7 Gray) 354; *Kent v. Willey*, 77 Mass. (11 Gray) 368; *Kennedy v. Foror*, 80 Mass. (14 Gray) 200.

seizure of such liquor, or the arrest of the illegal vendor of them.⁷⁴ And it has been held that a warrant to be within a reasonable time, must be taken out within twenty-four hours after such a seizure or arrest has been made, if no sufficient reason is given for a further delay.⁷⁵ But in an action of tort against an officer for assault and false imprisonment it is not necessary to justify the arrest of a person without a warrant, for illegally transporting intoxicating liquors for the officer to prove that a warrant was afterwards procured against the liquors seized and at the same time. In such case it is sufficient that the officer seasonably procured a warrant against the person, without proving that he also proceeded against the liquors. Whether the officer proceeded against the liquors is immaterial. Nor is it admissible in such case to prove that the officer acted maliciously. If the act was lawful, the motive with which it was done is likewise immaterial. An officer, however, cannot justify such an arrest without showing that he had reasonable proof at the time of the arrest that such person was illegally transporting the liquors; that the officer acted in good faith and had reasonable cause to suspect that the plaintiff was illegally transporting the liquors will not suffice.⁷⁶ Nor will the fact that the plaintiff has been convicted before a justice of the peace for illegally transporting liquors be sufficient evidence of probable cause if an appeal has been taken from the judgment.⁷⁷

⁷⁴ *Kent v. Willey*, 77 Mass. (11 Gray) 368.

⁷⁵ *Weston v. Carr*, 71 Me. 356.

⁷⁶ *Kennedy v. Favor*, 80 Mass. (14 Gray) 200.

⁷⁷ *Mason v. Lothrop*, 73 Mass. (7 Gray) 354.

Where a statute authorizes a seizure of liquors without a warrant, the complaint for a warrant may be made after the seizure. *State v. Intoxicating Liquors*, 58 Vt. 394; 4 Atl. 229; and in Rhode Island it must be sworn to by the officer making the seizure.

Farmer v. State, 3 R. I. 107. The allegations in the complaint must be that the liquors were unlawfully kept and were then and there intended for unlawful sale. *State v. Dunphy*, 79 Me. 104; 8 Atl. 344.

It is immaterial whether the complaint is made before or after the seizure. *State v. Intoxicating Liquors*, 58 Vt. 594; 4 Atl. 229. Allegations in complaint need not be that the liquors "are kept by the defendant," but may be changed to suit the facts. *State*

Sec. 644. Arrest without warrant, when not justified.

When the general terms of a statute specifies with precision the particular instance in which seizures of intoxicating liquors may be made without a warrant, and by a section further provides that no action shall be had or maintained against any officer for executing any warrant or order issued under the statute by a court of competent jurisdiction, "nor shall any action be had or maintained against any officer for seizing, detaining or destroying any intoxicating liquor or the vessels containing it, unless such liquor and vessels are legally kept by the owner thereof," an officer cannot justify entering a building and seizing intoxicating liquors and vessels containing the same, which were illegally kept by the owner thereof, unless the officer had, and acted under, a warrant. Each part and clause of such section refers equally to the various provisions which precede it, and which show the reason and occasion for the indemnity intended to be afforded, the extent to which it is to reach, and the limitation to which it is restricted. The limitation is the same in both cases; namely, protection against the consequences of all those acts, and of those only, which, whether done under or without a warrant, are done under the authority, permission or requirement of the statutes. In such case, the enumeration of the particular instances, according to the well-settled rule of construction, necessarily excludes all others. When it is remembered, that immunity from all unreasonable searches and seizures both of the person and property of the citizen is a constitutional right, though liable in their misuse to cause the most mischievous effects, are

v. LeClair, 86 Me. 522; 30 Atl. 7; *State v. McCann*, 59 Me. 383; *State v. Dunphy*, 79 Me. 104; 8 Atl. 344.

If the liquors be destroyed in the scuffle to seize them, then the officer cannot file a complaint, alleging that they are unlawfully kept by the accused. *State v. Howley*, 65 Me. 100.

If the liquors have been seized,

then warrant thereafter issuing to the officer thus having seized them need not contain a command to seize them. *State v. LeClair*, 86 Me. 522; 30 Atl. 7.

The fact that part of the liquor seized was not intoxicating does not avoid the proceedings as to the remaining part. *Commonwealth v. Intoxicating Liquors*, 113 Mass. 13.

still to be regarded as property, the indemnity provided for by such section, cannot, without giving undue and unwarrantable force to the general terms in which it is expressed, be construed as extending to other cases, in respect to which no authority has been conferred or permission given.⁷⁸ Nor can an officer justify the arrest of a person without a warrant on the ground that he was illegally transporting intoxicating liquors, without showing that he had reasonable proof, at the time of the arrest, that such person was illegally transporting the liquors. Mere probable cause, on the part of the officer, to believe that the plaintiff was transporting the liquors in question with an intent that the same should be sold contrary to law, especially the technical probable cause arising from a conviction before a court of inferior jurisdiction, is not sufficient ground to justify an officer in arresting the plaintiff, and seizing his liquors, without a warrant. The authority to seize liquor, and arrest persons for illegally transporting them without a warrant, though sometimes necessary, is a high power; and, being in derogation of common law right, is to be exercised only where it is clearly authorized by a statute or rule of law which warrants it.⁷⁹

⁷⁸ Reed v. Adams, 84 Mass. (2 Allen) 413.

77 Mass. (11 Gray) 368; Kennedy v. Favor, 80 Mass. (14 Gray) 200.

⁷⁹ Mason v. Lathrop, 73 Mass. (7 Gray) 354; Kent v. Willey,

CHAPTER XIX.

KEEPING LIQUOR FOR UNLAWFUL SALE—KEEPING PLACE FOR SALE OF LIQUOR.

SECTION.

- 646. Keeping liquor for unlawful sale.
- 647. Unlawfully keeping liquor for sale, continued.
- 648. Unlawfully keeping liquor for sale, continued.
- 649. Unlawfully keeping liquor for sale, continued.
- 650. Wife of defendant keeping liquors for sale.
- 651. Unlawful sale and unlawful keeping distinct offenses.
- 652. Keeping liquors at place of business.
- 653. Keeping place for sale of liquors.

SECTION.

- 654. Keeping place for sale of liquors, continued.
- 655. Keeping liquor nuisance.
- 656. Saloon at common law as a nuisance.
- 657. Nuisance under general statute on nuisance.
- 658. Keeping "blind tiger."
- 659. Keeping disorderly house.
- 660. Carrying on the liquor business.
- 661. A common seller of liquors.
- 662. Exposing liquor for sale.
- 663. Keeping tippling house—
Definition.

Sec. 646. Keeping liquors for unlawful sale.

At common law the possession of an instrument of crime accompanied by an intent to use it was not a crime without some overt act.¹ But there are many ancient and modern statutes, English and American, which make the bare possession of such an instrument a crime when accompanied with a criminal intent. In the case of *The King v. Sutton*, as reported in *Cases Temp. Hardwicke*, 370, it was admitted in the argument for the prisoner that the bare possession with the intent could be made a crime by positive enactment. And so it has always been considered, else these statutes would not have been so long and so often enforced and no question made

¹ *I Bishop Crim. Law*, § 204; *Dougdale v. The Queen*, 1 El. and Rex v. Heath, Russ and R. 184; B. 435.

about it. Accordingly, it has been held that a statute which makes it an offense to own, keep or possess with intent to sell, furnish or give away intoxicating liquors in violation of law is valid notwithstanding it did not provide that an overt act should accompany the intent.² Under such a statute the guilty intent need not include a knowledge by an offender of the intoxicating quality of his liquor;³ he is bound to know its kind and quality.⁴ Nor is it necessary to conviction in such case to show that the person in possession of such liquors intends to make the unlawful sale himself.⁵ The possession of such liquors with such intent is unlawful though the liquors are not exposed to persons visiting the premises,⁶ and are deposited where their presence cannot be known to the public.⁷ Where there is a keeping with the intent that an unlawful sale shall be made in the State by any person, or with the intent to aid or assist in such unlawful sale, the law is violated;⁸ and in Maine this has been held to be true, even though the defendant was authorized to sell such liquors for certain purposes, or in certain places or districts, as where he was appointed agent for such sale in a given city or town.⁹ It was also held that the fact that an officer proceeded illegally in making search for and seizure of liquors kept for unlawful sale was no defense to a prosecution for keeping them;¹⁰ nor is the fact that one who violates such a statute would be liable to a prosecution under a statute for the unlawful selling of such liquor when the sale is consummated a defense to such a prosecution,¹¹ nor an ordinance for keeping such liquors for sale.¹² For this reason the same testimony by which a convic-

² State v. Wheeler, 62 Vt. 439; 20 Atl. 601.

³ Commonwealth v. Goodman, 97 Mass. 117.

⁴ Commonwealth v. Slavery, 145 Mass. 212; 13 N. E. 611.

⁵ State v. Kaler, 56 Me. 88.

⁶ Commonwealth v. McCue, 121 Mass. 352; Commonwealth v. Sprague, 128 Mass. 75; Commonwealth v. Atkins, 136 Mass. 160; Commonwealth v. Peto, 136 Mass. 155; Commonwealth v. Hender-

son, 140 Mass. 303; 5 N. E. 832; Commonwealth v. Welch, 140 Mass. 372; 5 N. E. 166; Commonwealth v. Tay, 146 Mass. 146; 15 N. E. 503.

⁷ Commonwealth v. Fraher, 126 Mass. 56.

⁸ State v. Kaler, 56 Me. 88.

⁹ State v. Connelly, 63 Me. 212.

¹⁰ State v. McCann, 61 Me. 116.

¹¹ State v. Head, 3 R. I. 135.

¹² Griffin v. City of Atlanta, 78 Ga. 679; 4 S. E. 154.

tion of a sale is obtained against a defendant, the State may introduce upon the trial of the same individual, charged with keeping for sale.¹³ But in Rhode Island it has been held that to sustain such a prosecution the State must not only show that the defendant kept such liquors with the intent to sell them but also to deliver as well as sell them within the State.¹⁴

Sec. 647. Unlawfully keeping liquors for sale, continued.

In some States—perhaps many—statutes forbid the keeping of intoxicating liquor with the intent to sell it. All offenses of this kind are, of course, purely statutory,¹⁵ and no offense can be committed unless the act comes within the terms and meaning of the statute. Under these statutes it is usually held that the owner or keeper of the liquors is bound to know that they are intoxicating, and he cannot set up his ignorance of their intoxicating qualities as a shield against the penalty of the statute.¹⁶ Even though a defendant may have had the right to keep liquors for certain purposes, yet if he systematically sells them for other purposes, or if it be clearly shown that he kept them intending to sell them for other purposes, he violates the statute, and the fact that he had the right to keep them for specified legal purposes cannot avail him in his defense.¹⁷ It is the possession and not the sale that makes the offense, and so long as the owner of them keeps them with the intent to sell them for an unlawful purpose or to sell them illegally he is engaged in an unlawful

¹³ *State v. Head*, 3 R. I. 135.

¹⁴ *State v. Murphy*, 15 R. I. 543; 10 Atl. 585

One statute may provide that it shall be illegal to keep liquor for unlawful sale, and another that the same liquor may be seized and destroyed *Riggs v. State* (Neb.), 121 N. W. 588.

At common law there is no such a criminal offense as keeping a place for illegal sale of liquors.

Commonwealth v. McDonough, 13 Allen 581.

¹⁵ *Bishop Stat. Crimes*, § 1054; *State v. McIntyre*, 139 N. C. 599; 52 S. E. 63; *Paulk v. Sycamore*, 105 Ga. 501; 31 S. E. 200; *Little v. State*, 123 Ga. 503; 51 S. E. 501.

¹⁶ *Commonwealth v. Goodman*, 97 Mass. 117.

¹⁷ *State v. Connelly*, 63 Me. 212; *Commonwealth v. Boutwell*, 162 Mass. 230; 38 N. E. 441.

act.¹⁸ To the commission of the offense it is not necessary that the owner should have the intent to sell them in or from the building where they are kept,¹⁹ and even though it is the intent to export the liquors from the State a statute prohibiting their keeping, although the words "within the State" be not used in the statute, is violated.²⁰ If the statute make it unlawful to keep liquors with intent that they be sold by any person, or to aid or assist any person in their sale, then a sale by the owner is not necessary to constitute an offense, for if sold by another, or the owner aids or assists another to make a sale of them or any part of them, he violates the statute.²¹ A sale at a time not authorized by law to be made will justify a conviction of keeping liquors for the purposes of an illegal sale.²² Where liquor was shipped in sugar barrels to a druggist marked as sugar, having on the barrels the druggist's initials, which were planed off as soon as received, and he was found in a room drawing whisky from a cask into colored jars, and there was also another cask, and he had no prescriptions for the sale of liquors, and men were seen to go in and come out of his store on a particular day, one of the men's hip pocket protruded as he came out, it was held that the evidence justified a finding that he kept the liquor for illegal sales.²³ If the illegal sale was out of hours and made by the servant of the defendant, it is a question for the jury whether the defendant authorized the sale, although he testified that he had given positive orders not to sell at such times, if there be other evidence tending to contradict him.²⁴ If a

¹⁸ Griffin v. Atlanta, 78 Ga. 679; 4 S. E. 154; Manker v. Atlanta, 78 Ga. 668; 2 S. E. 559.

¹⁹ State v. Viers, 82 Iowa 397; 48 N. W. 732.

²⁰ State v. Guinness, 16 R. I. 401; 16 Atl. 910.

²¹ State v. Kaler, 56 Me. 88.

²² Rooney v. Augusta, 117 Ga. 709; 45 S. E. 72; Smith v. State, 105 Ga. 724; 32 S. E. 127; People v. Renner, 135 Mich. 629; 98 N. W. 397; 100 N. W. 403; 10 Detroit L. N. 907 (by statute).

Occasionally statutes provide that proof of possession shall raise the presumption that the liquors were kept for an illegal sale. Durfee v. State, 53 Neb. 214; 73 N. W. 676.

²³ Commonwealth v. Foster, 182 Mass. 276; 65 N. E. 391; State v. Thoemke, 11 N. D. 386; 92 N. W. 480.

²⁴ Commonwealth v. Coughlin, 182 Mass. 558; 66 N. E. 207; Commonwealth v. Foster, 182 Mass. 276; 65 N. E. 391.

boarding house keeper keeps liquor to disburse among his boarders under an agreement that those of them who pay the regular price should have it to drink at their meals if they called for it, it is liquor "kept for sale."²⁵ Proof of one illegal sale is sufficient to show the liquor was kept for illegal sales.²⁶ Where a statute makes proof of possession presumptive evidence of a keeping for an illegal purpose the defendant has the burden to show it was not kept for an illegal purpose.²⁷ Where no such a statute is in force and the court charged the jury the prosecution must show that the liquor was kept for the purpose of unlawful sale, the court need not also charge them that the prosecution must show that the defendant did not keep the liquor for a lawful purpose.²⁸ The fact that the liquor is owned by a third person is no defense if the defendant kept it for an unlawful sale.²⁹ If partners

²⁵ *State v. Wenzel*, 72 N. H. 396; 56 Atl. 918.

²⁶ *Reese v. Newman*, 120 Ga. 198; 47 S. E. 560; *Erwin v. Cartersville*, 120 Ga. 150; 47 S. E. 512; *Pedigo v. Commonwealth (Ky.)*, 68 S. W. 1113; 70 S. W. 659; 24 Ky. L. Rep. 535; *State v. White*, 70 Vt. 225; 39 Atl. 1085; *Ex parte Grieves*, 29 N. B. 543; *People v. Robinson*, 135 Mich. 511; 98 N. W. 12; 10 Det. L. N. 857.

²⁷ *Peterson v. State*, 63 Neb. 251; 88 N. W. 549; *Commonwealth v. Regan*, 182 Mass. 22; 64 N. E. 407; *State v. Sheppard*, 64 Kan. 451; 67 Pac. 870; *State v. Nickels*, 65 S. C. 169; 43 S. E. 521; *Peterson v. State*, 64 Neb. 875; 90 N. W. 964; *State v. Spiers*, 103 Iowa 711; 73 N. W. 343; *Steinkuhler v. State*, 77 Neb. 331; 109 N. W. 395; *State v. Barrett*, 138 N. C. 630; 50 S. E. 506; *King v. Nugent*, 9 Can. Cr. Cas. 1; *O'Neill v. State*, 76 Neb. 135; 107

N. W. 119; *McCracken v. Miller*, (Iowa), 106 N. W. 4; *Bohstedt v. Tempel* (Iowa), 106 N. W. 513; *State v. Blackman*, 134 N. C. 683; 47 S. E. 16; *State v. Hale*, 91 Iowa 367; 59 N. W. 281.

A statute authorizing druggists to keep all medicines authorized by the United States Dispensary as of recognized medicinal utility authorizes the keeping of intoxicating liquors. *Pollard v. Allen*, 96 Me. 455; 52 Atl. 924.

²⁸ *State v. Wade*, 63 Vt. 80; 22 Atl. 12; *State v. O'Grady*, 65 Vt. 66; 25 Atl. 905 (defendant failing to testify); *Commonwealth v. Maloney*, 113 Mass. 211 (defendant failing to testify).

²⁹ *State v. Stevens*, 119 Iowa 675; 94 N. W. 241; *State v. Gruner*, 25 R. I. 129; 54 Atl. 1058; *State v. McGuire*, 64 N. H. 529; 15 Atl. 213; *Ex parte Grigg*, 4 Viet. L. R. 146; *State v. Sutor*, 78 Vt. 391; 63 Atl. 182.

keep liquor for illegal sale they must be proceeded against as individuals.³⁰ An ordinance prohibiting the keeping of liquors for sale is valid although a statute even makes it unlawful to keep them at public places or at places of business.³¹ Such an ordinance is not void on the ground that it punishes a mere intention disconnected with any overt act.³² Where the defendant owned the majority of stock in a pharmacy company, and his wife and his sister the remainder, he being the president and general manager and being the sole person in charge and in possession of the liquor owned by the company, it was held that he could be convicted for keeping the liquor for illegal sale.³³

Sec. 648. Unlawfully keeping liquors for sale, continued.

Where liquors were found, by means of a search warrant, concealed in an unusual manner, it was considered there was sufficient evidence to sustain a conviction.³⁴ An unusual amount of liquor kept at a dwelling house raises the presumption that it was kept for an unlawful sale, where a statute raises the presumption that such should be the fact by mere proof of possession.³⁵ Proof of an actual sale is not necessary in order to show a keeping with intent to sell.³⁶ A statute forbidding the "manufacture, sale, barter or exchange, receipt or acceptance for unlawful use, delivery, storing or keeping in possession" intoxicating liquors, except as provided in its own provisions, only makes unlawful the "receipt or acceptance" of such liquors and not the keeping

³⁰ *Ex parte* Howard, 25 N. B. 191; see also Overall v. Berzeau, 37 Mich. 506.

³¹ Callaway v. Mims, 5 Ga. App. 9; 62 S. E. 654. The offense under the ordinance was said to be materially different from the one under the statute.

³² Callaway v. Mims, *supra*.

³³ Riggs v. State (Neb.), 121 N. W. 588.

³⁴ King v. McNutt, 11 Can. Cr. Cas. 26; 38 N. S. 339; State v. Sutor, 78 Vt. 391; 63 Atl. 182.

³⁵ Bohstedt v. Tempel (Iowa), 106 N. W. 513.

³⁶ State v. Sutor, 78 Vt. 391; 63 Atl. 182; People v. Remus, 135 Mich. 629; 98 N. W. 397; 100 N. W. 403; 10 Detroit L. N. 907; State v. McGlynn, 34 N. A. 422; Commonwealth v. Maskin, 165 Mass. 142; 42 N. E. 562.

of them.³⁷ Evidence showing beer in bottles in the room, bottles of beer and ice in a refrigerator, whisky in the room, bottles of beer in the hands of persons who had come into the room, show a sale of beer and a keeping of it for sale.³⁸ The question whether the liquor kept was a medicine or an intoxicating liquor is one of evidence for the jury.³⁹ Where several persons clubbing together appoint another to purchase liquor in bulk for them, each member reimbursing him monthly for the cost of the liquor he consumes, and the person so purchasing for the club acquires the right of property in the stock of liquors and keeps possession of them, he may be convicted of "keeping liquors for sale," notwithstanding he made no profit on the transactions.⁴⁰ And where a defendant testified he purchased liquors for others and kept them at his place of business, it was considered that he showed such a clear intent to evade the law that his conviction was proper.⁴¹ If a sale on Sunday be made by the defendant's servant, upon a charge of keeping liquor for an unlawful sale, the burden, irrespective of a statute, rests upon the defendant to show that the sale was unauthorized and in violation of his orders.⁴² So long as a person has possession

³⁷ *State v. Chastain*, 49 S. C. 171; 27 S. E. 2.

³⁸ *Commonwealth v. Ttate*, 173 Mass. 121; 59 N. E. 646 (a druggist); *Commonwealth v. Regan*, 182 Mass. 22; 64 N. E. 407; *Commonwealth v. Lufkin*, 167 Mass. 553; 46 N. E. 109; *State v. Wright*, 68 N. H. 351; 44 Atl. 519; *State v. Harrington*, 69 N. H. 670; 45 Atl. 404; *State v. York*, 74 N. H. 125; 65 Atl. 685; *State v. La Rose*, 71 N. H. 435; 52 Atl. 943 (a druggist); *Peterson v. State*, 64 Neb. 875; 90 S. W. 964.

³⁹ *State v. Costa*, 78 Vt. 198; 62 Atl. 38; *State v. Krinski*, 78 Vt. 162; 62 Atl. 37.

⁴⁰ *King v. Cavischi*, 8 Can. Cr.

Cas. 78; *Mohrman v. State*, 105 Ga. 709; 32 S. E. 143.

⁴¹ *Hartgraves* (Tex. Cr. App.), 43 S. W. 331.

⁴² *Commonwealth v. Coughlin*, 182 Mass. 558; 66 N. E. 207.

Where a statute prohibits the "handling" of liquors, an indictment charging a "hauling" is fatally defective. *State v. Adams*, 49 S. C. 518; 27 S. E. 523. See also *State v. Neild*, 4 Kan. App. 626; 45 Pac. 623.

A statute forbidding the "storing" or "keeping" of liquor involves the idea of habit or continuity, but it is not essential that they be kept in possession for an unlawful purpose, unless the statute specifies they must be so

of liquors intending to sell them unlawfully he violates the statute.⁴³ If the defendant sold the liquors as a pharmacist, but he was not licensed to sell liquors as a pharmacist, though his clerk who made the sale was, yet the offense of keeping the liquor for unlawful sale is committed the same as if such clerk was not licensed, for the clerk made the sale as the agent and on behalf of the defendant.⁴⁴ Unless the statute makes it a necessary part of the crime that the sale must take place from a building where the liquor is kept, it is not necessary that it be kept in a building nor sold from one, any keeping and illegal sale being sufficient to constitute a violation of the statute.⁴⁵ Nor is it necessary that the accused should have intended to make the sale in person, it being sufficient that they be kept with the intent that they be unlawfully sold or with intent to assist in an unlawful sale of them, where the statute forbids a keeping with intent that they shall be so sold by any person or to aid or assist any person to make a sale of them.⁴⁶ If liquor be forcibly and unlawfully seized and taken away from the owner by an officer without justification or authority, such owner cannot be convicted of keeping them unlawfully for sale while they are in the possession of such officer.⁴⁷ Peddling liquor from place to place in a wagon is a violation of the statute.⁴⁸ On a charge of keeping for illegal sale it is not error to refuse to charge the jury that

kept, to incur a penalty for storing or keeping them in violation of the prohibition. *Easley v. Pegg*, 63 S. C. 98; 41 S. E. 18.

Under a statute making the "keeper" of intoxicating liquors liable to a penalty, a person in possession of liquor violates the statute. *Ford v. State*, 79 Neb. 309; 112 N. W. 606.

⁴³ *Menken v. Atlanta*, 78 Ga. 668; 2 S. E. 559; *Griffin v. State*, 78 Ga. 679; 4 S. E. 154.

⁴⁴ *State v. Norton*, 67 Iowa 641; 25 N. W. 842.

⁴⁵ *State v. Viers*, 82 Iowa 297; 48 N. W. 732; *Commonwealth v. McConnell*, 11 Gray, 204.

⁴⁶ *State v. Koler*, 56 Me. 88; *State v. Connelly*, 63 Me. 212. A sale under such a statute by any one having authority to sell the liquor, and who is keeping them is an offense.

⁴⁷ *State v. Riley*, 86 Me. 144; 29 Atl. 920.

⁴⁸ *Commonwealth v. McConnell*, 11 Gray 204. And this is also true, although the offense of illegal transportation was also committed.

“there must be the overt act of offering for sale, while intent may exist in a man’s mind, and no act be done in pursuance of such intent.”⁴⁹ Of course, exposure of the liquors to those visiting the building is not essential to a violation of the statute, for a secret keeping with intent to sell is as much an offense against it as a public keeping. Indeed, in most of these instances of a violation of the statutes there is a secret keeping.⁵⁰ And keeping liquor in one’s pocket with intent to sell it is a violation of a statute making it an offense to keep it for unlawful sale.⁵¹ If a statute provides that proof of possession of liquor shall be evidence of a keeping with intent to unlawfully sell it there can be no conviction⁵² unless the facts surrounding show that it was kept for that purpose.⁵³ Under a statute forbidding the mere carrying of liquor to a church where divine worship is being held, taking it there in a buggy and keeping it one or two hundred yards distant from the church is a violation of the statute, even though the accused was taking it home as medicine for his family.⁵⁴

Sec. 649. Unlawfully keeping liquors for sale, continued.

Where a statute makes the finding of liquor in possession of the defendant, under certain circumstances, presumptive evidence of keeping it with intent to unlawfully sell it, it is

⁴⁹ Commonwealth v. McCue, 121 Mass. 358.

⁵⁰ Commonwealth v. Faher, 126 Mass. 56; Commonwealth v. Henderson, 140 Mass. 303; 5 N. E. 832.

⁵¹ Commonwealth v. Ryan, 160 Mass. 172; 35 N. E. 673; State v. Grames, 68 Me. 618.

A statute providing that a fine shall be imposed if, “in the opinion of the” court, the liquor was kept for sale means that the “opinion” must be a properly formed “judicial opinion,” one based on the evidence. *Lincoln v. Smith*, 27 Vt. 328.

Statutes usually permit druggist and pharmacist to keep liquors for medicinal purposes. *Commonwealth v. Ramsdell*, 130 Mass. 68; but they can only keep them for the purposes allowed by the statute. *State v. Cloyd*, 34 Neb. 600; 52 N. W. 579; *State v. Shank*, 74 Iowa 649; 38 N. W. 523.

⁵² *Commonwealth v. Caney*, 158 Mass. 210; 33 N. E. 340.

⁵³ *Commonwealth v. Keenan*, 148 Mass. 470; 20 N. E. 101.

⁵⁴ *Brice v. State* (Ga.), 34 S. E. 202.

error in the court to tell the jury that such evidence is conclusive proof of guilt, because it takes away from the jury a consideration of the intent with which it was kept.⁵⁵ If there be a reasonable doubt as to whether the liquor kept was such as the statute prohibits the keeping, then the accused must be acquitted.⁵⁶ Where a statute makes the proof of the keeping presumptive evidence of a keeping with intent to sell⁵⁷ the finding of liquor in a place, not a residence, raises the presumption that the person in possession of the place was keeping it with the intent to sell it.⁵⁸ Keeping it on a single occasion has been held sufficient to constitute a violation of the statute.⁵⁹ Evidence that the officer searching for liquors found them in defendant's kitchen closet in the rear of his grocery, covered with boards and dirt, with glasses for retailing them, is sufficient to warrant a conviction on a charge of keeping them for sale.⁶⁰ Under a charge of unlawfully exposing and keeping for sale, it is sufficient to sustain a conviction if the evidence shows an unlawful keeping with intent to sell.⁶¹ There may be a conviction for unlawfully keeping with intent to sell though no liquor be found on the premises, if the evidence is sufficient from which to draw the conclusion

⁵⁵ State v. Cunningham, 25 Conn. 195.

⁵⁶ Hollingsworth, 79 Ga. 503; 5 S. E. 37; State v. Dobbins, 149 N. C. 465; 62 S. E. 645.

See Langel v. Bushnell, 197 Ill. 20; 63 N. E. 1086, affirming 91 Ill. App. 618.

⁵⁷ State v. Munzenmeier, 24 Iowa 87.

⁵⁸ State v. Arie, 95 Iowa 375; 34 N. W. 268.

⁵⁹ Commonwealth v. Cleary, 105 Mass. 384; Commonwealth v. Hoar, 121 Mass. 375; Commonwealth v. Hayes, 114 Mass. 382; Coggins v. Griffin, 5 Ga. App. 1; 62 S. E. 659.

What is sufficient evidence to carry the case to the jury, see

Commonwealth v. Shaw, 116 Mass. 8; Commonwealth v. Shea, 160 Mass. 6; 35 N. E. 83, and what is not, Commonwealth v. Certain Intoxicating Liquors, 116 Mass. 21.

⁶⁰ Commonwealth v. Gallagher, 124 Mass. 29; Commonwealth v. Levy, 126 Mass. 240; Commonwealth v. McKenna, 158 Mass. 207; 33 N. E. 389; Commonwealth v. Canny, 158 Mass. 210; 33 N. E. 340.

⁶¹ Commonwealth v. Atkins, 136 Mass. 160; Commonwealth v. Tay, 146 Mass. 146; 15 N. E. 503; Commonwealth v. Welch, 140 Mass. 372; 5 N. E. 166; Commonwealth v. Henderson, 140 Mass. 303; 5 N. E. 832.

that sales had been made on the premises, coupled with the fact that the accused had previously—a month before—laid in a stock of liquors.⁶² And a statute providing that one charged with keeping liquors for unlawful sales, when it is found in his possession, shall not be entitled to the presumption of innocence, deprives him of such a presumption as usually surrounds a defendant in a criminal prosecution.⁶³ The keeping of liquors for illegal sale may be inferred from evidence showing a single illegal sale;⁶⁴ but the presence of liquor in a drug store is not necessarily an indication of an intent to make an illegal sale of it.⁶⁵

Sec. 650. Wife of defendant keeping liquors for sale.

If a wife of the defendant owned the residence wherein she keeps liquors for sale, to her husband's knowledge, he may be convicted of keeping liquors for illegal sale.⁶⁶ But he must have knowledge of the fact and of her intent, and if he has such knowledge he must use reasonable means to prevent her carrying out such intent. He is liable for her act, under the conditions just stated, although she is doing business on her own account and has a United States license as a retail liquor dealer.⁶⁷ Where the wife of defendant made the sales in his

⁶² *Commonwealth v. Mead*, 140 Mass. 300; 3 N. E. 39; *Commonwealth v. Martin*, 162 Mass. 402; 38 N. E. 708; *Commonwealth v. Lynch*, 164 Mass. 541; 42 N. E. 95.

⁶³ *Yeoman v. State*, 81 Neb. 244; 115 N. W. 784; 81 Neb. 252; 117 N. W. 997.

⁶⁴ *Coggins v. Griffin*, 5 Ga. App. 1; 62 S. E. 659.

⁶⁵ *Kellogg v. German American Ins. Co.*, 133 Mo. App. 391; 113 S. W. 663.

As to failure of accused to produce person he claimed owned the liquor, and for whom he said he acted as agent, see *Williams v. State*, 4 Ga. App. 853; 62 S. E. 671.

⁶⁶ *State v. Rozum*, 8 N. D. 548; 80 N. W. 477; *State v. Ekanger*, 8 N. D. 559; 80 N. W. 482.

⁶⁷ *Commonwealth v. Barry*, 115 Mass. 146.

In this case the bill of exceptions showed that the liquors were kept by the wife, who did business on her own account and had taken out a United States license as a retail liquor dealer, and that the accused lived in the house with her. It did not state that the wife kept the liquors in a tenement apart from her husband's house. It was ruled that it would be assumed she kept them in his house.

house, as he said, while he was out of the State and without his knowledge or assent, it was held proper to leave to the jury the question whether she was acting as his agent, and that they might disbelieve his testimony.⁶⁸ Where the defendant was charged with keeping a tenement as a house of ill fame, for gambling and for the illegal keeping and sale of liquors, it was shown that the premises were owned by his wife, that he lived with her and was present and knew of the illegal sales and acts. He offered to show that "from time to time he had ordered, directed, persuaded and used all reasonable and practical means in his power to prevent his wife from doing any of the acts charged, and that his wife told him the property was hers and she would do as she pleased." All evidence on this point relating to any time prior to the first date named in the indictment was excluded by the court, and it was held that this was error.⁶⁹

Sec. 651. Unlawful sale and unlawful keeping, distinct offenses.

An unlawful sale of intoxicating liquors whether without a license, to a minor, or on Sunday, and an unlawful keeping of the same liquor, are distinct and separate offenses, and a conviction or acquittal of one is not a bar or defense to a prosecution for the commission of the other.⁷⁰ Of course, it is no objection to the admission of evidence upon a charge of an illegal sale that it had been admitted at a previous trial on a charge of illegally keeping liquor for sale.⁷¹ A conviction of having and controlling a building in which the defendant kept liquor with intent to sell it is no bar to a prosecution for keeping the same liquor with intent to sell it, for the first offense is the keeping of the building with liquor therein intending to sell such liquor; the other is merely keep-

⁶⁸ Commonwealth v. Hyland, 155 Mass. 7; 28 N. E. 1055.

⁶⁹ Commonwealth v. Hill, 145 Mass. 305; 14 N. E. 124.

⁷⁰ Griffin v. Atlanta, 78 Ga. 679; 4 S. E. 154; State v. Head, 3 R. I.

135; State v. Henderson, 52 S. C. 470; 30 S. E. 477; State v. Suitor, 78 Vt. 391; 63 Atl. 182; Oshe v. State, 37 Ohio St. 394.

⁷¹ State v. Head, 3 R. I. 135.

ing the liquor with intent to sell it.⁷² Each act of keeping is a separate offense.⁷³ It is one offense to keep liquors with intent to illegally sell them and quite another to maintain them as a nuisance under a statute making the keeping of them the maintenance of a common nuisance.⁷⁴

Sec. 652. Keeping liquors at place of business.

A statute of Georgia ⁷⁵ prohibits the keeping of intoxicating liquors of the owners thereof "at their place of business." The phrase "place of business" is construed by the courts to mean the place devoted by the proprietor to the carrying on of some form of trade or commerce.⁷⁶ It includes the immediate room or place in which the business is conducted, as well as any nearby room or place used by the proprietor in connection with such business, or even in such a relation thereto as to indicate that it is a convenient place which he would probably use for keeping of such liquors as might be desired by him to furnish others for the purpose of inducing trade or for unlawful sale.⁷⁷ If the premises are occupied both as a place of business and for residential purposes or other private use, then during any business hours when the place is open for business he cannot lawfully keep liquors there; but during the hours when the premises are closed and they are devoted only to private use, he may keep liquors but must remove them before reopening the premises for business.⁷⁸ Where the accused kept a restaurant from which a

⁷² State v. Harris, 64 Iowa 287; 20 N. W. 439.

⁷³ Hans v. State, 50 Neb. 150; 69 N. W. 838.

⁷⁴ State v. Wold, 96 Me. 401; 52 Atl. 909.

Although sales of liquors in the State are forbidden, yet a law forbidding the keeping of a "blind tiger" is valid, there being a substantial distinction between the keeping of such a place and the crime either of selling liquors il-

legally or of keeping it at a public place or at a place of business. Callaway v. Mims, 5 Ga. App. 9; 62 S. E. 654.

⁷⁵ Acts 1907, p. 81, § 1.

⁷⁶ Jenkins v. State, 4 Ga. App. 859; 62 S. E. 574.

⁷⁷ Jenkins v. State, *supra*; Bashinski v. State, 5 Ga. App. 3; 62 S. E. 577.

⁷⁸ Land v. State, 5 Ga. App. 98; 62 S. E. 665.

door led into a closed hall, and opening into this hall was a door leading into other rooms, with a storage room downstairs from the hall and another upstairs, and in both the downstairs and upstairs rooms were found whisky, and in the storage room several unopened cases of different kinds of liquor, it was held that the accused had kept liquors "at his place of business" within the prohibition of the statute.⁷⁹ In this same case it was ruled that if a person should make a common practice of selling liquor at a fixed place, that place would become his place of business. However, a single sale, or even occasional sales, would not of itself convert the place into the seller's "place of business."

Sec. 653. Keeping place for sale of liquors.

Statutes are in force in a number of States which forbid the keeping of a "public bar," or "a place for the unlawful sale of liquors," or "a place of public resort" "for illegal sales and drinking," or "a place for the sale of intoxicating liquors." In all such instances it is the keeping of the place or public bar for an illegal purpose (or, in the last instance, for the sale of liquors) that constitutes the offense and not an actual illegal (or even other) sale. Therefore, to commit the offense a sale is not necessary and one need not be proven; but proof of an illegal sale or sales is admissible to show for what purpose the place was kept.⁸⁰ Under these statutes a mere sale of liquor is not prohibited; it is the keeping of the place for their sale that is the offense.⁸¹ In Connecticut the statute forbade the keeping of a place without a license "in which it is reported that intoxicating liquors are sold," and it was held proper to charge the jury that the reputation of sales must be an "honest one, founded on the true and honest

⁷⁹ *Bashinski v. State*, 5 Ga. App. 3; 62 S. E. 577.

⁸⁰ *State v. Viers*, 82 Iowa 397; 48 N. W. 732; *State v. Mullenhoff*, 74 Iowa 271; 37 N. W. 329; *Commonwealth v. Powderly*, 148 Mass. 457; 19 N. E. 781.

⁸¹ *Ramsey v. State*, 11 Ark. 35; *State v. Sowers*, 111 N. C. 685; 16 S. E. 315; *State v. Fraser*, 1 N. D. 425; 48 N. W. 343; *Oshe v. State*, 37 Ohio St. 494; *State v. Schoenthaler*, 63 Kan. 148; 65 Pac. 235.

opinion of the neighborhood.”⁸² This reputation, it was held, must be based upon the fact that liquors were actually kept and not from any other source;⁸³ but it was not necessary that it be reputed they were kept for sale without a license, a mere reputation that they were kept for sale being sufficient.⁸⁴ Where a statute forbade the keeping of a place in which liquors were sold “to the annoyance or injury of any part of the citizens of this State,” it was held that the word “citizens” included “residents.”⁸⁵ It is no excuse that the defendant believed he had the right to sell the liquor, however much in good faith he acted.⁸⁶ In a case of a druggist who may keep such liquors as is necessary to carrying on his business for the present and for a reasonable time in the future, it is a question for the jury whether he kept an unreasonable amount and thereby violated the statute;⁸⁷ but if the statute permits him to sell for the “necessities of medicine,” and he sells for other purposes, he is guilty of the offense of keeping a place for illegal sales.⁸⁸ To constitute the offense of keeping a building for unlawful sales it is not necessary that the liquors be kept in the place.⁸⁹ And where liquor could be sold to slaves with the permission of their owner, the keeping a house wherein liquor was sold them with such permission, was held to be an offense.⁹⁰ Even though the keeping of the building for sales is not the main purpose of keeping it, yet the offense is as complete as if the entire building had been kept for that purpose.⁹¹ Upon a charge of keeping a “public bar,” it was held that a person licensed as a common victualer,

⁸² State v. Morgan, 40 Conn. 44.

⁸³ State v. Morgan, 40 Conn. 44.

⁸⁴ State v. Buckley, 40 Conn. 246.

⁸⁵ Skinner v. State, 120 Ind. 127; 22 N. E. 115.

⁸⁶ State v. Mullenhoff, 74 Iowa 271; 37 N. W. 329. See also State v. Frederickson, 101 Me. 37; 63 Atl. 535.

⁸⁷ State v. Shank, 74 Iowa, 649;

38 N. W. 523; State v. Shank, 79 Iowa, 47; 44 N. W. 241.

⁸⁸ State v. Saltz, 77 Iowa, 193; 39 N. W. 167; State v. Webber, 76 Iowa, 686; 39 N. W. 286.

⁸⁹ State v. Viers, 82 Iowa, 397; 48 N. W. 732.

⁹⁰ Wilson v. Commonwealth, 12 B. Mon. 2; Smith v. Commonwealth, 6 B. Mon. 21.

⁹¹ Commonwealth v. Burke, 114 Mass. 261; Commonwealth v. Fraher, 126 Mass. 56.

and to sell liquors to be drunk in the premises, might be convicted if he sold and delivered liquors to all who called for them, regardless of the fact that he furnished them no food, over a bar or counter, and regardless of the fact that there was no display of liquors and the counter was used as a lunch counter.⁹² A person charged with keeping a place for the sale of intoxicating liquor cannot escape under a fictitious or pretended lease of the premises to another where he practically controls or even where he participates in the management of the place.⁹³ If a druggist may sell liquor for certain purposes, then proof of a single sale will not justify his conviction, for the proof must be of an unlawful sale.⁹⁴ Proof of mere sales are not sufficient under a statute making it unlawful to erect any stand or place of business for the purpose of offering for sale or selling intoxicating liquors within a prescribed distance of any church. It must be proven that a stand or place of business was erected for that purpose, and without that proof any number of sales will not sustain a conviction. In fact, under such a statute the act prescribed is not a sale of liquor but the erection of the stand or place of business for their sale.⁹⁵ Under a charge of keeping a "room" for the illegal sale of liquor it may be shown that the accused kept a cellar or grocery for that purpose. This is upon the theory that the primary object of the statute is to prohibit the keeping of a resort to which the public can go for the purchase of intoxicating liquors as beverages.⁹⁶ An ordinance prohibiting the keeping of a place for the sale of liquor is violated, it has been held, by the making in such a place of a single sale.⁹⁷ Where a statute prevents the keeping of a tippling house or a resort for tippling and intemperance, something more than proof of keeping a place for the sale of

⁹² Commonwealth v. Rogers, 135 Mass. 536.

⁹³ Commonwealth v. Locke, 148 Mass. 125; 19 N. E. 24.

⁹⁴ Maynard v. Eaton, 108 Mich. 201; 65 N. W. 760.

⁹⁵ State v. Sowers, 111 N. C. 685; 16 S. E. 315; State v.

Fraser, 1 N. D. 425; 48 N. W. 343.

⁹⁶ O'Keefe v. State, 24 Ohio St. 175.

⁹⁷ Belle Center v. Welsh, 11 Ohio Dec. 41; 24 Wkly. L. Bull. 176.

intoxicating liquors seems to be required. Thus, it has been held that on the trial of a charge for keeping such a place it must be shown that many people resorted to the place and purchased or secured intoxicating liquors, and that each or many of them drank until he or they felt the effects of the liquor consumed.⁹⁸ But under a statute prohibiting the keeping of a "public resort" proof of the habit of several persons gathering daily in an alley or street adjoining the defendant's brewery for the purpose of drinking beer made in the brewery, shows a violation of its provisions.⁹⁹ Whether or not a place is one of "public resort" is not necessarily determined by the number of persons resorting to it. Thus, a "dwelling house" may be such a place if it be frequented by the public with the freedom that persons exercise in going to saloons for drinks.¹ Upon proof of one or two illegal sales the court cannot instruct the jury that the evidence is sufficient to show that the place was kept for the illegal sales of liquors, for that question is one for the jury;² but a statute may make proof of a single sale evidence of the fact that the place was so kept, in which event the court may so charge the jury.³

⁹⁸ *Irwin v. Martinsville*, 9 Ohio Dec. 31; 10 Wkly. L. Bull. 76; *Cable v. State*, 8 Blackf. 531; *Dunaway v. State*, 9 Yerg. 350; *Moore v. State*, 9 Yerg. 353; *Hinton v. Commonwealth*, 7 Dana, 216; *Commonwealth v. Graves*, 16 Ky. L. Rep. (abstract) 272; *Lovejoy v. Commonwealth*, 13 Ky. L. Rep. (abstract) 976; *Allen v. Commonwealth*, 10 Ky. L. Rep. (abstract) 272; *Bagby v. Commonwealth*, 4 Ky. L. Rep. (abstract) 537.

⁹⁹ *Bandalow v. People*, 90 Ill. 218.

¹ *State v. Spaulding*, 61 Vt. 505; 17 Atl. 844.

² *State v. Stanley*, 84 Me. 555; 24 Atl. 983; *Commonwealth v. McNeff*, 145 Mass. 406; 14 N. E. 616.

³ *State v. Illsley*, 81 Iowa, 49; 46 N. W. 977.

Under such a statute an instruction that "the finding of such liquors, except in the possession of one legally authorized to sell the same, or except in a private dwelling house which does not include, or is not used in connection with, a tavern, public eating house, restaurant, grocery, or other place of public resort, shall be presumptive evidence that such liquors were kept for illegal sale, and proof of actual sale shall be presumptive evidence of illegal sale," is correct where the proof shows that the defendant kept a bakery and eating house, and that liquors, of several barrels in amount, were found at his residence.

To instruct the jury that if the defendant was interested in the profits of the business, or was a partner therein, he is liable, is not error upon a charge of keeping a tenement for the illegal sale of liquors, the instruction meaning that the accused must be interested in the profits as a proprietor of the place.⁴

Sec. 654. Keeping place for sale of liquors, continued.

Actual ownership of the premises where the liquor is kept for sale or wherein a sale occurs when a sale in unlicensed premises is an offense, is not necessary to constitute the offense. Possession and control of them is all that is necessary, and acts of proprietorship over them are admissible to show such possession and control.⁵ But mere proof that the accused had been seen in the adjoining room where the liquor was found, unaccompanied by proof of ownership, will not support a conviction.⁶ In the case of a charge of illegally keeping liquor on the premises the introduction of a deed showing a conveyance of the premises to defendant's wife is not sufficient to show she kept the liquor, where it is shown that she and her husband lived on the premises and that he conducted thereon the business of selling liquors.⁷ Under a statute making it an offense to keep a building for the sale of liquors, it is not necessary that the entire building be devoted to the

⁴ Commonwealth v. Jennings, 107 Mass. 488; Commonwealth v. Aaron, 114 Mass. 255; Commonwealth v. McNeff, 145 Mass. 406; 14 N. E. 616.

⁵ Plunkett v. State, 69 Ind. 68; State v. Wambold, 74 Iowa, 605; 38 N. W. 429; State v. Hughes, 3 Kan. App. 95; 45 Pac. 94; Commonwealth v. Hoyer, 9 Gray, 292; Commonwealth v. Dunbar, 9 Gray, 298; Commonwealth v. Dow, 12 Gray, 133.

⁶ State v. Johnson, 93 Iowa, 768; 61 N. W. 195; State v. Hart, 84 Iowa, 215; 50 N. W. 981.

⁷ State v. Neeson (Iowa), 64 N. W. 409.

As to what is sufficient evidence of proprietorship to send the case to the jury, see State v. Hughes, 3 Kan. App. 95; 45 Pac. 84; Commonwealth v. Hoyer, 9 Gray, 292; Commonwealth v. Shaw, 116 Mass. 8; Commonwealth v. Sisson, 126 Mass. 48; Commonwealth v. Merriam, 148 Mass. 425; 19 N. E. 405; Commonwealth v. Hughes, 165 Mass. 7; 42 N. E. 121.

And what is not, see Commonwealth v. Dunbar, 9 Gray, 298.

illegal purpose.⁸ Where the charge is keeping a building for illegal sales, the question of sales by device is immaterial, and it is improper to instruct the jury as to such sales.⁹ The conviction of so keeping a building must be based upon the one designated in the indictment.¹⁰ If two persons be indicted for keeping a tenement, one may be convicted and the other acquitted.¹¹ A statute which prohibits anyone, by himself or with others, keeping a club or other place where liquors are received or kept for use, barter, or sale as a beverage, has no application to a social club some of whose members themselves keep it.¹² If a druggist makes illegal or unauthorized sales he violates the statute, but not if he makes only legal sales.¹³ A fictitious lease of the premises will not enable the owner to escape the charge of keeping them for illegal sales.¹⁴ Two sales from a room in a farm house where there were other liquors has been held sufficient to convict the accused of selling liquor unlawfully at his place of business, it not being necessary that at such a place the accused carry on any other business.¹⁵ If the statute forbids the keeping of liquor by name it is immaterial that it is not intoxicating.¹⁶ Upon a charge of keeping a place for the illegal sale of liquors, proof of sales on the Lord's Day supports the charge, although such

⁸ Commonwealth v. Fleckner, 167 Mass. 13; 44 N. E. 1053.

⁹ State v. Black (Ark.), 111 S. W. 993.

¹⁰ Levy v. State, 89 Miss. 394; 42 So. 875; State v. Bartlett, 47 Me. 388. See State v. Donovan, 41 Iowa, 587.

¹¹ Commonwealth v. Gavin, 148 Mass. 449; 19 N. E. 554.

¹² Donald v. Scott, 76 Fed. 554.

¹³ People v. Congdon, 137 Mich. 133; 100 N. W. 266; 11 Detroit L. N. 236; State v. Giroux, 75 Kan. 695; 90 Pac. 249.

As to permitting sale and the sufficiency of evidence to carry

the case to the jury, see State v. Harrington, 69 N. H. 670; 45 Atl. 404.

As to what evidence is sufficient to carry the case to the jury on the charge of keeping a house for illegal sales, see Commonwealth v. Lufkin, 167 Mass. 553; 46 N. E. 109.

¹⁴ *Ex parte* Jones, 31 N. B. 78; State v. Brown, 107 Minn. 175; 119 N. W. 657.

¹⁵ Clark v. Adams, 80 Miss. 219; 31 So. 746.

¹⁶ Langel v. Bushnell, 197 Ill. 20; 63 N. E. 1086; affirming 96 Ill. App. 618.

sales made on other days would be legal.¹⁷ A clerk or servant having the entire control and superintendence of the house, and so aiding and assisting, may be charged with maintaining a house as a liquor nuisance, however brief be his control.¹⁸ A charge of keeping a house used for the illegal sale and of illegally keeping intoxicating liquors, is supported by proof of keeping a house used for either purpose.¹⁹ Of course, it is necessary to prove that the liquor kept in the place was intoxicating liquor, and to show that fact it may be proven that the accused broke a bottle filled with a liquor in order to keep it away from an officer searching the premises for intoxicating liquors under a search warrant.²⁰ It may be shown that the place was fitted up as a saloon, even though malt liquors could be lawfully kept and sold, the jury's attention being called to that fact.²¹ Evidence that the county officers had told accused he could conduct two bars under one license is not admissible to enable him to escape the charge of keeping a place for illegal sales of liquor.²²

¹⁷ *Commonwealth v. McCurdy*, 109 Mass. 364; *Commonwealth v. Bennett*, 108 Mass. 27; *Commonwealth v. Tabor*, 138 Mass. 496 (sales to two minors).

¹⁸ *Commonwealth v. Kimball*, 105 Mass. 465; *Commonwealth v. Maroney*, 105 Mass. 467, note; *Commonwealth v. Burke*, 114 Mass. 261.

¹⁹ *Commonwealth v. Carolin*, 2 Allen, 169; *Commonwealth v. Connelly*, 108 Mass. 480; *Commonwealth v. Finnegan*, 109 Mass. 363.

²⁰ *Commonwealth v. Daily*, 133 Mass. 577.

²¹ *Commonwealth v. Cogan*, 107 Mass. 212.

²² *Huber v. Commonwealth* (Ky.), 112 S. W. 583; 33 Ky. L. Rep. 1031. Nor is it to show other persons were conducting two bars under one license.

As to what evidence shows accused was in possession and control of the premises, see *Commonwealth v. Shea*, 160 Mass. 6; 35 N. E. 83.

That information derived from a tax assessor's books, or from a lease that accused held the premises under a lease, is not sufficient to show proprietorship or control of the premises, see *Commonwealth v. Sullivan*, 156 Mass. 229; 30 N. E. 1023.

Where the accused was a married woman, and she was charged with maintaining a house for the illegal sale and illegal keeping of liquors, and the evidence tended to show her husband conducted the house, a hotel, as her agent, she not living on the premises, and that he, according to her wishes, instructed the barkeeper not to sell liquors illegally, the

Sec. 655. Keeping liquors nuisance.

Although treated of elsewhere it may be stated in this connection that the keeping or maintenance of a liquor nuisance and the keeping of a place for illegal sales are offenses scarcely distinguishable. Usually, however, statutes that declare the keeping of a place for the sale or illegal sale of liquor shall be a nuisance provide for the abatement of such a place by proceedings in equity, or the prevention of maintaining it by

following instruction was held correct:

"In considering whether the defendant acted in good faith in giving instructions as to the conducting of her business in the hotel, and intending that her instructions should be obeyed, the jury may consider the defendant's relations to and practical connection with the business of her hotel, her means and opportunities of knowing how her business was conducted there in the matter of selling intoxicating liquors, and what information her interest and duty in that matter would reasonably induce her to seek and obtain. An instruction would not be given in good faith, which the person giving it, from the nature of the matter to which that instruction applied, and the character of the persons to whom it was given, could not reasonably expect to be obeyed, and which he did not follow by any supervision of care, for the purpose of ascertaining if that instruction was obeyed." *Commonwealth v. Hayes*, 145 Mass. 289; 14 N. E. 151.

In Massachusetts, if the owner of a tenement knowingly permits his tenant to use a portion of his premises not leased by him for illegal sales or keeping of liquors,

he is liable, although he has no interest in the liquors. *Commonwealth v. Hayes*, 167 Mass. 167; 45 N. E. 82.

Where a statute made it an offense for any person to sell, keep, run, or operate a place where liquors were illegally sold, or any person who should be found in possession of such liquors for such purpose guilty of a misdemeanor, it was held that it denounced the offense of keeping, running or operating a place where liquors were illegally sold, and also the offense of being found in possession of liquors for the purpose of illegally selling them, and that the element of place did not enter into the latter offense. *Barnhardt v. State*, 171 Ind. 428; 86 N. E. 481.

Where the testimony showed that the accused had a license to sell liquor to be drunk on the premises, that two sales of liquor had been made by him, which were carried from the premises by the buyers, it was held error to instruct the jury that if he was the proprietor of the premises, and made either of the sales, they must return a verdict of guilty. *Commonwealth v. Patterson*, 138 Mass. 498.

injunction, and in addition thereto provide for criminal prosecutions. Of course, to constitute the commission of the offense it is generally necessary that there be shown a sale or sales in violation of some statute, or in some instances, in violation of an ordinance.²³ As a rule, no particular number of sales is necessary to constitute the offense of maintaining a nuisance. It is the keeping of the liquors with the intent to sell them in violation of law that causes the defendant to create the nuisance. A single sale will disclose the intent as well as the keeping, and proof of only one sale is sufficient to convict for maintenance of a nuisance.²⁴ Two or more persons may be indicted for maintaining the nuisance, and the State need not prove on such a charge that they are partners.²⁵ And if a statute makes it an offense to be a common seller of liquors a subsequent statute making the place where liquors are sold a nuisance does not necessarily repeal the former.²⁶ To be guilty of the offense it is not necessary that the accused have the absolute, or even ultimate, control of the premises.²⁷ In a line with the cases holding that a single sale is sufficient to constitute the nuisance, drunkenness, quarreling and breaches of the peace carried on but once creates a nuisance where the statute provides that such acts permitted upon the premises shall constitute them a nuisance.²⁸ To constitute the place a nuisance it is not necessary that the main purpose,

²³ State v. Wayrich, 45 Iowa 516; State v. Johnson, 61 Iowa 504; 16 N. W. 534; State v. Jordan, 72 Iowa 377; 34 N. W. 265.

The offense is purely statutory. Commonwealth v. McDonough, 13 Allen, 581.

²⁴ State v. Reylets, 74 Iowa 499; 38 N. W. 377.

²⁵ State v. Hoxsie, 15 R. I. 1; 22 Atl. 1059; 2 Am. St. 838; Commonwealth v. Burns, 167 Mass. 374; 45 N. E. 755.

²⁶ Commonwealth v. Roland, 12 Gray 132.

²⁷ State v. Chapman, 1 S. D.

414; 47 N. W. 411; Henry v. State, 77 Ark. 453; 92 S. W. 405. All participants in keeping the place are equally guilty. State v. Lord, 8 Kan. App. 257; 55 Pac. 503. A clerk in absolute control of the premises may be guilty of keeping the place for illegal sales. Commonwealth v. Kimball, 105 Mass. 465; Commonwealth v. Maroney, 105 Mass. 467, note.

²⁸ State v. Pierce, 65 Iowa 85; 21 N. W. 195. But it must be shown to be an unlawful sale. State v. Skillicorn, 104 Iowa, 97; 73 N. W. 503.

or even one of the main purposes of keeping it, was for the sale of liquors.²⁹ If a statute provides that a sale of liquor in violation of law will constitute the place where it takes place a nuisance, then the sale made must be an illegal one; and if not illegal—as where the enactment of an ordinance was necessary to make it illegal—then the place cannot be held to be a nuisance.³⁰ So a single sale without the permission of the owner will not constitute the place a nuisance, though if made with his consent it might.³¹ To convict one of keeping a place as a nuisance it must be shown that he had control or possession over it.³² To constitute the places nuisances under these statutes it is not necessary that they be disorderly houses.³³ Sales of native wine sold at a farm house, at least to the extent that those drinking it there become drunk and boisterous, constitutes the place a nuisance;³⁴ and so liquor unlawfully sold at a drug store produces the same result upon the store.³⁵ To render a house a nuisance under a statute making it a nuisance if maintained for the sale of liquors illegally, it is not necessary that the liquors be kept in it, the sale there of the liquors being sufficient to create the offense.³⁶ Although a person with the permission of their owner could lawfully furnish liquors to slaves, yet if he frequently permitted them to assemble in his house and there drink and tipple, it was a nuisance under a statute forbidding such conduct.³⁷ A statute forbidding a “using of a tenement for the

²⁹ *State v. Hoxsie*, 15 R. I. 1; 22 Atl. 1059; 2 Am. St. 838; *Commonwealth v. Burke*, 114 Mass. 261.

³⁰ *State v. Wacker*, 71 Wis. 672; 38 N. W. 189; *State v. Stevens*, 119 Iowa 675; 94 N. W. 241.

³¹ *Nicholson v. People*, 29 Ill. App. 57.

³² *Brecourt v. State*, 5 Ind. 499. See *State v. Louis*, 63 Kan. 268; 65 Pac. 258.

³³ *Howard v. State*, 6 Ind. 444.

³⁴ *State v. Dieffenbach*, 47 Iowa 638.

³⁵ *State v. Shank*, 74 Iowa 649; 38 N. W. 523; *State v. Shank*, 79 Iowa 47; 44 N. W. 241; *State v. Salts*, 77 Iowa 193; 39 N. W. 167; *State v. Webber*, 76 Iowa 686; 39 N. W. 286; *State v. Skillicorn*, 104 Iowa 97; 73 N. W. 503.

³⁶ *State v. Viers*, 82 Iowa 397; 48 N. W. 732.

³⁷ *Wilson v. Commonwealth*, 12 B. Mon. 2; *Smith v. Commonwealth*, 6 B. Mon. 21.

keeping of liquors" is shown to be violated by the finding of liquor upon the ground under its floor.³⁸ The illegal use of one room and then another connected with the other room will render the entire tenement obnoxious to the statute so that the illegal use of one room only will be sufficient to create the offense as to both.³⁹ Where a statute provided that "all buildings or places used by clubs for the purpose of selling, distributing or dispensing intoxicating liquors to their members" should be deemed nuisances, it was held that a place used by an incorporated club for the purpose of dispensing liquors to its members, although for and belonging to the members individually, fell within its provisions.⁴⁰ In determining what is a "tenement" constituting a nuisance it may be considered that a parcel of land with detached buildings thereon is such;⁴¹ or rooms connected by passageways between them,⁴² or a hotel,⁴³ or a dwelling house, whether attached to the land or not.⁴⁴ Where a statute declared a place to be a nuisance "where any persons are permitted to resort for the purpose of drinking intoxicating liquors as a beverage, or where intoxicating liquors are kept for sale," it was held that if liquors were sold on the premises in violation of the statute that constituted them a nuisance whether drank there or not.⁴⁵ If proof of a sale of intoxicating liquor is sufficient to establish that the place where it was sold is a liquor nuisance, it is not necessary to show that the owner selling it knew it was intoxicating, for, as he owned and had possession of it, it will be

³⁸ Commonwealth v. Welsh, 110 Mass. 359.

³⁹ Commonwealth v. Fraher, 126 Mass. 56; Commonwealth v. Patterson, 153 Mass. 5; 26 N. E. 136.

⁴⁰ Commonwealth v. Baker, 152 Mass. 337; 25 N. E. 718; State v. Peck, 66 Kan. 701; 72 Pac. 237.

⁴¹ Commonwealth v. Patterson, 153 Mass. 5; 26 N. E. 136; State v. Brown, 14 N. D. 529; 104 N. W. 1112.

⁴² Commonwealth v. Fraher, 126 Mass. 56.

⁴³ Commonwealth v. Purcell, 154 Mass. 388; 28 N. E. 288.

⁴⁴ Commonwealth v. Mullen, 166 Mass. 377; 44 N. E. 343; Meyer v. State, 41 N. J. L. 6; State v. Spaulding, 61 Vt. 505; 17 Atl. 844; State v. Paull, 14 N. D. 557; 105 N. W. 717; or a cold-storage warehouse. Bell v. Thompson (Iowa), 106 N. W. 949.

⁴⁵ State v. Fraser, 1 N. D. 425; 48 N. W. 343.

presumed he knew the effect of its use;⁴⁶ and in Michigan under a statute making it unlawful to keep a place for manufacturing, selling or giving away liquors, it is immaterial the intent with which the place was kept.⁴⁷ Unlawful sales to drunkards are such unlawful sales as constitute the place a nuisance.⁴⁸ If it is necessary to prove sales to show the place is a liquor nuisance, the sales that the person who verified the information had in mind when he did so need not be proven if other sales are shown.⁴⁹ But under a charge of keeping a place to which persons resorted for drinking who made a loud and boisterous noise, it is error to say to the jury they can convict the accused if they find he kept a place to which persons are permitted to resort for the purpose of drinking liquor.⁵⁰ To sell off the premises liquor that is delivered from them where the statute requires sales to be made on such premises, will create the place a nuisance.⁵¹ A licensee is guilty of the offense of keeping a place for illegal sale of liquors if he sells at prohibited times.⁵² Under a charge of

⁴⁶ State v. Hughes, 16 R. I. 403; 16 Atl. 911.

⁴⁷ People v. Bacon, 117 Mich. 187; 75 N. W. 438. See State v. Moore, 49 S. C. 438; 27 S. E. 454.

⁴⁸ State v. Skillicorn, 104 Iowa 97; 73 N. W. 503.

⁴⁹ State v. Tegder, 6 Kan. App. 762; 50 Pac. 985.

⁵⁰ State v. Watson, 6 Kan. App. 897; 50 Pac. 959.

⁵¹ Cameron v. Fellows, 109 Iowa 534; 80 N. W. 567.

Under the Maine statute (Rev. St. 1883, c. 17, § 1) the place must be habitually used for sales of liquor to make the place a common nuisance. State v. McIntosh, 98 Me. 397; 57 Atl. 83.

In Iowa a freight depot where liquors are held C. O. D. for the consignee has been held to be a nuisance. Dosh v. United

States Exp. Co. (Iowa), 93 N. W. 571; but the soundness of this decision is very doubtful.

Proof of actual sale is not always necessary to show the commission of the offense. State v. Lewis, 63 Kan. 268; 65 Pac. 258.

⁵² State v. Moorehead, 22 R. I. 272; 47 Atl. 545.

Presumption by statute that possession of liquor is for an illegal purpose and rebuttal of that purpose. State v. Stevens, 119 Iowa 675; 94 N. W. 241.

Handling liquor in night time is forbidden in South Carolina. State v. Norris, 65 S. C. 287; 43 S. E. 791; State v. Adams, 49 S. C. 518; 27 S. E. 523.

On a charge of keeping liquor in a shop, an employe testified he took the liquor there without the knowledge of his employer, it was held error for the court to

keeping a nuisance a lease that is a mere scheme to evade the law is no defense.⁵³ In some jurisdictions the owner of premises is liable if his tenant maintains a nuisance on the leased premises,⁵⁴ and he may restrain by an injunction such illegal use,⁵⁵ or cancel the lease.⁵⁶ If the keeper permits his servants to illegally sell the liquor it is the same as if he himself sold it.⁵⁷

Sec. 656. Saloon at common law as a nuisance.

A saloon at common law is not a nuisance and to sell liquors therein is not an unlawful act. It is true that brothels and gaming houses were at common law, under all circumstances, held to be nuisances, but ale houses and other places in which intoxicating liquors were sold to be drunk as a beverage were not so held or regarded, unless they became disorderly, and in such cases it was not the mere sale of the liquors which constituted them nuisances but it was the disorderly conduct therein, or, in other words, the disorderly manner in which they were conducted, and in such cases it was immaterial whether the keepers thereof were licensed or unlicensed dealers. The first general statute restricting and regulating the keeping of ale houses and tippling houses was passed by

say to the jury: "Is it reasonable that a white man, who admits that he is practicing a deception on his employe, would carry to a negro, and have placed in his blacksmith shop, four bottles of liquor, when it has been further shown that this blacksmith shop was the rendezvous always of a number of idle negroes, especially on Saturday evening, when from six to twenty would gather there?" *McIntosh v. State*, 140 Ala. 137; 37 So. 223.

But this was held not error: "Where did the bottle come from? Miracles don't happen now; it came from some place?" *State v. Bryant*, 97 Minn. 8; 105 N. W. 974.

In Kansas an acquittal on a count for selling illegally is a bar to another count for an illegal sale and the maintenance of a nuisance. *State v. Turner*, 63 Kan. 714; 66 Pac. 1008.

⁵³ *Queen v. Lammert*, 31 N. S. 387; 5 Can. Cr. Cas. 151; *Queen v. McNutt*, 33 N. S. 14.

⁵⁴ *Commonwealth v. Hayes*, 167 Mass. 176; 45 N. E. 82.

⁵⁵ *Jalageas v. Winton*, 119 Ill. App. 139.

⁵⁶ 579.

⁵⁷ *State v. Moore*, 49 S. C. 438; 27 S. E. 454. See also *Commonwealth v. Mullen*, 166 Mass. 377; 44 N. E. 343.

the British Parliament in 1552.⁵⁸ The preamble to this statute declares: "For as much as intolerable hurts and troubles to the Commonwealth of this realm doth daily grow and increase through such abuses and disorders as are held and used in common ale houses and other houses, called tipping houses, it is, therefore, enacted by the King, our sovereign lord," etc. At common law, prior to the passage of this statute, any person had the right without a license, to maintain ale houses and tippling houses. Such business was not regarded as a public offense but was held to be a means of livelihood which anyone was free to follow.⁵⁹ Consequently it is held that a public and disorderly liquor store in a town, in and about which dissolute persons are permitted, for lucre, to remain at night and in the daytime, drinking, tippling, carousing, swearing and hallooing, to the damage and disturbance of the public, was a public nuisance and the keeper of it is indictable.⁶⁰ And the fact that the Legislature de-

⁵⁸ 5 & 6 Edw. VI, c. 25.

⁵⁹ *Sopher v. State*, 169 Ind. 177; 81 N. E. 913, citing *Stephens v. Watson*, 1 Salk. *45; *King v. Randall*, 3 Salk. *27; *Anonymous*, 3 Salk. *25; *King v. Marriot*, 4 Mod. *144, and notes; *Faulkner's Case*, 1 Saund. *249; *King v. Iyves*, 2 Showers (K. B.) *468; *Commonwealth v. McDonough*, 13 Allen 581; *Welsh v. State*, 126 Ind. 71; 25 N. E. 883; 9 L. R. A. 664; *State v. Bertheol*, 6 Blackf. 474; 39 Am. Dec. 442; *State v. Mullikin*, 8 Blackf. 260; 1 Hawkins P. C. (8th ed.) 714; 4 Cooley's Blackstone (Andrews' ed.) *168; 1 Bishop Crim. Law (8th ed.) § 505; *Bishop, Stat. Crimes* (3d ed.), §§ 984, 985.

"In the argument of the Commonwealth, such places as the defendant is charged with keeping are classed with brothels and gaming houses, and it is agreed

that they are all equally nuisances. But it was not so at common law.

Brothels and gaming houses were held to be nuisances under all circumstances; but ale houses were not, unless they became disorderly; and in such cases they were held to be nuisances on account of the disorderly conduct." *Commonwealth v. McDonough*, 13 Allen, 581.

⁶⁰ *State v. Bertheol*, 6 Blackf. 474; 39 Am. Dec. 442; *Cable v. State*, 8 Blackf. 531; *United States v. Columbus*, 5 Cranch. C. C. 304; *Fed. Cas. No. 14841*; *State v. Burchinal*, 4 Harr. (Del.) 572; *Meyer v. State*, 41 N. J. L. 6; 42 N. J. L. 145; *State v. Williams*, 30 N. J. L. 102; *Wilson v. Commonwealth*, 12 B. Mon. 2; *United States v. Berner*, 5 Cranch. C. C. 347; *Fed. Cas. No. 14569*; *United States v. Bede*, *Fed. Cas. No.*

clared disorderly kept unlicensed tippling houses to be public nuisances does not impliedly make licensed owners to be such.⁶¹

Sec. 657. Nuisance under general statute on nuisances.

The instances we have been considering are those where a statute specifically declares that a place kept for the sale or unlawful sale of intoxicating liquors shall be deemed a public nuisance, and a statute of this kind is frequently called a "liquor nuisance statute." But a place may be a nuisance under a statute defining a nuisance generally and making no specific reference to the sale or keeping of intoxicating liquors. Such was the case in Indiana. A statute of that State provides that, "Every person who shall erect, or continue and maintain, any public nuisance, to the injury of any part of the citizens of this State shall be fined not exceeding one hundred dollars."⁶² Under this statute it was held that any nuisance was a "public nuisance" if it annoyed such part of the public as necessarily came in contact with it; and, therefore, an indictment which charged that a defendant had control of a building, that screens, partitions, blinds and other paraphernalia were arranged therein for the purpose of selling liquors unlawfully, that liquors were sold therein unlawfully, that by reason thereof men were made drunk, that such men congregated therein and on the street thereby and blocked the sidewalk and used profane, obscene and indecent language, all to the annoyance of the citizens of the town, charged an indictable offense. It was also held that the maintenance of a public place, equipped with devices to make

14558; *United States v. Elder*, 4 Cranch. C. C. 507; *Fed. Cas. No. 15039*; *United States v. Coulter*, 1 Cranch. C. C. 203; *Fed. Cas. No. 14875*; *United States v. Prout*, *Fed. Cas. No. 16093*; *United States v. Lindsay*, 1 Cranch. C. C. 245; *Fed. Cas. No. 15602*; *State v. Buckley*, 5 Har. (Del.) 508; *State v. Thornton*, Busb. L. (N. C.) 252; *Smith v. Commonwealth*, 6 B. Mon. 21.

⁶¹ *State v. Mullikin*, 8 Blackf. 260; *Bloomhoff v. State*, 8 Blackf. 205.

What is a good common law indictment for maintaining a liquor nuisance, see *Sullivan v. Commonwealth*, 13 Ky. L. Rep. (abstract) 397.

⁶² *Burns R. S. 1901*, § 2153; *R. S. 1881*, § 2065.

the violation of the law easy and safe from criminal prosecution, and in which it was well known from its results that the laws are systematically violated, was "offensive to the senses" and was a public nuisance, as well as a menace to the community.⁶³ But the place kept to be a nuisance must be so kept that it is an annoyance or injury to the public.⁶⁴

Sec. 658. Keeping a "blind tiger."

The term "blind tiger" is one of recent origin in the liquor statutes of the Legislature and decisions of the courts, although it has long been a slang phrase in common usage. "It is well known," said the Court of Appeals of Kentucky, "that a keeper of a 'blind tiger,' in its general acceptance and understanding, means a person engaged in the unlawful sale of intoxicating beverages."⁶⁵ A blind tiger is a public nuisance independent of any statute making it such.⁶⁶ An ordinance making it an offense to maintain a blind tiger is valid, although prohibition prevails throughout the State.⁶⁷

Sec. 659. Keeping disorderly house.

Statutes make the keeper of a dramshop liable if he permit his customers to conduct themselves in a disorderly manner

⁶³ *State v. Taber*, 34 Ind. App. 393; 72 N. E. 1039. The court relied upon *Haggart v. Stehlin*, 137 Ind. 43; 35 N. E. 997; 22 L. R. A. 577; *Tron v. Lewis*, 31 Ind. App. 178; 68 N. E. 490; *Kissel v. Lewis*, 156 Ind. 233; 59 N. E. 478; *Cannon v. Merry*, 116 Ga. 291; 42 S. E. 274, and *Legg v. Anderson*, 116 Ga. 401; 42 S. E. 720. See also *People v. Wing*, 147 Cal. 379; 81 Pac. 1103; *State v. Prater*, 59 S. C. 271; 37 S. E. 933; *In re Charge to Grand Jury*, 10 N. J. Law J. 116.

⁶⁴ *State v. Ingram*, 118 Mo. App. 323; 94 S. W. 790; *State v. Lord*, 8 Kan. App. 257; 55 Pac. 503. In this case it was held error for the

court not to define the words "public nuisance."

⁶⁵ *Rush v. Commonwealth* (Ky.), 47 S. W. 586; 20 Ky. L. Rep. 775, quoted in *State v. Taber*, 34 Ind. App. 393; 72 N. E. 1039; *Cannon v. Merry*, 116 Ga. 291; 42 S. E. 274; *State v. McCoy*, 86 Minn. 149; 90 N. W. 305; *Henry v. State*, 77 Ark. 453; 92 S. W. 405; *State v. Bryant*, 97 Minn. 8; 105 N. W. 974.

⁶⁶ *Legg v. Anderson*, 116 Ga. 401; 42 S. E. 720. Approved in *State v. Taber*, 34 Ind. App. 393; 72 N. E. 1039.

⁶⁷ *Calloway v. Mims*, 5 Ga. App. 9; 62 S. E. 654.

upon his premises,⁶⁸ although a single act of disorderly conduct is not sufficient to justify his conviction.⁶⁹ The disorder "must be to some extent, at least, continuous, to make the place a disorderly house."⁷⁰ If the disorderly conduct takes place in front of the saloon or place, when it is occasioned by the liquor the keeper of it sold the disorderly person, the charge of keeping a disorderly place is sufficiently established.⁷¹ If the disorder must be to the annoyance of the citizens of the vicinity, it is not necessary to the commission of the offense that the defendant knew that such citizens were annoyed, it is sufficient if they were in fact annoyed and that the acts of the disorderly persons reasonably tended to annoy them.⁷² Even though no liquor be sold, yet if the keeper of the place permits persons to gather on his premises and conduct themselves riotously and disorderly he offends the statute.⁷³ If the keeper of a disorderly house be acquitted of a violation of an ordinance on that subject, he may still be convicted of keeping such a house under the common law.⁷⁴ It is a question of fact for the jury whether or not the conduct constituted the place a disorderly one, and there is no rule of law what number of violations of the law or statute will

⁶⁸ *State v. Burchinal*, 4 Harr. (Del.) 572; *Commonwealth v. McDonough*, 13 Allen 581.

⁶⁹ *Overman v. State*, 88 Ind. 6; *Leary v. State*, 39 Ind. 544; *State v. Lichta*, 130 Mo. App. 284; 109 S. W. 825.

⁷⁰ *Overman v. State*, 88 Ind. 6; *State v. Rechards*, 21 Minn. 47; *Dunnaway v. State*, 9 Yerg. 350.

⁷¹ *Cable v. State*, 8 Blackf. 531; *State v. Buckley*, 5 Harr. (Del.) 508; *State v. Thornton Busb. L.* (N. C.) 252; *United States v. Elder*, 4 Cranch C. C. 507; *Fed. Cas. No. 15039*; *United States v. Bede*, *Fed. Cas. No. 14558*.

But see *Dunnaway v. State*, 9 Yerg. 350.

⁷² *Cable v. State*, 8 Blackf. 531;

Garrison v. State, 14 Ind. 287; *Skinner v. State*, 120 Ind. 127; 22 N. E. 115; *State v. Bertheol*, 6 Blackf. 479; 39 Am. Dec. 442; *Bloomhoff v. State*, 8 Blackf. 205; *State v. Mullikin*, 8 Blackf. 260; *United States v. Columbus*, 5 Cranch C. C. 304; *Fed. Cas. No. 14841*.

⁷³ *Cable v. State*, 8 Blackf. 531; *State v. Hoard*, 123 Ind. 34; 23 N. E. 972; *Skinner v. State*, 120 Ind. 127; 22 N. E. 115; *Hosea v. State*, 47 Ind. 280; *Fletcher v. State*, 54 Ind. 462; *Ostler v. State*, 3 Ind. App. 122; 29 N. E. 270; *In re Charge to Grand Jury*, 10 N. J. Law J. 116.

⁷⁴ *In re Charge to Grand Jury*, 10 N. J. Law J. 116.

constitute the place a disorderly one.⁷⁵ It is necessary to show that the defendant had possession and control of the premises when the acts of disorder took place, and for that purpose a witness may testify that there hung on the walls of the saloon a United States revenue license made out in the defendant's name.⁷⁶ Even though the accused have a license to conduct a saloon at the place, yet he may be guilty of keeping a disorderly house if he keeps it for the purpose of entertaining men and women of low morals who there assemble habitually to drink and dance together.⁷⁷ The offense of keeping a disorderly house is distinct from an illegal sale,⁷⁸ and even though a statute provides that proof of a single illegal sale shall constitute the place a disorderly house that does not prevent the conviction of the keeper for keeping a disorderly house under the common law; and a conviction of the former is not a bar to a prosecution for the latter offense.⁷⁹ A statute forbidding the keeping of a disorderly house applies to local option territory.⁸⁰ Where a statute provides for the enjoining of the keeping of a disorderly house the proceeding

⁷⁵ *In re* Charge to Grand Jury, 10 N. J. Law 116; *Dunnaway v. State*, 9 Yerg. 350.

⁷⁶ *Joliff v. State*, 50 Tex. Cr. App. 61; 109 S. W. 176; *Webber v. State* (Tex. Cr. App.), 109 S. W. 182. These two cases state that in Texas the form of an indictment given in *Wilson's Criminal Forms*, No. 218, is sufficient, and that proof of sales in the defendant's absence are admissible, as well as the general regulation of the place for disorder.

⁷⁷ *State v. McGahan*, 48 W. Va. 438; 37 S. E. 573; *State v. Moorehead*, 22 R. I. 272; 47 Atl. 545; *United States v. Coulter*, 1 Cranch C. C. 203; Fed. Cas. No. 14875; *United States v. Prout*, Fed. Cas. No. 16093; *United*

States v. Lindsay, 1 Cranch C. C. 245; Fed. Cas. No. 15602; *United States v. Benner*, 5 Cranch, C. C. 347; Fed. Cas. No. 14569; *Smith v. Commonwealth*, 6 B. Mon. 21; *Wilson v. Commonwealth*, 12 B. Mon. 2; *State v. Williams*, 1 Vroom 102; *Meyer v. State*, 41 N. J. L. 6; 42 N. J. L. 145; *Johnson v. State* (Tex. Cr. App.), 21 S. W. 371; *In re Brodie*, 38 Up. Can. Rep. 580.

⁷⁸ *Smith v. Commonwealth*, 6 B. Mon. 21; *Nace v. State*, 117 Ind. 114; 19 N. E. 729.

⁷⁹ *Parker v. State*, 62 N. J. L. 801; 45 Atl. 1092, affirming 61 N. J. L. 308; 39 Atl. 651.

⁸⁰ *Joliff v. State*, 53 Tex. Cr. App. 61; 109 S. W. 176; *Webber v. State* (Tex. Cr. App.), 109 S. W. 182.

is a civil one, or at most only *quasi* criminal.⁸¹ A statute defining a disorderly house as one in which intoxicating liquors are sold or kept for sale without a license and providing that the keeping of such a house may be enjoined requires the petition for an injunction to contain an allegation that the liquors sold or kept for sale were intoxicating.⁸² In order to show that the accused occupied and kept the premises a lease to him of the premises is admissible, though by its terms it has expired, the evidence tending to show he held over.⁸³

Sec. 660. Carrying on the liquor business.

Occasionally a statute makes it an offense to carry on the business of a liquor dealer without a license instead of making it unlawful to sell liquor without a license. In the latter instance a single sale is a violation of a statute;⁸⁴ but under the former statute there must be something more than a sale, and it was said in one case that the accused must either have procured the liquor with the intent to sell it at retail, or must, having it, formed the intent to sell it and carry out such intent by one or more acts. And if he had it on hand for his own use and let others have it as an act of kindness or accommodation, though he took money for it, yet no offense is committed.⁸⁵ And the gratuitous distribution of liquor will not make the person distributing it a retailer of the

⁸¹ Jelinek v. State, 115 S. W. 508.

⁸² Jelinek v. State, *supra*.

⁸³ Smith v. State (Tex.), 116 S. W. 593.

⁸⁴ Frese v. State, 23 Fla. 267; 2 So. 1; Dansey v. State, 23 Fla. 316; 2 So. 692; Kansas City v. Muhlbeck, 68 Mo. 638; State v. Glasgow, Dud. L. (S. C.) 40; State v. Cassety, 1 Rich. L. (S. C.) 90; State v. Bugbee, 22 Vt. 32; Lewis v. Commonwealth, 90 Va. 843; 20 S. E. 777; Commonwealth v. Smith, 16 Pa. Co. Ct. Rep. 644; Commonwealth v. Thurlow, 24

Pick. 374; Commonwealth v. Costello, 133 Mass. 192.

⁸⁵ United States v. Bonham, 31 Fed. 808; Lawson v. State, 55 Ala. 118; Bryant v. State, 46 Ala. 302; Anderson v. State, 32 Fla. 242; 13 So. 435; Mansfield v. State, 17 Tex. App. 468; Overall v. Bezeau, 37 Mich. 506; Stanford v. State, 16 Tex. App. 331; Halpin v. State, 18 Tex. App. 410; Wells v. State, 18 Tex. App. 417; Williams v. State, 23 Tex. App. 499; 5 S. W. 136; *Contra*, State v. Chandler, 15 Vt. 425.

liquors.⁸⁶ Thus, a person in the grocery or butcher or dry goods business who makes a single sale cannot be regarded as carrying on the liquor business.⁸⁷ To "engage in or carry on any business" is to pursue the employment or occupation as a livelihood, or as a source of profit, although not necessarily the person's sole employment or occupation;⁸⁸ and, under the latter qualification of this statement, if a person have liquor with intent to sell it, and he makes a single sale of a drink of it, he engages in the business of carrying on the liquor business,⁸⁹ though if he were to make a purchase and give a note for the liquor purchased the transaction would not be a carrying on of the business so as to render the note void.⁹⁰ To travel and make sales of liquor carried on the person is a carrying on of the liquor business,⁹¹ it not being necessary to make the sales all to one person,⁹² or on different days.⁹³ To in fact sell liquors but not know them to be intoxicating renders the seller amenable to the penalty of the statute.⁹⁴ Sales of liquor made to persons who make the purchases with a view of prosecuting the seller is a violation of the statute against the carrying on of the liquor business.⁹⁵ Occasionally statutes provide that a certain number of sales shall constitute the carrying on of the business of selling liquors, and unless that number is proven there can be no conviction.⁹⁶ And without such a statute proof of four

⁸⁶ *United States v. Mickle*, 1 Cranch C. C. 268; *Fed. Cas. No. 15763*.

⁸⁷ *Moore v. State*, 16 Ala. 411; *Baker v. State*, 117 Ga. 428; 43 S. E. 744.

⁸⁸ *Harris v. State*, 50 Ala. 127; *Koopman v. State*, 61 Ala. 70; *Lilientsteine v. State*, 46 Ala. 498.

⁸⁹ *Abel v. State*, 90 Ala. 631; 5 So. 760.

⁹⁰ *Schwenyer v. Oberkoelter*, 25 Ill. App. 183.

⁹¹ *State v. Gramos*, 68 Me. 618. See *Commonwealth v. Ryan*, 160 Mass. 172; 35 N. E. 673.

⁹² *Commonwealth v. Odlin*, 23 Pick. 275.

⁹³ *Commonwealth v. Perley*, 2 Cush. 559.

⁹⁴ *Commonwealth v. Boyton*, 2 Allen, 160.

⁹⁵ *Commonwealth v. Graves*, 97 Mass. 114.

⁹⁶ *State v. Williams*, 6 R. I. 207; *Commonwealth v. Tubbs*, 1 Cush. 2; *Commonwealth v. Rumrill*, 1 Gray, 388; *Commonwealth v. Kirk*, 7 Gray 496; *Commonwealth v. Lamere*, 11 Gray, 319; *Commonwealth v. Munn*, 14 Gray 361; *Commonwealth v. Clark*, 14

sales has been held sufficient to sustain a conviction.⁹⁷ Yet it is not necessary to prove more than one sale by the purchasers of the liquor or by witnesses who saw the liquor purchased, for it is sufficient to make such a showing that the jury may infer from it several sales.⁹⁸ And the mere fact that the accused had a United States license to retail liquor does not show he was carrying on the business of liquor selling.⁹⁹ A sale of an occasional drink out of a bottle, apart from a saloon or barroom, is not a "carrying on of the business of a retail liquor dealer,"¹ and it is not proper to say to the jury that "different sales at different times, near each other, to different persons, constitute the occupation of selling."² Where people were found on the licensed premises with liquor glasses in their hands and liquors in the room, it was considered there was enough evidence to show a trafficking in liquor.³ An occasional statute uses the term "hawking" instead of "carrying on business." Where such a statute was in force a person gave a member of a club money on a Sunday, in which liquors were sold to members, who went into the club premises and shortly afterwards returned with a bottle of whisky which he handed to the person who had given him the money. It was held that this did not amount to a hawking of spirits.⁴ But where the money was given in the street on three different occasions, and on one of them the

Gray 367; Commonwealth v. Barker, 14 Gray 412.

⁹⁷ State v. Day, 37 Me. 244; Lemons v. State, 50 Ala. 130.

⁹⁸ State v. Hynes, 66 Me. 114; Commonwealth v. Mahony, 14 Gray 46; Commonwealth v. Dady, 14 Gray 412; Commonwealth v. Dady, 14 Gray 531; Commonwealth v. Colter, 97 Mass. 336; Commonwealth v. Van Stone, 97 Mass. 548; Commonwealth v. Powderly, 148 Mass. 457; 19 N. E. 781.

⁹⁹ State v. O'Connell, 82 Me. 30; 19 Atl. 86; State v. Intoxi-

cating Liquors, 80 Me. 57; 12 Atl. 794.

¹ United States v. Jackson, 1 Hughes 531.

² McReynolds v. State, 26 Tex. App. 372; 9 S. W. 617.

As to a conflict of a statute of this kind with a statute enacted to punish occasional sales of liquor made by unlicensed persons having no regular place of business, see Blackwell v. State, 45 Ark. 90.

³ Molyneux v. Ellison, 8 Aust. L. R. (C. N.) 17.

⁴ Dewant v. Neilsen, 2 F. (Just. Cas.) 57.

person giving it was a stranger, and the accused made a profit of three pence on each bottle, it was held that there had been a hawking of spirits, such as the statute forbade.⁵ A corporation may be guilty of carrying on an illegal business.⁶ A policeman testified that on Sunday he saw a woman coming from the back entrance of the accused's hotel with a bottle containing beer, that he took her back to the hotel where, in the accused's presence, she said, "I got the beer from a man in the yard and gave him three pence for it," and the accused then said, "I did not serve her with any beer," and that before he left the hotel the accused said to him, "Cannot you let this pass?" It was held that this showed that the accused was guilty of trafficking in beer.⁷ But offering or intending to do business is not engaging in or carrying on such business.⁸ Nor is a sale of one partner to another of his interest in their saloon a trafficking in liquor.⁹

Sec. 661. A common seller of liquors.

There is little or no difference in the cases concerning the offense of illegally pursuing or carrying on the business of selling liquor or engaging in its traffic and the offense of being a common seller of liquors. A statute making it an offense to be a common seller of liquor applies to a peddler traveling around the country selling liquors.¹⁰ Sales to several persons constitute the offense,¹¹ and if a sufficient number

⁵ Neilson v. Dunsmore, 3 F. (Just. Cas.) 6.

⁶ United States v. Ames Mercantile Co., 2 Alaska 74.

⁷ Graves v. Roth, 29 Vict. L. R. 841; 26 Austr. L. T. 58; 10 Austr. L. R. 158.

A statute forbidding illegal dealing on unlicensed premises applies to a purchase of liquors there. McKenzie v. Day, 62 L. J. M. C. 49 [1893]; 1 Q. B. 289; 5 R. 161; 68 L. T. 345; 41 W. R. 384; 17 Cox, C. C. 604; 57 J. P. 216.

⁸ Gambill v. Schunck, 131 Ala. 321; 31 So. 604; Bancher v. Warren, 33 N. H. 183.

⁹ Hagerty v. Tuxbury, 181 Mass. 126; 63 N. E. 333.

As to punishment under general liquor law or local option law, see Barker v. State, 117 Ga. 428; 43 S. E. 744.

¹⁰ State v. Grames, 68 Me. 418.

¹¹ Commonwealth v. Odlin, 23 Pick. 275; State v. O'Conner, 49 Me. 594; State v. Day, 37 Me. 244.

of sales be made on one day the offense of being a common seller may be incurred,¹² even though the accused did not know the liquors were intoxicating, for that he is bound to know;¹³ but a single sale in one lot of a stock of liquors does not make him a common seller.¹⁴ Mere proof that the accused had a United States license to sell intoxicating liquor is not sufficient to show he is a common seller unless a statute expressly so provides, and even then the jury must be convinced beyond a reasonable doubt that he is a common seller before they can convict him.¹⁵ If a statute requires three sales to be made to constitute the offense of being a common seller, then that number of sales must be proven before there can be a conviction, and it is not sufficient merely to prove that the accused had all the paraphernalia of a saloon and that he was there in person or by agent ready and willing to sell to anyone who desired to purchase; yet these facts may be shown in evidence, and if accompanied by some corroborative evidence of one or more sales, it may be sufficient to justify the jury in finding that three or more sales had been made.¹⁶ Where a statute provided a penalty against "a manufacturer of any spirituous or intoxicating liquors for sale, or a common seller thereof," it was held that the offense of being a common seller was incurred by the sale of liquors not manufactured by the seller.¹⁷ A person who sells liquor illegally may also be a

¹² Commonwealth v. Perley, 2 Cush. 559; Commonwealth v. Graves, 97 Mass. 114.

¹³ Commonwealth v. Boynton, 2 Allen 160.

¹⁴ Overall v. Bezeau, 37 Mich. 506. See also *Ex parte* Howard, 25 N. B. 191.

¹⁵ State v. O'Connell, 82 Me. 30; 19 Atl. 86; State v. Intoxicating Liquors, 80 Me. 57; 12 Atl. 794.

¹⁶ Commonwealth v. Tubbs, 1 Cush. 2; Commonwealth v. Rumrill, 1 Gray 388; Commonwealth v. Kirk, 7 Gray 496; Commonwealth v. Laurence, 11 Gray 319;

Commonwealth v. Mahony, 14 Gray, 46; Commonwealth v. Munn, 14 Gray 361; Commonwealth v. Clark, 14 Gray 367; Commonwealth v. Barber, 14 Gray 412; Commonwealth v. Dady, 7 Allen 531; Commonwealth v. Cotter, 97 Mass. 336; Commonwealth v. Van Stone, 97 Mass. 548; Commonwealth v. Powell, 148 Mass. 457; 19 N. E. 781; State v. Williams, 6 R. I. 207.

¹⁷ Commonwealth v. Bradley, 3 Gray 456. See Foster v. Haines, 13 Me. 307, and State v. Davis, 23 Me. 403.

common seller and be punished for both offenses, based upon such illegal sales, for the offenses are distinct and separate ones.¹⁸

Sec. 662. Exposing liquors for sale.

An occasional statute is to be found which prohibits the exposure of liquors for sale at prohibited times, or when it cannot lawfully be sold. What is and what is not an exposure for sale is a question of fact. Thus, where uniformed policemen went into a barroom on Sunday where they found the accused behind a bar with a barkeeper's white apron on, and they ordered whisky, whereupon the accused placed a bottle and glasses on the bar in front of them, from which they each poured out the drinks and paid for them, though they did not drink them, it was held that these facts showed both illegal sales and an illegal exposure of whisky for sale on Sunday.¹⁹ So where the slide of the bar was up so that anyone looking into the bar could see what was in it, it was held that liquors therein were illegally exposed, though no witness was produced who said he had actually seen what was in the bar.²⁰ But the mere exposure of liquor in a bar, so as to be visible to others, whilst drink lawfully sold to a lodger is being handed out from it, does not constitute an exposure for sale to others seeing it.²¹ The liquors exposed for sale must be intoxicating, and it is proper to so instruct the jury.²² Intent to sell is not an exposure. Nor is the offense committed if the liquor be concealed or deposited where its presence cannot be known to the public.²³

¹⁸ *State v. Johnson*, 3 R. I. 94; *Commonwealth v. Porter*, 4 Gray 426.

¹⁹ *People v. Clark*, 61 N. Y. App. Div. 500; 70 N. Y. Supp. 594.

²⁰ *Mackey v. Siddell*, 23 N. Z. L. R. 391; *In re Biggins*, 19 N. Z. L. R. 630.

²¹ *White v. Nestor*, 13 N. Z. L. R. 751.

²² *Commonwealth v. Curran*, 119 Mass. 206.

²³ *Commonwealth v. McCue*, 121 Mass. 358. But see *Commonwealth v. Atkins*, 136 Mass. 160, and *Commonwealth v. Welch*, 140 Mass. 372; 5 N. E. 166.

Sec. 663. Keeping tippling house—Definition.

Statutes occasionally forbid the keeping of a tippling house without a license. These statutes are similar to those forbidding the keeping of a house or place for the illegal sale of liquors, except that the place kept must come within the definition of a "tippling house." In Kentucky, according to common usage, a tippling house is "a house in which liquors are sold in drams or small quantities to be drunk on the premises."²⁴ A sale of any intoxicating liquor without a license, in a house, to be drunk therein or adjacent thereto, or which, after the sale, was so drunk, constitutes the offense of keeping a tippling house.²⁵ Under an indictment charging a sale without a license, the defendant cannot be convicted of keeping a tippling house, for the offense of a sale without a license is completed by the mere act of selling, without regard to the use to which the liquor is put or for which it is sold.²⁶ Where a statute made it an offense to sell liquor in a particular town to be drunk therein, and also provided that whoever should "sell the same and the same shall be so drunk shall be guilty of keeping a tippling house," it was held error to instruct the jury that if they believed the accused sold the liquor, as charged, to be drunk, "or" that the same was drunk in such town, they should find him guilty. The instruction should have been that if they believed the accused sold the liquor, as charged, to be drunk, "and" that the same was drunk in such town, they should find him guilty.²⁷

²⁴ *Lovejoy v. Commonwealth*, 13 Ky. L. Rep. (abstract) 976; *Koop v. State*, 47 Ill. 327.

²⁵ *Commonwealth v. Graves*, 16 Ky. L. Rep. (abstract) 272.

²⁶ *Bagby v. Commonwealth*, 4

Ky. L. Rep. (abstract) 537. See *Allen v. Commonwealth*, 10 Ky. L. Rep. (abstract) 272.

²⁷ *Raubold v. Commonwealth*, 12 Ky. L. Rep. (abstract) 987.

CHAPTER XX.

KEEPING PREMISES CLOSED—SALES TO TRAVELERS.

SECTION.

- 664. Keeping open defined.
- 665. Keeping open and selling distinguished.
- 666. Legal holidays defined.
- 667. Keeping saloon open at prohibited times.
- 668. Keeping open at prohibited times, continued.
- 669. Keeping open at prohibited times, continued.
- 670. Selling or exposing liquor for sale or opening premises during closing hours.—English cases.
- 671. Closing premises.
- 672. Constable demanding visitor's address.

SECTION.

- 673. Stranger found on the premises.
- 674. Permitting persons to enter saloon.
- 675. Liability of servant keeping saloon open.
- 676. Sales to travelers at prohibited times in England.
- 677. Sales to travelers at prohibited times in English colonies.
- 678. Sales at railway stations in England at prohibited times.
- 679. What time statute adopts.

Sec. 664. Keeping open defined.

In order to constitute the offense of "keeping open" a barroom or liquor saloon on prohibited days, it is not necessary that the house should be kept open in the same manner as on ordinary or lawful days. The statute will be violated if the place is so kept that access may be had thereto and facilities afforded for the obtaining of intoxicating liquors, and it is not material whether the access is by the front or back door, or whether the door is kept open or is opened only on application for admittance.¹ And it has been held that the fact that the saloon keeper's only entrance to his house was through a

¹ *Kroer v. People*, 78 Ill. 294.

room adjoining the saloon and separate from it by swinging doors only, was not a defense for keeping such a room open on Sunday.² In the District of Columbia, however, it has been held that where a saloon keeper had no means of ingress to or of egress from his home except through the saloon, an opening of the saloon for the purpose of entering his house was not within the statute.³ The general rule upon this subject and that which is supported by the greatest weight of authority, is that drinking places cannot be opened for any purpose whatever and that the intent with which they are opened is immaterial. If the place is in fact a barroom or saloon, and if it is open and accessible to the public, that is enough, without regard to the purpose for which it was opened.⁴ "And that part of the house where the bar is situated may not be open to the public, yet if other rooms in the house, connected with the barroom, and habitually or occasionally used for drinking purposes, are accessible to persons desiring liquor, such rooms are regarded as a part of the saloon, and, while they are open the saloon is not closed as the law requires."⁵ And the same is true of rooms not connected with the saloon if liquors are sometimes served and sold there.⁶ And if a room is used for a saloon and for other

² *People v. Talbot*, 120 Mich. 486; 79 N. W. 688.

³ *Hannan v. District of Columbia*, 12 App. Cas. (D. C.) 265.

⁴ *Hussey v. State*, 69 Ga. 54; *Klug v. State*, 77 Ga. 734; *Monsees v. State*, 78 Ga. 110; *Williams v. State*, 100 Ga. 511; *State v. Martin*, 20 Ind. App. 699; *Kurtz v. People*, 33 Mich. 279; *People v. Blake*, 53 Mich. 566; 18 N. W. 360; *People v. Cummerford*, 58 Mich. 328; 25 N. W. 203; *People v. Minter*, 59 Mich. 558; 26 N. W. 701; *People v. Taylor*, 110 Mich. 491; 68 N. W. 303; *People v. Schottey*, 116 Mich. 1; 74 N. W. 209; *State v. Heible*, 54 Ohio St. 321.

⁵ *Black on Intoxicating Liquors*, § 393; *Harvey v. State*, 65 Ga. 568; *People v. Higgins*, 56 Mich. 159; 22 N. W. 309; *People v. Scranton*, 61 Mich. 244; 28 N. W. 81; *People v. Cox*, 70 Mich. 247; 38 N. W. 235; *People v. Hughes*, 90 Mich. 368; 51 N. W. 531; *People v. Ringstead*, 90 Mich. 371; 51 N. W. 519; *People v. Koob*, 109 Ind. 358; 67 N. W. 320; *People v. Bowkus*, 109 Mich. 360; *Lederer v. State*, 50 Ohio Cir. Ct. 623; *Morgantown v. Commonwealth*, 94 Va. 787.

⁶ *People v. Whipple*, 108 Mich. 587; 66 N. W. 490.

purposes, it must be kept closed on prohibited days;⁷ and this is true where a restaurant and barroom are managed by the same person, there being a partition between them and liquor is furnished from the barroom to customers in the restaurant,⁸ even though the bar be concealed from the restaurant and a canvas between them bears the sign "bar closed."⁹ On the other hand, the statute is not violated if the proprietor of a barroom or saloon opens it at the request of an officer to allow him to search for a person, although a crowd follows him.¹⁰

Sec. 665. Keeping open and selling distinguished.

In the preceding section it is stated that in many jurisdictions it is made a criminal offense to keep open a place where intoxicating liquors are sold, or to sell them on a legal holiday. Under such a statute two distinct offenses are created, namely: (1) the keeping open of a place where intoxicating liquors are sold on a legal holiday, and (2) the selling of such liquors on such a day. Such crimes are of equal turpitude, and a prosecution and conviction for one cannot be pleaded as a defense in a prosecution for the other. In other words, a liquor dealer who admits a customer to his place of business on a prohibited legal holiday and sells intoxicating liquors to him may be prosecuted severally for both

⁷ Harris v. People, 1 Colo. App. 289; Lederer v. State, 11 Ohio Dec. (reprint) 31.

⁸ Cooper v. State, 88 Ga. 441; 14 S. E. 592; Harmon v. State, 92 Ga. 455; 17 S. E. 666.

⁹ Hussey v. State, 69 Ga. 54.

¹⁰ Miller v. State, 68 Miss. 533; 9 So. 289.

A private individual cannot bring proceedings in mandamus against a police commissioner to compel him to enforce the law requiring saloons to be closed, even though the proper officer refuses to bring such an action. Gowan

v. Smith (Mich.), 122 N. W. 286; 16 Det. L. N. 365.

The object of the law requiring saloons to be closed when sales cannot be lawfully made is to remove the dangers of the taking advantage of its being open to sell clandestinely what on other days is sold openly. People v. Beeler, 73 Mich. 640; 41 N. W. 827.

It is no offense at common law to keep a saloon open on Sunday. Young v. State (Ala.), 48 So. 490.

offenses and if convicted be punished in each, or if acquitted in one he may be prosecuted and convicted in the other. It cannot be said that one of these crimes is of a higher grade than the other, or that either merges in the other.¹¹

Sec. 666. Legal holidays defined.

In many jurisdictions it is made a criminal offense to keep open a place where intoxicating liquors are sold or to sell such liquors on a legal holiday. Holidays for any and all purposes are creatures of legislative enactment, and when the Legislature has designated a specific day as a legal holiday, it has the authority, under the police power of the State, to prohibit the sale of intoxicating liquors on such day.¹² There are, it is said, two kinds of holidays: ecclesiastical and State; the former established by the church, the latter by the State. In this country we do not recognize the ecclesiastical holidays, for we have no established church, and affairs of State are carefully separated from ecclesiastical matters. As already stated, in this country legal holidays are the creatures of legislative enactment.¹³ By a statute of William IV., Sunday, Easter Monday, Easter Tuesday and Christmas Day were made holidays, but in this country election days, Labor Day, Memorial Day, Washington's birthday, Fourth of July, Sunday, Christmas and New Year's Day usually are designated legal holidays.¹⁴ But in this connection it is to be remembered that a legal holiday created for a specific purpose, for instance, the protesting of commercial paper, is not a legal holiday

¹¹ *Commonwealth v. Harrison*, 11 Gray (Mass.) 308; *State v. Ambs*, 20 Mo. 214; *Weaver v. Mt. Vernon*, 6 Ohio Dec. 436; *Altenberg v. Commonwealth*, 126 Pa. St. 602; 17 Atl. 799; *Hudson v. Geary*, 4 R. I. 485; *Arrington v. Commonwealth*, 87 Vt. 96; 12 S. E. 224.

¹² *State v. Shelton*, 33 Ind. App. 60; 77 N. E. 1052.

¹³ *Hadley v. Musselman*, 104 Ind. 459; 3 N. E. 122; *State v. Shelton*, 38 Ind. App. 80; 77 N. E. 1052.

¹⁴ *Ruge v. State*, 62 Ind. 388; *State v. Atkinson*, 139 Ind. 426; 39 N. E. 51; *Commonwealth v. Francis*, 152 Mass. 508; 25 N. E. 836; *Reithmiller v. People*, 44 Mich. 280; 6 N. W. 667; *People v. Ackerman*, 80 Mich. 588; 45 N. W. 367.

within the purview of a statute making it criminal to keep open a place where intoxicating liquors are sold or to sell such liquors on such days. A "legal" holiday within the purview of such a statute must be a general one. If the statute does not enumerate the holidays, a day which is by another statute made a holiday for all purposes will be within the prohibition of the former statute. The term "legal holiday" has also been held to include any day appointed by the governor or by the President as a day of fasting and prayer, when a statute other than that regulating the liquor traffic declares that it shall be a legal holiday.¹⁵

Sec. 667. Keeping saloon open at prohibited time.

Statutes often require places where liquors are sold to be kept "closed" during certain hours of the day. What is meant by the term "closed" has been the subject of a number of judicial decisions. Thus, a statute requiring a saloon to be "closed" during certain hours, means such a closing as customers cannot get through the doors by a mere push of the hand and obtain liquors, even by helping themselves in the absence of the barkeeper. And so long as customers are in the saloon it cannot be said that the saloon is closed.¹⁶ Drawing a curtain around the bar and selling no liquors is not sufficient to prevent a conviction for keeping the saloon open.¹⁷ So it is a keeping open to remain with the barkeeper and permit a third person to be present during the time of clean-

¹⁵ Ruge v. State, 62 Ind. 388; State v. Atkinson, 139 Ind. 426; 39 N. E. 51; State v. Shelton, 38 Ind. App. 80; 77 N. E. 1052.

¹⁶ Smith v. State, 48 Tex. Cr. App. 509; 90 S. W. 37; People v. Cummerford, 58 Mich. 328; 25 N. W. 203; Kroer v. People, 78 Ill. 294; People v. Schotley, 116 Mich. 1; 74 N. W. 209; Johnson v. Chattanooga, 97 Tenn. 247; 36 S. W. 1092.

¹⁷ Baldwin v. Chicago, 68 Ill.

418; Morganstern v. Commonwealth, 94 Va. 787; 26 S. E. 402; Hussey v. State, 69 Ga. 54 (curtain having on it the words "bar closed"); People v. Hughes, 90 Mich. 368; 51 N. W. 518; Lerdner v. State, 24 Wkly. L. Bull. 153; affirmed 5 Ohio Cir. Ct. Rep. 623; 3 Ohio C. D. 303 (separated by a wire screen); Sullivan v. District of Columbia, 20 App. D. C. 29; Orme v. Tusculum, 150 Ala. 520; 43 So. 589.

ing up, and then taking a drink after the work is done.¹⁸ Under a statute requiring restaurants to be kept closed from 1 to 5 A. M., sales of liquors during those hours in connection with meals furnished to participants in a ball is a violation of its provisions, and it is no defense that the practice has long been followed.¹⁹ So serving liquors in an adjoining room in the same building, from the bar, though such room is disconnected from the saloon, is a keeping open of the saloon, and is a violation of the statute requiring it to be closed.²⁰ So a billiard room with an opening to the barroom, though closed with buttoned curtains, is a part of the saloon, and if kept open at prohibited times is a violation of the statute.²¹ Drawing liquor and delivering it in a saloon is a keeping it open, though the liquor was not there consumed.²² So it is sufficient to sustain a conviction that the door of the house was open as well as the gate of the fence surrounding the house, and the barkeeper and another person were in the saloon.²³ So it is sufficient to secure a conviction to show the usual paraphernalia of a saloon, that people went in and out at a side door, the front door being closed, and came out drunk and fighting, making a great noise, and that liquor was served at meals and people seen to there drink.²⁴ So if it be shown that men are seen in the saloon and a man walking behind the bar, the evidence is sufficient though it be shown that people had to pass through the saloon in order to reach a restaurant in the

¹⁸ *People v. James*, 100 Mich. 522; 59 N. W. 236. Or even if no third person be present. *People v. Tolman*, 148 Mich. 305; 111 N. W. 772; 14 Detroit L. News 107; *People v. Roby*, 52 Mich. 577; 50 Am. Rep. 270; 18 N. W. 365.

¹⁹ *In re Whitney*, 142 N. Y. 531; 37 N. E. 621, affirmed 3 N. Y. Supp. 838; *People v. Beller*, 73 Mich. 640; 41 N. W. 827; *People v. Norman* (Mich.), 122 N. W. 369; 13 Det. L. News 704.

²⁰ *People v. Whipple*, 108 Mich.

587; 66 N. W. 490; *People v. Cox*, 70 Mich. 247; 38 N. W. 235; *People v. Rinsted*, 90 Mich. 371; 51 N. W. 519; *People v. Hughes*, 97 Mich. 543; 56 N. W. 942.

²¹ *People v. Hughes*, 97 Mich. 543; 56 N. W. 942; *Utsler v. Territory*, 10 Okla. 463; 62 Pac. 287.

²² *Harris v. People*, 1 Colo. App. 289; 28 Pac. 1133.

²³ *Klug v. State*, 77 Ga. 734.

²⁴ *Commonwealth v. Leighton*, 140 Mass. 305; 6 N. E. 221.

rear, even though the front door be closed but not locked.²⁵ Upon a charge of exposing liquor for sale evidence showing defendant's shop door was open, persons were seen therein, one with a glass in his hand, liquors were exposed, and the door was open, was held sufficient to convict though the weather was very warm and the door was the only means of ventilating the room in which the defendant usually sat and ate.²⁶ So evidence showing the breaking open of the closed door of the saloon at two o'clock in the morning, finding the barkeeper behind the door, the doors between the saloon and a pool room and dining room open, and the sound of people rushing out the backway, is sufficient to sustain a conviction of keeping the saloon open.²⁷ A saloon keeper cannot justify his opening the saloon to give a man liquor who feigns sickness, but he may if the man is actually ill and in eminent need of it, and he acts in good faith.²⁸ In order to commit the offense of keeping a saloon open on Sunday it is not necessary that liquor be sold.²⁹ But it is error to charge the jury that they may convict the defendant if he kept his saloon open "for any purpose."³⁰ If a bar be openly situated in a garden provided with seats, resorted to for recreation, the bar is kept open, liquors being served from it.³¹ Upon proof that the

²⁵ *Warwick v. State*, 48 Ark. 27; 2 S. W. 253; *Bell v. Walters*, 14 N. W. (N. S. W.) 190.

²⁶ The clerk testified nothing had been sold that day. *City Council v. Talck*, 3 Rich. L. (S. C.) 299.

²⁷ *McKinney v. Nashville*, 96 Tenn. 79; 33 S. W. 724.

²⁸ *Leyden v. State*, 78 Ga. 105.

²⁹ *People v. Robbins*, 79 Mich. 130; 37 N. W. 924; *Lucas v. State*, 92 Ga. 454; 17 S. E. 668; *Klug v. State*, 77 Ga. 734; *Monser v. State*, 78 Ga. 110; *Hall v. State*, 3 Kelly (Ga.) 18; *Sullivan v. District of Columbia*, 20 App. D. C. 29.

Yet where an ordinance inflicted a penalty on anyone who

on Sunday opened "his shop where he retails for the purpose of selling" liquors of a certain amount for each offense of selling, it was held that a sale must be proven before any penalty could be assessed. It should be observed proof of a sale was absolutely necessary in order to determine the amount of the penalty to be assessed. *Lincolnton v. McCarter*, Busb. L. (N. C.) 429. *Contra*, *Werdman v. People*, 7 Ill. App. S. ³⁰ *People v. Winter*, 59 Mich. 557; 26 N. W. 701; *Monser v. State*, 78 Ga. 110.

³¹ *People v. Beller*, 73 Mich. 640; 41 N. W. 827. *Contra*, *State v. Barr*, 39 Conn. 40.

defendant had a license for a saloon and kept one in the building on the first floor, but the liquor was sold on the special occasion on the second floor, in a rear room unconnected with the saloon, where the defendant was present, sitting with people at a table, and his barkeeper selling liquor, it was held that the jury might draw the inference that he was keeping his saloon open, but it was error to charge the jury that his having a license and keeping a saloon on the first was *prima facie* evidence he kept the one on the second floor.³² So furnishing liquor in a sitting room opening off a saloon is the keeping the saloon open.³³ A statute requiring a saloon to be kept closed "during the entire day," means from midnight to midnight.³⁴ One forbidding the keeping open of a "liquor shop" applies to a dwelling house where liquor is sold.³⁵ Where a statute forbids the keeping open of a house on a certain day where liquors are reputed to be sold, the reputation applies to any time.³⁶ The usual statute applies to any house where liquors are sold in small quantities, and proof of that fact and the fact that the house was kept open on the prohibited time justifies a conviction.³⁷

Sec. 668. Keeping open at prohibited time, continued.

If an innkeeper may lawfully furnish his guests in his hotel liquors on Sunday, he cannot be convicted of keeping

³² *People v. Kridler*, 80 Mich. 592; 45 N. W. 374.

³³ *People v. Bowkus*, 109 Mich. 360; 67 N. W. 319; *Harvey v. State*, 65 Ga. 568 (a bedroom).

As to instructions, see *Croell v. State*, 25 Tex. App. 755; 9 S. W. 68, reversing 25 Tex. App. 596; 8 S. W. 816; *Levine v. State*, 35 Tex. Cr. Rep. 647; 34 S. W. 969.

³⁴ *Kane v. Commonwealth*, 89 Pa. 522; 33 A. Rep. 787; *Haines v. State*, 7 Tex. App. 30; *Lawrence v. State*, 7 Tex. App. 192; *Commonwealth v. Murphy*, 95 Ky. 38; 23 S. W. 655; *Schuck v. State*, 50 Ohio St. 493; 34 N. E. 663; *English v. State*, 7 Tex. App.

171; *Commonwealth v. Rogers*, 1 Del. Cr. Rep. 517; *Janks v. State*, 29 Tex. App. 233; 15 S. W. 815; *Kroer v. People*, 78 Ill. 294; *Jones v. State*, 32 Tex. Cr. Rep. 533; 25 S. W. 124 ("during any portion of the day on which an election is held"). It is otherwise where the day is defined to be from sunrise to sunset. *Wooster v. State*, 6 Baxt. 533.

³⁵ *Wooster v. State*, 6 Baxt. 533.

³⁶ *State v. Cady*, 47 Conn. 44; *Quintard v. Corcoran*, 50 Conn. 34.

³⁷ *Harris v. People*, 21 Colo. 95; 39 Pac. 1084.

open his saloon kept in connection therewith by proof of supplying liquors to such guests.³⁸ But a statute forbidding the keeping open of a place where liquor is reputed to be kept for sale may include an entire hotel having that reputation, though liquors be not sold in all its rooms.³⁹ It is not necessary that the house kept open should be a nuisance to constitute a violation of the statute.⁴⁰ It is immaterial that the purpose of keeping the saloon open was an innocent one,⁴¹ or for even a moment for any cause.⁴² Anyone having control over a saloon may be convicted of keeping it open, though he does not own it nor have any interest therein.⁴³ If the keeper of a bar have a restaurant in the next room, with a door opening through the portion between it and the barroom, and he serves liquor, in person or by his servant, to his customers in the restaurant, from the bar, he is guilty of keeping his saloon open;⁴⁴ and this is true although the liquor was brought into the restaurant the evening before, if the door be kept open.⁴⁵ So a person who sells his own manufactured wine by the quart on the Sabbath from a small house within the curtilage of his dwelling keeps open a tippling house within the meaning of a statute forbidding the keeping open such a house on that day.⁴⁶ And a "tippling" house is a place where liquor is sold by the glass or drink; and a boarding house keeper who sells but a single glass commits the offense of keeping such a

³⁸ *State v. Gregory*, 47 Conn. 276; *State v. Ryan*, 50 Conn. 411; *Commonwealth v. Barnes*, 138 Mass. 511; *Commonwealth v. Moore*, 145 Mass. 244; 13 N. E. 893.

³⁹ *State v. Ryan*, 50 Conn. 411.

⁴⁰ *Hall v. State*, 3 Kelly (Ga.) 18.

⁴¹ *Klug v. State*, 77 Ga. 734.

A saloon keeper should see that no necessity exists for keeping his saloon open by carrying on any other business therein, which would require the doors to be open or for persons to enter

therein. *People v. Minter*, 59 Mich. 557; 26 N. W. 701.

⁴² *Monson v. State*, 78 Ga. 110. *Contra*, *Patten v. Centralia*, 47 Ill. 370.

⁴³ *Cooper v. State*, 88 Ga. 441; 14 S. E. 592.

⁴⁴ *Cooper v. State*, 88 Ga. 441; 14 S. E. 592.

⁴⁵ *Harmon v. State*, 92 Ga. 455; 17 S. E. 666; *People v. Koob*, 109 Mich. 358; 67 N. W. 320 (double doors between the rooms).

⁴⁶ *Thomason v. State*, 92 Ga. 465; 17 S. E. 858.

house open.⁴⁷ Any means of access to the saloon afforded is a keeping of it open.⁴⁸ And it has been held that keeping it open for merely cleaning it up, no liquor being sold, was an offense.⁴⁹ Rooms adjoining kept for card playing are a part of a saloon, and if kept open an offense is committed;⁵⁰ and if such rooms are the saloon keeper's living rooms in which his family lives, to admit visitors to them is a violation of the statute.⁵¹ For a proprietor to allow his bartender to enter the saloon and get a glass of liquor for himself is an offense.⁵² If a druggist sells liquors on Sunday, then, under the Mississippi statute, he must close his drug store on Sunday, unless that part of the building devoted to the liquors is so separated from the drug store proper that the keeping of such store open will afford no access to the part devoted to the storage or keeping of liquors.⁵³ Under a statute forbidding the keeping open any shop "for the purpose of selling" no penalty is incurred except there be a sale.⁵⁴ And it has been held that a statute making it an offense to keep a saloon open on Sunday or to permit it to remain open on that day means keeping it "open" in such a manner as to induce the public to enter as on any other day.⁵⁵ Keeping open a cigar stand in connection with a saloon is an offense, though a wire screen

⁴⁷ *Koop v. State*, 47 Ill. 327.

⁴⁸ *Kroer v. People*, 78 Ill. 294; *People v. Henze*, 149 Mich. 130; 112 N. W. 491; 19 Det. L. N. 491.

⁴⁹ *People v. Waldvogel*, 49 Mich. 337; 13 N. W. 620; *McKinney v. Nashville*, 96 Tenn. 79; 33 S. W. 724; *Martin v. State* (Tenn.), 79 S. W. 131; *People v. Ludnell*, 136 Mich. 303; 99 N. W. 12; 11 Detroit Leg. N. 1; *Rosenthal v. State* (Iowa), 77 N. W. 488; *Regina v. Kirkdale*, 56 L. J. M. C. 24; 18 Q. B. Div. 248; 15 J. P. 214; *People v. Tolman*, 148 Mich. 305; 111 N. W. 772; 14 Det. L. N. 107.

⁵⁰ *People v. Higgins*, 56 Mich. 159; 22 N. W. 309; *People v. Hughes*, 90 Mich. 368; 51 N. W. 518; *People v. Ringstead*, 90 Mich. 371; 51 N. W. 519.

⁵¹ *People v. Cox*, 70 Mich. 247; 38 N. W. 235.

⁵² *People v. Crowley*, 90 Mich. 366; 51 N. W. 517; *McCarty v. Atlanta*, 121 Ga. 365; 49 S. E. 287, citing *Moneses v. State*, 78 Ga. 110.

⁵³ *Miller v. State*, 68 Miss. 533; 9 So. 289.

⁵⁴ *Lincolnton v. McCarter*, 44 N. C. 429. But is this true?

⁵⁵ *Munzebrock v. State*, 10 Ohio Dec. 277; 19 Wkly. L. Bull. 389.

separate them at the prohibited times.⁵⁶ Any opening whereby patrons may enter is an opening within the prohibition of the statute, though no business be carried on therein.⁵⁷ Keeping open a saloon on Sunday constitutes but a single offense, whether it be opened one or many times in a day.⁵⁸ Statutes sometimes provide that proof that a stranger was on the premises at a prohibited time shall be *prima facie* evidence that they were unlawfully kept open, and on such proof the owner may be convicted of unlawfully keeping his premises open.⁵⁹ Evidence that a person was standing behind the bar, in his shirt sleeves, with an apron on, and that the witness entered by a side door and purchased liquors shows that the saloon was unlawfully kept open.⁶⁰ Opening a barroom for only a minute by the proprietor, or by his agent with his consent, is a violation of the statute, length of time it is open being immaterial;⁶¹ but whether or not the opening was a necessity is a proper inquiry, for if it was opened through necessity no offense is committed.⁶² A sale is not necessary to constitute the offense of keeping the saloon open,⁶³ but it

⁵⁶ *Lerderer v. State*, 24 Wkly. L. Bull. 153; affirmed, 5 Ohio Cir. Ct. Rep. 623; 3 Ohio C. D. 303.

⁵⁷ *State v. Heibel*, 54 Ohio St. 321; 43 N. E. 328. People in the saloon is made evidence of sales by statute in Ohio. *Ellinger v. State*, Cir. Ct. Rep. 376.

⁵⁸ *People v. Cox*, 70 Mich. 247; 38 N. W. 235; *Queen v. Brooks*, 6 Juta 319.

Contra, *Commonwealth v. McCann*, 94 S. W. 645; 29 Ky. L. Rep. 707 (each opening is an offense).

⁵⁹ *Birmingham v. People* (Colo.), 90 Pac. 1121.

⁶⁰ *State v. Madeira*, 125 Mo. App. 508; 102 S. W. 1046; *Bell v. Walters*, 14 W. N. (N. S. W.) 190.

⁶¹ *Kohnan v. State*, 2 Ga. App.

648; 58 S. E. 1070; *Richardson v. State*, 3 Ga. App. 313; 59 S. E. 916.

⁶² *Richardson v. State*, *supra*; *Thompson v. Commonwealth* (Ky.), 107 S. W. 223; 32 Ky. L. Rep. 714.

In South Dakota if a servant open his master's saloon against his instructions, the master is liable. *State v. Kinney*, 21 S. D. 390; 113 N. W. 77; *Roberts v. State*, 52 Tex. Cr. App. 355; 107 S. W. 59.

⁶³ *Smith v. State*, 52 Tex. Cr. App. 357; 107 S. W. 353; *State v. Binnard*, 21 Wash. 349; 58 Pac. 210; *People v. Bowkus*, 109 Mich. 360; 67 N. W. 319; *People v. Schottey*, 116 Mich. 1; 74 N. W. 209. Nor an intent to sell. *Clifford v. O'Donnell*, 24 N. S. W.

has been held that a proof of a sale of non-intoxicating liquor did not show a keeping open for the sale of intoxicating liquor.⁶⁴ An ordinance prohibiting licensed saloons from opening on the Sabbath is a reasonable one, and means that saloon keepers must temporarily cease to entertain the public on that day.⁶⁵ If there be a substantial adjustable partition between the saloon and a restaurant in the same building, and this partition is put in place, the saloon will be closed.⁶⁶ This is also true if the partition be a glass one.⁶⁷ Where a bar is in a dwelling house, only the bar need be kept closed, not the entire house.⁶⁸ Under a statute or ordinance which prohibits a saloon keeper from admitting any person to his saloon on Sunday, other than himself and family, it is immaterial for what purpose he admitted a person, to incur its penalty.⁶⁹ The unexplained fact that the saloon is open on Sunday is enough upon which to convict the proprietor.⁷⁰ An unlicensed saloon keeper may be indicted for keeping his saloon open at prohibited times.⁷¹ The fact that the defendant has a hotel, restaurant or boarding house in the same building

8. *Contra*, Weidman v. People, 7 Bradw. (Ill.) 38; Vandalia v. Carracher, 116 Ill. App. 62 (must be proof of an attempt to sell); Purefoy v. People, 65 Ill. App. 167.

⁶⁴ *Ex parte* Menzies, 24 N. S. W. 179. See also Dominick v. State, 27 Ohio Cir. Ct. Rep. 305.

⁶⁵ Richards v. Bayonne (N. J. L.), 39 Atl. 708; Bennett v. Pulaski (Tenn. Ch.) 52 S. W. 913; 47 L. R. A. 278; State v. Calloway, 11 Idaho 719; 84 Pac. 27. The ordinance may forbid the keeping open of the saloon for one purpose and permit it for another. Lynch v. People, 16 Mich. 472.

⁶⁶ *In re* Cullinan, 90 N. Y. App. Div. 607; 86 N. Y. Supp. 1046;

but see Sullivan v. District of Columbia, 20 App. D. C. 29.

⁶⁷ *In re* Cullinan, 93 N. Y. App. Div. 427; 87 N. Y. Supp. 660, affirming 41 N. Y. Misc. 3; 83 N. Y. Supp. 581; Blaylock v. State, 108 Tenn. 185; 65 N. W. 398.

⁶⁸ Poitras v. Quebec, 9 Rev. Leg. 531.

⁶⁹ State v. Calloway, 11 Idaho 719; 84 Pac. 27.

⁷⁰ State v. Grant, 20 S. D. 164; 105 N. W. 97; Rooney v. Augusta, 108 Ga. 774; 33 S. E. 646. See Cullinan v. Trolley Club, 65 N. Y. App. Div. 202; 72 N. Y. Supp. 629; People v. Ryan, 86 N. Y. App. Div. 524; 83 N. Y. Supp. 657.

⁷¹ State v. Meagher, 114 Mo. App. 266; 89 S. W. 595. See § 669.

with his saloon will not justify his keeping the latter open.⁷² Where liquors are sent up from a saloon by a dumb waiter to a room not otherwise connected with the saloon, to purchasers, the saloon is kept open.⁷³ Evidence of sales are permissible to show a keeping open, though such evidence also shows illegal sales.⁷⁴ Where a statute prohibited the keeping open of any door leading to a bar on Sunday, and the bar was located in a hotel whose proprietor had a right to serve his guests with liquors, and his waiters went through a door to the bar to obtain liquors for guests, and while so doing two special excise agents thrust themselves through the door and started for the bar, but were promptly ejected, it was held that no offense had been committed by the saloon or hotel keeper.⁷⁵ Where a statute makes it an offense to keep a bar-room open at a prohibited time, it is not necessary to charge that it was kept open for the purpose of a sale, for it is the keeping of it open that constitutes the offense, and the presumption is that if it was kept open so the public could have access to it, it was kept open for the purpose of a sale.⁷⁶ On a charge of keeping a saloon open, the evidence must connect the defendant with the control over the saloon.⁷⁷ The proprietor of a saloon may go into it to obtain liquor for his own

⁷² *Hofheintz v. State*, 45 Tex. Cr. App. 117; 74 S. W. 310.

Where a statute required a liquor "shop" to close at 11 P. M., a shop wherein the defendant displayed for sale and sold at retail wines, spirits and beer only, was held to be such a shop. *Mackinson v. Hannay* [1906], Viet. L. R. 604.

⁷³ *Kitchens v. State*, 44 Tex. Cr. App. 216; 70 S. W. 82.

⁷⁴ *State v. Sodini*, 84 Minn. 444; 87 N. W. 130.

⁷⁵ *In re Cullinan*, 75 N. Y. App. Div. 301; 78 N. Y. Supp. 118; *In re Cullinan*, 68 N. Y. App. Div. 119; 74 N. Y. Supp. 182.

An instruction to the jury need not state the defendant must have kept his saloon open unlawfully and willfully in order to convict him. *Knox v. State* (Tex. Cr. App.), 77 S. W. 13.

It is error to tell the jury that a man who keeps a saloon must, under the decisions of the courts, be more careful than any other man in the State, and that it takes less evidence to convict him of the offense than of any other offense. *Veruki v. State*, 127 Ga. 289; 56 S. E. 408.

⁷⁶ *Lehman v. District of Columbia*, 19 App. D. C. 217.

⁷⁷ *Beane v. State*, 72 Ark. 368; 80 S. W. 573.

use unless the statute absolutely prohibits him entering it except in acts of actual necessity.⁷⁸ Usually proof of a sale by one behind the bar is sufficient evidence to show that the saloon was kept open.⁷⁹ A manager of a saloon, on returning from a theater with a friend, just as the saloon was being closed, gave him half a glass of sherry wine from the saloon stock; it was held that he was not guilty of keeping the house open after hours and permitting drinking therein.⁸⁰

Sec. 669. Keeping open at prohibited time, continued.

To constitute the offense of keeping a saloon open, it is said that it must be so kept that persons may get in and out of it. Where, therefore, the outer door was closed, but the persons in at the closing time remained, and the keeper of the saloon intended to sell them liquor, no offense, it was held, was committed, for a sale did not amount to a keeping of the saloon open.⁸¹ It is not necessary that the opening of the saloon be willful to incur the penalty of the statute,⁸² nor that the defendant personally escort the customer into the barroom.⁸³ Where a statute declared that saloons should not be open between 10 o'clock, P. M. and 5 o'clock A. M., and at 10 o'clock P. M. the keeper locked the doors to his saloon but

⁷⁸ *Tobin v. District of Columbia*, 22 App. D. C. 482.

⁷⁹ *Moncla v. State* (Tex. Cr. App.), 70 S. W. 548; *Bell v. Walters*, 14 W. N. (N. S. W.) 190.

Sometimes statutes of this kind apply only to licensed dealers, and unlicensed dealers cannot be convicted of keeping a saloon open, for in contemplation of law they cannot keep a saloon. *Jordan v. Nocolin*, 84 Minn. 370; 87 N. W. 916.

⁸⁰ *White v. Neilson*, 6 F. (Just. Cas.) 51.

⁸¹ *Metropolitan Police Commissioners v. Roberts*, 73 L. J. K. B. 231 [1904]; 1 K. B. 369; 52 W.

R. 560; 68 J. P. 39; 20 T. L. R. 105.

It may well be doubted if this case would be accepted as a proper construction of the statute in many States, owing to the extreme length and strictness that many courts have gone on questions involving the liquor traffic.

⁸² *Cranfill v. State*, 49 Tex. Cr. App. 397; 92 S. W. 846; *Biggs v. Lamley* [1907], Viet. L. R. 300; *McGee v. Wolfenden*, [1907], Viet. L. R. 195.

⁸³ *People v. Rand*, 114 N. Y. App. Div. 826; 100 N. Y. Supp. 174; *Blaylock v. State*, 108 Tenn. 185; 65 S. W. 398.

remained with his bartenders to take up the cash and compare the amount with the register, all of which took only fifteen or twenty minutes, and then they unlocked the door and passed out, no one entering, and no sales having been made after closing, it was held that the statute had been violated.⁸⁴ Where a statute required a saloon to be "locked," it was held that merely slipping a bolt into its place was not a compliance with its provisions, the word "locked" meaning locked in the ordinary sense of the word.⁸⁵ Yet the court making this decision held that under the law permitting sales to travelers on Sunday the saloon might be kept open to sell to them, by which we may understand that entering the saloon to procure liquor for travelers was not a violation of the statute requiring such places to be closed on that day.⁸⁶ Of course, if a saloon be opened without the knowledge or consent of its owner, no offense is committed on his part.⁸⁷ But it has been held that if defendant's barkeeper keep the saloon open in disregard of his instructions such defendant violates the statute.⁸⁸ Thus, where a plumber entered a saloon at a prohibited time to repair a water pipe, and after completing the work remained, and, without request, swept out the saloon, and remained a few minutes longer talking with the barkeeper,

⁸⁴ *Lingelbock v. Hobson*, 139 Iowa, 488; 107 N. W. 168. This is certainly a very extreme decision, produced probably by public clamor against the liquor traffic.

In Canada only a licensed saloon keeper can be guilty of keeping a saloon open at prohibited times. *Queen v. Davidson*, 6 Can. Cr. Cas. 117; 3 Terr. L. R. 425; *Regina v. Henderson*, 4 Terr. L. R. 146; 2 Can. Cr. Cas. 364; *Regina v. Williams*, 8 Manitoba 342; *Regina v. Grannis*, 5 Manitoba 153; *Regina v. Radwell*, 5 Ont. 186; *Regina v. Henderson*, 3 Terr. L. R. 146. Probably upon the

theory that only a licensed dealer can have a saloon.

⁸⁵ *O'Flaherty v. Hackett*, 14 Vict. L. R. 97.

⁸⁶ *Pewtress v. Smith*, 13 Vict. L. R. 390.

⁸⁷ *Beane v. State*, 72 Ark. 662; 80 S. W. 573.

⁸⁸ *People v. Possing*, 137 Mich. 303; 100 N. W. 396; 11 Detroit Leg. N. 249; *People v. Kriesel*, 136 Mich. 80; 98 N. W. 850; 10 Detroit Leg. N. 972.

[Citing *People v. Roby*, 52 Mich. 577; 18 N. W. 365; 50 Am. Rep. 270; *People v. Blake*, 52 Mich. 566; 18 N. W. 360; *People v. Talbot*, 120 Mich. 486; 79 N. W. 688.]

it was held that the statute had been violated, the saloon having been kept open contrary to law.⁸⁹ Opening the saloon to sell to an employe is a violation of the statute.⁹⁰ So if a social club keeps its bar open it violates the statute.⁹¹ If hotels may keep their bars open to dispense liquors to their guests, it is error to charge generally that the defendant was guilty if he kept his place of business open or sold liquors during prohibited hours.⁹² Where the only entrance to the saloon keeper's dwelling was through his saloon, it was held that no offense was committed by opening the saloon doors to reach such dwelling;⁹³ but exactly the opposite has also been held.⁹⁴ The fact that the saloon does not exactly cover the place as described in the application for a license and in the license is no defense, although a statute required the place where the saloon was to be opened to be specifically described in both the application and license.⁹⁵ In an Australian case the police on entering licensed premises during prohibited hours found the bar lighted, the licensee's husband inside the bar, and the bar door locked. The husband thereupon had the door unlocked and came out of the bar, and the door was immediately relocked. No liquor was sold. The statute required the doors to be kept locked during prohibited hours.

⁸⁹ *People v. Lundell*, 136 Mich. 303; 99 N. W. 12; 11 Detroit Leg. N. 1, citing *People v. Waldvogel*, 49 Mich. 337; 13 N. W. 620; *People v. Crowley*, 90 Mich. 366; 51 N. W. 517; *State v. Grant*, 20 S. D. 164; 105 N. W. 97; *Barber v. Sullivan*, 78 Ill. App. 298.

⁹⁰ *McCarty v. Atlanta*, 121 Ga. 365; 49 S. E. 287 (citing *Moneses v. State*, 78 Ga. 110); *People v. Crowley*, 90 Mich. 366; 51 N. W. 517.

⁹¹ *Mohrman v. State*, 105 Ga. 709; 32 S. E. 143; *Beauvoir Club v. State*, 148 Ala. 643; 42 So. 1040.

⁹² *State v. Eckert*, 74 Minn. 463; 77 N. W. 294. See *State v. Binnard*, 21 Wash. 349; 58 Pac. 210, and *Pewtress v. Smith*, 13 Vict. L. R. 390.

⁹³ *Hannan v. District of Columbia*, 12 App. D. C. 265; *People v. Henze*, 149 Mich. 130; 112 N. W. 491; 14 Det. L. N. 491.

⁹⁴ *People v. Talbot*, 120 Mich. 486; 79 N. W. 688.

Perhaps it was the duty of the saloon keeper to so construct his dwelling house that he could enter it without going through his saloon. See *People v. Minter*, 69 Mich. 557; 26 N. W. 701.

⁹⁵ *State v. Sodini*, 84 Minn. 444; 87 N. W. 1130.

It was held that the statute had been violated.⁹⁶ Proof that on three different Sundays defendant sold liquor in his dwelling house and there permitted the purchasers to drink it, is sufficient evidence to sustain the charge of keeping a tippling house open on a Sunday.⁹⁷ Where a saloon keeper opened his saloon to take in a relative suddenly taken ill in the street, and there were other places into which he could have been taken, it was held that the evidence did not show an overwhelming necessity for opening the saloon.⁹⁸ If the defendant may open his saloon for a particular purpose, then the burden is on him to show that he opened it for that particular purpose.⁹⁹ Unless the statute makes the offense to be a keeping open with intent to supply liquors, it is not necessary to show it was kept open with that intent.¹

⁹⁶ *Connolly v. Stenniker*, 22 Vict. L. R. 257; 18 Austr. L. T. 60; 2 Austr. L. R. (C. N.) 322, explained and approved in *Charles v. Bones*, 22 Austr. L. T. 97; 6 Austr. L. R. 209. See also *Beddek v. Bowdler*, 26 N. Z. 884.

⁹⁷ *Williams v. State*, 100 Ga. 511; 28 S. E. 624; 39 L. R. A. 269.

⁹⁸ *People v. Taylor*, 110 Mich. 491; 68 N. W. 303. This certainly is a "hard case."

⁹⁹ *Clifford v. O'Donnell*, 24 N. S. W. 8.

¹ *Clifford v. O'Donnell*, 24 N. S. W. 8; *Bell v. Walters*, 14 W. N. (N. S. W.) 190.

If a liquor dealer's bond be conditioned to observe all the liquor laws, it is a breach of its terms if he keeps open in violation of a statute requiring him to close his saloon on Sunday. *Quintard v. Corcoran*, 50 Conn. 34.

If a statute prohibits the keep-

ing open on Sunday and another statute prohibits a sale on that day; to open a saloon and make a sale therein on that day is a violation of both statutes, and two offenses are committed. *State v. Ambs*, 20 Mo. 214; *Hudson v. Geary*, 4 R. I. 485.

A saloon is kept "open," although admission can be gained only upon application to the proprietor. *Kroer v. People*, 78 Ill. 294; *People v. Cunmerford*, 58 Mich. 328; 25 N. W. 203; *People v. Beller*, 73 Mich. 640; 41 N. W. 827; *Birmingham v. People (Colo.)*, 90 Pac. 1121.

To open a saloon in response to the demand of a police officer, who desires to search the place for an alleged criminal or for alleged stolen property is not an offense, though a crowd follow the officer into the saloon. *Miller v. State*, 68 Miss. 533; 9 So. 289.

A statute forbidding the "exposure" of liquors on Sunday does

Sec. 670. Selling or exposing liquors for sale or opening premises during closing hours—English cases.

Under the English statutes many decisions have been made concerning sales or exposing liquors for sale or opening or keeping open licensed premises during the time that public places for the sale of liquors are required by statute to be closed. The statute provides that, "Any person who during the time at which premises for the sale of intoxicating liquors are directed to be closed by or in pursuance of this act, sells or exposes for sale on such premises any intoxicating liquor, or opens or keeps open such premises for the sale of intoxicating liquors, or allows any intoxicating liquors although purchased before the hours of closing to be consumed in such premises, shall be" liable to a penalty." One of the English judges expressed the opinion that "a person opens his premises within the meaning of this section when he opens them for carrying out of any material part of the transaction of sale."³ Other

not require them to be covered up when at the bar. *Houtsch v. Jersey City*, 29 N. J. L. 316.

To open a door in a partition between a saloon and a store, when both are owned by the same person, is an "opening" of the saloon. *Mallon v. Commonwealth* (Ky.), 98 S. W. 315; 30 Ky. L. Rep. 328.

An ordinance requiring all places where "near beer" is sold to be kept closed during night hours or on Sundays, election days or legal holidays is valid. *Campbell v. Thomasville* (Ga.), 64 S. E. 815. Where a statute provides that a city may give permission to open a saloon after an hour set by such statute, it must give the permission by a duly enacted ordinance, and can not do it by the individual permission of members of the common council.

People v. Richmond, 59 Mich. 570; 26 N. W. 770.

A statute empowering police commissioners, whenever in their judgment the public peace requires it, to order the closing temporarily of all barrooms, requires them to specify on the face of the order the length of time the barrooms shall be kept closed, and any order to operate, by its terms, until further notice is void. *State v. Strauss*, 49 Md. 288.

If one obtain a license in his own name and permit another to conduct a saloon in his name under it and deposit the receipts in his name, he makes him his agent and is liable for losses at gaming carried on at the place, though he exercise no control over the place.

² 37 and 38 Vict. c. 49, § 9.

³ *Saunders v. Thorney*, 62 J. P. 404; 78 L. T. 627; 14 T. L. R.

statutes permit a keeper to have his *bona fide* private friends or guests during the prohibited hours and also permitted him to supply them by gift with liquors.⁴ And it will be noted that liquors cannot be consumed on the premises after closing hours which had been bought while the house could be kept lawfully open. We take the following summary of the English cases from Mr. Patterson's excellent work,⁵ which clearly shows how the courts of that country regard what is an offense under this statute: "In *Tennant v. Cumberland*,⁶ Tennant, a beer house keeper, was charged with opening his house for the sale of beer before the prohibited hour on Sunday. The evidence in support of the charge was that a little after midnight on Sunday, the door of the house was closed and all appeared quiet; that a little after two o'clock on Sunday morning, persons looking through the window saw a man drinking with the beer house keeper in the house, and that afterwards the beer house keeper let the man out. The court held that there was no evidence of opening the house for the sale of liquor, inasmuch as it did not appear but that the man was let into the house on the Saturday or that the house was open at all on Sunday before he was let out. In *Cates v. South*,⁷ an ale house keeper was charged with keeping open the house for the sale of spirits during the prohibited hours. The only evidence was that guests remained in the house after the hour of closing, but there was no selling of liquor after the hour of closing. The court held there was no evidence of keeping open, but evidence of allowing liquor to be consumed, and that an ale house keeper was not bound to turn his guests

346; *Noblett v. Hopkinson* [1905], 2 K. B. 214; 69 J. P. 269; 74 L. J. K. B. 544; 53 W. R. 637; 92 L. T. 462; 21 T. L. R. 448.

⁴ *Overton v. Hunter*, 23 J. P. 608; 1 L. T. 360.

Formerly gifts of liquor to guests were not forbidden. *Petherick v. Sargent*, 26 J. P. 135; 6 L. J. 48.

⁵ Patterson's Licensing Acts (19 ed.), pp. 504-508.

⁶ 1 El. and El. 401; 23 J. P. 57 (decided under 11 and 12 Vict. c. 49, s. 1, now repealed, which made it an offense to open licensed premises for the sale of wine, spirits, beer, etc., or sell wine, spirits, beer, etc., before certain hours on Sundays).

⁷ 23 J. P. 739; 1 L. T. 365 (also decided under 11 and 12 Vict. c. 49, s. 1).

out when the clock struck twelve. In *Thomson v. Greig*,⁸ a constable found the door of a public house ajar at twenty minutes to 4 A. M., and pushing it open found five men in the bar parlour, three of whom were drunk. Glasses of spirits were found on the table but none of the men were seen consuming anything. The licensee was charged under the Public House Closing Act, 1864,⁹ s. 5, for opening his house during closing hours, and convicted, and the court held that there was ample evidence to support the conviction. Cockburn, L. C. J., said: 'I think there was abundant evidence here on which the justices might convict the appellant [the licensee], and it was not material that the men were not seen to consume anything. To hold otherwise would be opening a door to a gross abuse.' In *Jefferson v. Richardson*,¹⁰ an ale house keeper was charged under 11 and 12 Vict., c. 4, s. 4, for unlawfully and knowingly opening and keeping open the licensed premises for the sale of ale, etc. At one o'clock on Sunday morning seven men were seen to come out of the side door of the premises, the front door being shut, and shortly afterwards an eighth man came out drunk. The ale house keeper said that they were lodgers, and there was no other evidence on that point one way or the other. The justices convicted but the court quashed the conviction on the ground that there was not sufficient evidence to justify a conviction for opening or keeping open the house. Lush, J., said: 'If the conviction had been for selling beer the evidence might have been sufficient, but here the charge is for opening the house.' Mellor, J., said: 'There may have been some evidence if the offense charged had been selling but here the charge is opening the house.' In *Brewer v. Shepherd*,¹¹ a beer house keeper was charged with keeping open his premises for the sale of intoxicating liquor during prohibited hours. A man went into a beer house after closing hours and was seen to come out with a bottle of beer. Afterwards the man explained that he had left the bottle before closing hours, ordering it to be filled, and then went to get shaved, after which he called for

⁸ 34 J. P. 214.¹⁰ 35 J. P. 470.⁹ 27 and 28 Vict. c. 64.¹¹ 37 J. P. 102.

the bottle. The justices, disbelieving the explanation, convicted the beer house keeper, and it was held that there was some evidence that the offense had been committed and that the conviction could not be interfered with. In *Pearse v. Gill*,¹² some farmers had met on licensed premises to transact business as to letting some grass fields, and remained after the hour of closing with drinking glasses before them, some of which were not quite empty, the front door being closed, but a back door being unfastened. The licensee was charged for unlawfully opening or keeping open his premises after closing hours, and the court held that there was evidence to support a conviction for keeping open. Field, J., said: 'The case of *Tennant v. Cumberland*, *supra*, was under a statute which prohibited the opening of houses; here the statute is against keeping open. The back door here was unfastened, and, if so, how can you say there was no evidence of keeping open the house, especially as men were inside with beer before them?' Mellor, J., said: 'The justices must consider all the circumstances and they might have thought it unlikely that the men were not supplied after closing hours.' In *Saunders v. Thorney*,¹³ a beer house keeper was charged under s. 9 of this act for opening his house for the sale of intoxicating liquors during prohibited hours. A person on the Saturday evening ordered and paid for a dozen bottles of beer, which were, by arrangement, to have been delivered on the Saturday night, but, owing to an accident, the beer was not delivered on the Saturday. During prohibited hours on the Sunday the purchaser sent his servant to the beer house for two bottles of the beer, and such servant was there supplied with and was seen to come out of the licensed premises with the two bottles of beer. The justices convicted and the high court upheld the conviction. There appeared to have been no appropriation of any specific goods for the purposes of the contract on the Sunday, and on the Sunday the house was opened for the delivery of goods in respect of which there had been no appropriation and no property had passed. The

¹² 41 J. P. 742.

¹³ 62 J. P. 404; 78 L. T. 627;
14 T. L. R. 346.

delivery on the Sunday was a material part in the carrying out of and giving effect to the contract made on the Saturday. There was thus sufficient evidence to support the conviction. In *Jeffrey v. Weaver*,¹⁴ a publican was charged with keeping open his licensed premises for the sale of intoxicating liquor during closing hours. Two men were found in the bar by a constable after closing hours. They had remained on in the house since before closing time and subsequently left by a back door and ran down the lane. All the doors were closed and locked so that there was no access to the premises from the outside. It was held that there was no evidence of keeping open. Bruce, J., said: 'In my opinion, if the doors are really closed so that a person outside could not come in, the premises are not open within the meaning of s. 9 of the Licensing Act, 1874. It is really a question of means of access to the interior of the premises from the outside, and if there are no such means of access, then the premises are not open or kept open within that section.' In *Lloyd v. Burnett*,¹⁵ the appellant was charged for unlawfully keeping open his premises during closing hours. The house was entered by the police after closing time (11 o'clock). Five men were found in the bar with glasses of liquor before them. Every Saturday night it was usual to have the house washed up after 11 P. M., and it was proved that no drink had been sold after 11 o'clock; that although the doors were open no person would have been supplied had he entered after 11 o'clock, and the front door was always kept open while the house was being cleansed. The justices convicted for keeping open for the sale of liquor, but the conviction was quashed by the high court. *Pearse v. Gill* may be distinguished from *Lloyd v. Burnett* on the ground that, in the latter case, the justices found as facts that no person would have been supplied had he entered, and that no drink was, in fact, sold after 11 o'clock. Channell, J., said: 'I think the justices must be taken to have found as facts that no person would have been supplied had

¹⁴ [1899] 2 Q. B. 449; 63 J. P. 193; 47 W. R. 638; 15 T. L. R. 663; 68 L. J. Q. B. 817; 81 L. T. 422.

¹⁵ 64 J. P. 708; 82 L. T. 804.

he entered, and that no drink was, in fact, sold after 11 o'clock. That being so, I think that the justices were wrong in convicting.' In *Commissioner of Police v. Roberts*,¹⁶ a publican was summoned for unlawfully keeping open his premises during prohibited hours. The premises were closed at the closing hour, but certain persons who were present at a Masonic festival remained on. It was held that in order to constitute the offense of keeping open licensed premises for the sale of intoxicating liquor during prohibited hours there must be a keeping open of the premises in the sense that people can get in from the outside to procure intoxicating liquor, or can get it supplied to them when outside. In *Noblett v. Hopkinson*,¹⁷ two men went to the house of the respondent on Saturday during opening hours and asked if they could have half a gallon of beer delivered to them on Sunday morning during the prohibited hours. They paid for the beer, and directly afterwards, before closing time, half a gallon of beer was drawn and put in a bottle belonging to the respondent, and corked and put on the bar counter by the respondent's son. It was subsequently taken by him to the brew house stable within the curtilage of the licensed premises, when it was taken by him on the Sunday morning and given by him to the barman behind the counter in the licensed premises, to deliver to the purchasers during prohibited hours. A charge against the respondent of unlawfully opening his premises for the sale of intoxicating liquor during prohibited hours on the Sunday was dismissed by the justices. The court held that there had been no sufficient appropriation of the beer on the licensed premises on the Saturday and that the respondent ought to have been convicted. The court (Lord Alverstone, C. J., and Kennedy J., Ridley, J., diss.) held that, assuming that there had been a complete appropriation of the beer on the Saturday, the respondent was nevertheless liable to be convicted on the ground that the delivery on

¹⁶ [1904] 1 K. B. 369; 68 J. P. 39; 73 L. J. K. B. 231; 52 W. R. 560; 20 T. L. R. 105.

¹⁷ [1905] 2 K. B. 214; 69 J. P. 269; 74 L. J. K. B. 544; 53 W. R. 637; 92 L. T. 462; 21 T. L. R. 448.

Sunday was an essential condition of the purchase, and that by opening his premises on that day for the carrying out of the material part of the contract of Saturday he had opened them during prohibited hours. In *Mackenzie v. Spear*,¹⁸ there was an ordinary bargain for sale and delivery during opening hours, the goods were set aside for the purchasers to be delivered on the Saturday, it was no material part or no part of the transaction at all that they should be delivered on the Sunday, but the purchasers came and took them away on the Sunday. The court held that the licensee had not infringed the section. In *Finch v. Blundell*,¹⁹ a constable entering during prohibited hours found two men secreted, one having a pot of fresh beer in his hand; the outer doors were shut, and the men not seen to enter. The court held some evidence of opening the house for sale. In *Smith v. Vaux*,²⁰ during prohibited hours the street door was found open, and men, not lodgers or travelers, drinking inside, but there was no evidence as to when the liquor was sold. The court held some evidence of keeping open for sale. In all these cases it is not material to prove that the persons complained of were seen to consume anything.”²¹

Sec. 671. Closing premises.

The English statute requires premises whereon are sold liquors to be closed during certain hours of certain days and during certain hours of the night. It permits saloons to be open on certain hours on Sunday in certain districts, including the metropolitan districts of London. Within this district the opening hours on Sunday are from 1 P. M. to 3 P. M. and from 6 P. M. to 11 P. M.; beyond this district, but within the metropolitan police district, from 12:30 P. M. to 2:30 P. M. and from 6 P. M. to 10 P. M.; and elsewhere the same as in the latter instance.²² Formerly saloons could not be opened on Sunday during the hours of divine service in the town, but if

¹⁸ Referred to at [1905] 2 K. B. p. 220; 69 J. P. p. 270.

¹⁹ 26 J. P. 71; 5 L. T. 672.

²⁰ 26 J. P. 134; 6 L. T. 46.

²¹ Cockburn, C. J., in *Thompson v. Greig*, 34 J. P. 215.

²² *Patterson's Licensing Acts* (19 Ed.), p. 497.

no such service was held there could be no conviction for keeping a saloon open on that day.²³ Though a theater be open that fact does not authorize sales in it at prohibited hours.²⁴ "Where the premises are kept for two different purposes, as, for example, where a house is subdivided into two parts, one for selling liquors and the other for groceries, and at the closing hours for liquors the part used for selling liquors is closed by shutters, and all communications with the grocer's shop is cut off, no offense is committed by continuing to sell groceries and other articles in the other part of the premises unless the grocer's shop is kept open merely as a blind for the other purposes, as to which last matter of fact it will be for the justices to decide."²⁵ So where the large wooden case in which all the liquors were kept was shut up and locked, it was considered that no offense had been committed.²⁶

Sec. 672. Constable demanding visitor's address.

By the provisions of the English statute: "Any constable may demand the name and address of any person found on any premises during the period during which they are required by the provisions of this act to be closed, and if he has reasonable ground to suppose that the name or address given is false, may require evidence of the correctness of such name and address, and may, if such person fail upon demand to give his name or address, or such evidence, apprehend him without warrant, and carry him as soon as practicable, before a justice of the peace." If such person fails to comply with the demand of the constable he is liable to a fine.²⁷ Of this quoted clause it has been said: "The visitor found on the premises during prohibited hours is bound to give his name

²³ Regina v. Knopp, 2 E. & B. 447; 22 L. J. M. C. 139; 17 J. P. 599.

²⁴ Gallagher v. Rudd, 67 L. J. Q. B. 65 [1898]; 1 Q. B. 114; 77 L. T. 367; 46 W. R. 108; 61 J. P. 789; 18 Cox, C. C., 654.

²⁵ Patterson's Licensing Acts (19 ed.), p. 497, citing Bridgen v.

Heighes, 1 Q. B. Div. 330; 40 J. P. 661; 45 L. J. M. C. 58; 34 L. T. 242; 24 W. R. 272; *Ex parte* Joynt, 38 J. P. 390.

²⁶ Tassell v. Ovenden, 2 Q. B. Div. 383; 41 J. P. 710; 46 L. J. M. C. 228; 36 L. T. 696; 25 W. R. 692.

²⁷ 35 and 36 Vict. c. 94, § 25.

and address, on request, to a constable, but he is not bound to give it to any other person. As to the constable requiring evidence of the correctness of the name and address given, it is difficult to define what this means. The person cannot be expected to do more than assert his correct name and residence; at the same time, if the name and address given turn out to be false, the constable, acting at his peril, will be able to justify the apprehension, if made. The more prudent course for the constable will be to proceed against the visitor if the name and address be refused or be false, and not apprehend on the last ground, namely, 'giving false evidence with respect to such name or address,' which must be a very vague and uncertain ground to proceed upon, so far as he is concerned, and will require great judgment to work out within the limits of the law. * * * In order to establish the offense, a previous request by the constable must be proved, and in all cases the reasonableness and truth of the information given will be important. No power is given to the constable to turn out the visitor found on the premises, or detain him till inquiries are made, and though he may, in the circumstances stated, apprehend the visitor and carry him before a justice, this will be at the risk of the constable."²⁸

Sec. 673. Stranger found on the premises.

An English statute, and there are others, provides that any person found on the licensed premises during the closing hours, "unless he satisfies the court that he was an inmate, servant, or a lodger on such premises, or a *bona fide* traveler, or that otherwise his presence on such premises was not in contravention of the provisions of 'the statute' with respect to the closing of licensed premises," shall be liable to a penalty not to exceed forty shillings. Upon this and other statutes referred to therein, the following construction has been put: "The offense created by the first paragraph [that portion of the statute quoted] of the section is the person being found on licensed premises during prohibited

²⁸ Patterson's Licensing Acts (19 ed.), p. 393.

hours, and not satisfying the court that he is an inmate, servant, lodger, traveler, or otherwise not contravening the section. In order to convict the person found on the premises it is not necessary that the keeper of the house should have committed any offense. Nor, on the other hand, is it necessary, in order to convict, that the person found should have consumed or purchased any liquor during the prohibited hours. The mere presence of the person found is sufficient *prima facie* evidence of the offense unless explained. The explanation which will no doubt be generally given, will be that the person found is a 'friend of the family' and is on a visit of friendship or condolence or mutual admiration. It was under this act, before the Act of 1874 ²⁹ was passed, not unlawful for a licensed person to entertain a visitor or friend even during prohibited hours, and in order to define the circumstances under which the friend will escape liability, it is necessary to consider what meaning is to be given to the words 'in contravention of the provisions of this act with respect to closing.' The only object of the provisions as to closing as declared by the Act of 1874 ³⁰ is to prevent the selling or exposing for sale of liquors, or keeping open the premises for the sale of liquors, during those hours, or allowing liquors already sold to be consumed there, or permitting any equivalent to a sale or consumption, as explained by Section 62 of this act; ³¹ therefore, the provisions will not be contravened if there is no selling and no keeping open, or exposing for sale, or consumption of liquors on the premises during those hours by persons of the class of customers or purchasers. It would seem to follow that if a person is found on the premises and is a private friend, or has any lawful business there, the mere fact of the licensed person giving (not selling) liquor to such visitor would not amount to an offense, while, on the other hand, if the liquor was actually sold to, or consumed by, one who is there as a customer and not as a private friend, it would. This view of the construction of this section has been more clearly sup-

²⁹ 37 and 38 Vict. c. 49.

³⁰ Sec. 9.

³¹ The section referred to simply provides what facts may be taken to show a sale.

ported by the Act of 1874, Section 30,³² which expressly exempts from any penalty a licensed person who during prohibited hours entertains his private friends *bona fide* at his own expense. It will thus be a delicate inquiry in such cases for the justices to discriminate between sham friendship and real hospitality, or lawful business. A 'private friend' is a somewhat vague phrase, but justices may, from the explanations, easily settle its meaning in each case. Not only private friends, however, but persons having other lawful business on the premises would also be exempt, however difficult it may be to describe the conditions of their being lawfully there. If, for example, people have been frequenting the house and paying for their liquor in the ordinary way, and being about to leave on the closing hour arriving the licensed person says he will treat them as his private friends, and allows them to return later, this will usually be treated as a mere device and the host will be held liable to the penalty.³³ The mere fact of persons being private friends and lawfully on the premises during closing hours does not entitle the landlord to allow them to carry on gaming³⁴ nor play at a game of billiards.³⁵ A private friend apparently does not contravene this section if he plays cards for money after closing hours.³⁶ Another instance of no penalty being incurred will occur in grocers' and tobacconists' shops, where customers after closing hours are *bona fide* purchasing other articles as tea, sugar, cigars, which a licensed person is not prohibited from selling.³⁷ This section obviously cannot apply to persons at or near a railway

³² "No person keeping a house licensed under this or the principal act shall be liable to any penalty for supply intoxicating liquors after the hours of closing to private friends, *bona fide*, entertained by him at his own expense." 37 and 38 Vict. c. 49, § 30.

³³ Citing *Corbett v. Haigh*, 5 C. P. Div. 50; 44 J. P. 39; 42 L. T. (N. S.) 185; 28 W. R. 430.

³⁴ Citing *Hare v. Osborne*, 34 L.

T. (N. S.) 294; *Osborne v. Hare*, 40 J. P. 759.

³⁵ Citing *Ovenden v. Raymond*, 40 J. P. 727.

³⁶ Citing *Cooper v. Osborne*, 35 L. T. (N. S.) 347; 40 J. P. 759.

³⁷ Citing *Brigden v. Heighes*, 1 Q. B. Div. 330; 40 J. P. 661; 45 L. J. M. C. 58; 34 L. T. 342; 24 W. R. 58; *Ex parte Joynt*, 38 J. P. 390; *Tassell v. Ovenden*, 2 Q. B. Div. 383; 41 J. P. 710.

station refreshment room, which need not at any time be closed, if there are persons arriving at or departing from the station by railroad.³⁸ It is enough to satisfy the word 'found on the premises' if the person has been detected or seen or clearly ascertained to have been on the premises during prohibited hours.³⁹ Thus, P was seen to go into licensed premises and in three minutes to come out again with a bottle of gin. The justice refused to convict P because he was not 'found on the premises.' A divisional court held that the justices were wrong as the facts proved were equivalent to P being found or ascertained to be actually on the premises.⁴⁰ The 'premises' were the premises comprised in the license. Thus, an outhouse may be part of the licensed premises.⁴¹ Where a licensee is convicted of unlawfully keeping open his premises for the sale of liquor, it will, in general, follow that customers who are found in the house were there in contravention of the statute. The burden of proof will be on them to show that they were not there in contravention of the statute."⁴²

Sec. 674. Permitting persons to enter saloon.

Statutes of recent date make it an offense to "permit" anyone to enter a saloon during the hours it must be kept closed. Usually the members of the proprietor's family are excepted. Where such a statute was in force, and the proprietor's barkeeper, while the proprietor was out of the city, entered the saloon on Sunday against his express orders, the proprietor was held not guilty. "It cannot be said that

³⁸ This is so by reason of the express provisions of a statute: "Nothing in this act contained as to hours of closing shall preclude the sale at any time, at a railway station, of intoxicating liquors of persons arriving at or departing from such station by railroad." 37 and 38 Vict. c. 49, § 10.

³⁹ Citing *Thomas v. Powell*, 57 J. P. 329.

⁴⁰ Citing *Thomas v. Powell*, 57 J. P. 329.

⁴¹ Citing *Regina v. Tott*, 25 J. P. 327; 30 L. J. M. C. 177; 4 L. T. 306; 9 W. R. 663.

⁴² *Patterson's Licensing Acts* (19 ed.), p. 391, citing to the last proposition. *Harbottle v. Gill*, 41 J. P. 742.

putting it within the power of another to do an act means a permission to do such act," said the court.⁴³ But where the saloon keeper intrusted his barkeeper with the key to his saloon and at the time of his arrest he admitted that he had told the barkeeper to be more careful and not let the police see him in the saloon, an appellate court refused to set aside a conviction.⁴⁴ Where the statute required the license to be issued for a particular room, which should be on the ground or first floor and front on a public street, and a partition reaching to within three feet of the ceiling, in which were two doors, separated the saloon from a billiard room, and these doors were kept open during the week but closed on Sunday, and the dimensions of the room given in the licensing papers were greater than the actual dimensions of the barroom, and, in fact, extended into the billiard room, it was held that a statute making it an offense to permit anyone to enter the saloon on Sunday was violated by permitting them to enter the billiard room on that day.⁴⁵ Under such a statute if a stranger go upon the premises and ask for a drink the proprietor is not guilty of an offense.⁴⁶ Where a statute made it an offense to permit anyone to be on the premises for an unlawful purpose—such as purchasing liquor at a prohibited time—and a customer purchased liquor on a weekday and left it on the premises without the owner's knowledge, and on a Sunday went on the premises for it, it was held that no offense had been committed.⁴⁷ Evidence that a person was seen coming out of licensed premises after closing hours by a person standing outside the premises, is sufficient proof that such person was "found" on licensed premises within the meaning of a statute making it an offense for any person to be found on licensed premises during closing hours.⁴⁸

⁴³ *Wilson v. State*, 19 Ind. App. 389; 46 N. E. 1050.

⁴⁴ *Botkins v. State*, 36 Ind. App. 179; 75 N. E. 298. See *Armstrong v. State*, 14 Ind. App. 566; 43 N. E. 142.

⁴⁵ *Atkinson v. State*, 33 Ind. App. 8; 70 N. E. 560.

⁴⁶ *Charles v. Grierson*, 29 Austr. L. T. 222.

⁴⁷ *Wilson v. Peters*, 24 N. S. W. 9.

⁴⁸ *Roche v. Owens*, 23 N. S. W.

Sec. 675. Liability of servant keeping saloon open.

The general rule is that it is the proprietor who is liable if his saloon be kept open or be opened at prohibited times. As he has control over the premises it is his duty to keep them closed or see to it that they are kept closed. Whether or not his servant would be liable who actively participated with him in keeping the saloon open has not been decided; or whether the servant would be liable who opened the saloon pursuant to his orders, or opened it in violation of his orders, has also not been decided.⁴⁹ But statutes are occasionally drafted which in direct terms hold the servant liable who opens a saloon at prohibited times, and when that is the case it is no defense for him that he had no control of the saloon or of the conduct of the business therein.⁵⁰ Thus, the manager of a club is liable for keeping it open on a Sunday.⁵¹

Sec. 676. Sales to travelers at prohibited times in England.

In both England and several of its colonies a licensed dealer may sell on Sundays and at all times to "*bona fide* travelers" liquors to be consumed on the premises. In England a person is "not deemed to be a *bona fide* traveler unless the place where he lodged during the preceding night is at least three miles distant from the place where he demands to be supplied with liquor, such distance to be calculated by the nearest public thoroughfare."⁵² A similar definition is used in some of the Australian statutes. Patterson makes these observations on the English Act:⁵³ "The exemption from the penalty on the ground of serving a traveler is confined to houses licensed to sell liquor 'to be consumed on the premises,' and keepers of houses licensed to sell liquor not to be consumed on the premises are not mentioned, so that they cannot claim any exemption. Moreover, the liquor must be consumed on

⁴⁹ See *White v. Neilson*, 6 F. 709; 32 S. E. 143; see also *King v. Cavischi*, 8 Can. Cr. Cas. 78. (Just. Cas.) 51.

⁵⁰ *Ramey v. State* (Tex. Cr. App.), 61 S. W. 126. ⁵² 37 and 38 Vict. c. 49, § 10.

⁵¹ *Mohrman v. State*, 105 Ga. (19 ed.), pp. 510-512. ⁵³ Patterson's Licensing Act

the premises.⁵⁴ The question as to who was a traveler within the meaning of the exemption depended very much on his distance from home, and the courts had held that a person walking or driving two and a half miles from home sufficiently comes within the description of a traveler.⁵⁵ Whether business or pleasure is the object of the traveler is wholly immaterial.⁵⁶ Q, with others, traveled in a vehicle to a town twenty miles off on Sunday and went to a public house where they got refreshment and remained three hours. They then went to see the town and visited a second public house where they took refreshment during prohibited hours, staying fifteen minutes, after which they returned to the first house, from which they proceeded home. It was held that Q did not cease to be a traveler while he was in the second house and was there entitled to refreshment.⁵⁷ Where D, a publican, invited C, a friend who lived seven miles off, to sing at a concert in D's house, and C performed there till after closing hours, and C then, before starting home, was supplied with a bottle of whisky, it was held that C was a *bona fide* traveler and continued such till he returned home.⁵⁸ But if the publican supplies liquor to a *bona fide* traveler to be consumed off the premises he will be liable to the penalty.⁵⁹ The appellant was charged with selling beer on licensed premises during prohibited hours. The beer was sold to a railway porter who early on Sunday morning walked from his house where he had slept to a railroad station, and traveled thence by train to another station, where he was on duty during the first part of the day. During the interval between two trains he went for a walk to occupy his time and visited the appellant's inn,

⁵⁴ Mountifield v. Ward [1897], 1 Q. B. 326; 61 J. P. 216; 66 L. J. Q. B. 246; 76 L. T. 202; 45 W. R. 288; 18 Cox, C. C., 515; 13 T. L. R. 159.

⁵⁵ Peplow v. Richardson, L. R. 4 C. P. 168; 33 J. P. 407; 17 W. R. 410.

⁵⁶ Atkinson v. Sellers, 5 C. B. (n. s.) 442; 28 L. J. M. C. 12;

23 J. P. 71; Taylor v. Humphries, 30 L. J. M. C. 242; 10 C. B. (n. s.) 429; 9 W. R. 705; 4 L. T. 514; Taylor v. Humphries, 28 J. P. 793; 34 L. J. M. C. 1.

⁵⁷ Sheasby v. Oldham, 55 J. P. 214; 60 L. J. M. C. 812.

⁵⁸ Dames v. Bonds, 55 J. P. 503.

⁵⁹ Mountifield v. Ward, *supra*.

where he was supplied with beer at about 9:45 o'clock on Sunday morning. The inn was more than three miles from his house. The court held that the porter was a *bona fide* traveler, and, therefore, the appellant could not be convicted of selling beer during the time at which the premises were directed to be closed.⁶⁰ Where P's licensed house was three and a half miles from N, a large town, and about 131 persons on being asked stated that they had walked from N, on Sunday, and were then served in prohibited hours with a pint of beer and left the house of P immediately, the justices, on P being charged with opening in prohibited hours, found, as a fact, that the travelers had gone there solely to get beer and were not *bona fide* travelers; the court held that the decision of justices who convicted P could not be interfered with.⁶¹ In any proceeding against the keeper of a licensed house for supplying liquor to persons during the prohibited hours, it was held in *Roberts v. Humphreys*,⁶² that it lay on the defendant to prove that the person supplied was a traveler.⁶³ If, however, the stranger, being unknown to the housekeeper, is asked and answers that he is a traveler and states the place where he slept on the previous evening, and there is no reason for disbelieving him, that will be enough to justify the supply of refreshment. Where about sixty persons were found sitting in an ale house in prohibited hours, let in by a back door, of whom three had traveled four miles but had sat more than two hours, all the rest of the company being travelers, it was held that the justices might fairly draw the inference that all the people were not *bona fide* travelers.⁶⁴ The manager of W's hotel opened his house during prohibited hours on Sunday after the arrival of a railway train bringing excursionists. One or two persons living in a town a mile off were also served along with a crowd of travelers. Being charged, the

⁶⁰ *Cowap v. Atherton* [1893], 1 Q. B. 49; 68 L. T. 88; 57 J. P. 8; 41 W. R. 158; 5 R. 86.

⁶¹ *Penn v. Alexander* [1893], 1 Q. B. 522; 57 J. P. 118; 68 L. T. 355; 41 W. R. 392; 17 Cox C. C. 615.

⁶² L. R. 8 Q. B. 483; 42 L. J. M. C. 147; 38 J. P. 135; 29 L. T. 387; 21 W. R. 885.

⁶³ See also *Gallimore v. Goodall*, 38 J. P. 597.

⁶⁴ *Gallimore v. Goodall*, 38 J. P. 597.

manager swore that to his knowledge he served none who had not a railway ticket, but the justices convicted. The court held that as the *bona fide* belief of the manager was a question of fact, and the justices might reasonably infer that he had none, their decision could not be interfered with.⁶⁵ Where one or two non-travelers are among travelers supplied, this will not justify a conviction in the absence of any evidence of intention.⁶⁶ In this case there does not appear to have been any express finding that the defendant had no *bona fide* belief that all the persons were not *bona fide* travelers. By the latter part of this section no person now shall be deemed a traveler unless he is three miles from his place of sleeping on the previous night. It has been decided that the three miles are to be measured by the nearest public thoroughfare, whether by land or water. Thus, where by sailing in a boat across a public navigable lake or arm of the sea the distance would be less than three miles, while round by land it would be eight miles, the landlord would be liable for serving such traveler, for the way by sea was within the prohibited distance.⁶⁷ Nothing is said as to the length of time that has elapsed since the journey began. Though, however, the person slept three miles off the previous night, it does not follow that he is entitled to be served, the justices having still to find whether he had come to the place for the sole object of obtaining the liquor, and this may depend on the intervening period of time between the sleeping and the application.⁶⁸ The lodging place includes the traveler's own or any friend's house and is not confined to a lodging house, otherwise an absurdity would arise. The mere neglect of a servant, contrary to his or her instructions, to ask if the person supplied was a traveler, will not render the keeper of the house liable.⁶⁹

⁶⁵ Watt v. Glenister, 40 J. P. 181; 32 L. T. 856.

⁶⁶ Peache v. Colman, L. R. 1 C. P. 324; 35 L. J. M. C. 118; 14 W. R. 439.

⁶⁷ Coulbert v. Troke, 1. Q. B. Div. 1; 40 J. P. 533; 45 L. J. M. C. 7; 33 L. T. 340; 24 W. R.

41; see also Graham v. McDougall, 6 F. (Just.) 57.

⁶⁸ See Penn v. Alexander, *ante*, p. 511.

⁶⁹ Copley v. Burton, L. R. 5 C. P. 489; 22 L. T. 888; 39 L. J. M. C. 141.

But it will depend on whether the servant was a manager of that department of the business.”⁷⁰ A *bona fide* traveler stopped at a hotel and dined. He then went out and entered a saloon and purchased liquor there. It was held that he was a *bona fide* traveler at the saloon.⁷¹ In order to justify a sale the seller must in good faith believe he is selling to a *bona fide* traveler.⁷³ Thus, where four men went out for a Sunday walk and were supplied with liquor at a hotel two miles in a direct line from the place where they lived, but somewhat longer by the way they had come, and they did not go out with the intention to purchase liquor, and were known to the hotel keeper, it was held they were not *bona fide* travelers and the seller was convicted of an illegal sale.⁷⁴

Sec. 677. Sales to travelers at prohibited times in English colonies.

In British Columbia it is held that a constable visiting saloons on Sundays to see whether or not the law with respect to the sale of liquor is being obeyed, is a *bona fide* traveler within the meaning of the Licensing Act of 1891.⁷⁵ A person who furnishes a room in a hotel and lives there during two months is not a traveler, and if the hotel keeper sells liquor to him on Sunday he cannot shield himself under the statute permitting sales to travelers.⁷⁶ A statute authorizing a sale of liquor at any time to “a *bona fide* traveler seeking refreshment on arriving from a journey,” authorizes a sale to such traveler only on his arriving at the end of a journey, not on his arriving at some place in the course of his journey, although he may then have traveled more than the prescribed statutory distance from the place where he lodged during the preceding night.⁷⁷ But where a person *bona fide* travels from

⁷⁰ Bond v. Evans, 21 Q. B. Div. 249; 52 J. P. 613; 57 L. J. M. C. 105; 59 L. T. 411; 36 W. R. 767.

⁷¹ Oldham v. Sheasby, 60 L. J. M. C. 81; 55 J. P. 214.

⁷³ Regina v. Dublin, 8 L. R. Irish Rep. 274; Parker v. Regina [1896], 2 Irish Rep. 404.

⁷⁴ Graham v. McDougall, 6 F. (Just. Cas.) 57.

⁷⁵ Regina v. Harris, 2 B. C. 177.

⁷⁶ Ferguson v. Riendeau, 2 Mon. (Can.) S. C. 136.

⁷⁷ Hammond v. Hobson, 23 N. Z. 395, 1102.

his home to a certain place, intending to remain there for a time, and returns home on the same day, he makes two journeys, one there and the other back.⁷⁸ A fireman on a steamer arriving at a port at 12:10 P. M. and purchasing liquor at 8 P. M. is not a *bona fide* traveler seeking refreshment on arriving from a journey.⁷⁹ A person, otherwise a *bona fide* traveler, who arrives at 3 P. M. on Sunday, goes to a hotel and has a drink, and thirty-five minutes afterwards goes to another hotel and has another drink, is not, on the latter occasion, "seeking refreshments on arriving from a journey."⁸⁰ Nor is a person such a traveler who has traveled sixteen miles from one town to another on Sunday, who has taken a meal at the latter town elsewhere than at the licensed premises at which he subsequently applies for liquor, and who then at 10 P. M. demands liquors at licensed premises before returning home.⁸¹ Nor is one arriving at 11 A. M. and seeking refreshments at 4 P. M.⁸² So a person going from one place to another cannot obtain liquor at an intermediate place, for in doing so he is not "seeking refreshment on arriving from a journey."⁸³ Where such a statute was in force, F and H, two *bona fide* travelers, went into a hotel; they were accompanied by S, who was neither a traveler nor a lodger in the hotel; F called for and paid for three drinks, one of which was placed before S; before he could drink it a constable came in and almost immediately S left, without having touched the liquor. It was held that the license holder should have been convicted of an illegal sale to F of the liquor that went to S, the offense being complete the moment the liquor was sold to a traveler for consumption by any other person, a statute forbidding such a sale.⁸⁴ The burden in these

⁷⁸ Hammond v. Hobson, 23 N. Z. 395, 1102.

⁷⁹ Payne v. Johnston, 22 N. Z. 176. It was suggested that perhaps a man on a steamer lying in a harbor was not a traveler within the meaning of the statute.

⁸⁰ Clark v. Sheehan, 22 N. Z. 767.

⁸¹ O'Connell v. O'Malley, 18 N. Z. 577.

⁸² Stanton v. James, 19 N. Z. 392.

⁸³ Hammond v. Hobson, 23 N. Z. 395, 1102.

⁸⁴ Miller v. Hobson, 17 N. Z. 225.

cases is upon the accused to show that the sale was made to a *bona fide* traveler.⁸⁵ Where a statute requires a saloon keeper to "take all reasonable precautions" to ascertain if the purchaser is a traveler, it means such precautions as an honest and reasonable man would take under the circumstances of the particular instance.⁸⁶ But merely asking a person if he is a traveler is not taking reasonable precautions. The seller must inquire elsewhere.⁸⁷ But where two men rode from one town to another on Sunday on bicycles, seven and a half miles, told the defendant where they came from and that they were going right back, and he then sold them liquor, it was held that he had taken proper precautions to ascertain if they were *bona fide* travelers, although they admitted they had taken the journey to get a drink, of which fact the defendant was ignorant.⁸⁸ A defendant in South Africa was licensed to sell at M railway station, which was not a terminal station. On Sunday he could only sell refreshments while passenger trains were drawn up at the station, and the Government reserved to itself the right to close the platform against all but passengers. On Sunday he sold to certain persons who had not traveled by railway and had no tickets, but the sale took place while a passenger train was drawn up at the station. The Government had not exercised its right to close the platform. It was held that the defendant was not guilty.⁸⁹

Sec. 678. Sale at railway station in England at prohibited times.

By the express terms of an English statute⁹⁰ any licensed dealer may sell liquors "at any time, at a railway station * * * to persons arriving at or departing from such station

⁸⁵ Atwell v. Lucas, 3 N. S. W. L. R. 193.

⁸⁶ Perry v. Rasmusen, 22 N. Z. 581; McGrath v. Patton, 24 N. Z. 527.

⁸⁷ O'Connell v. O'Malley, 18 N. Z. 577.

⁸⁸ Cooper v. Anderson, 22 N. Z. 1010. See Brooking v. Crawford,

24 N. Z. 738; Nankivell v. Donovan, 13 N. Z. L. R. 60.

⁸⁹ Queen v. Truman, 15 Juta 79. For a case holding that sales should be made only to persons actually arriving and departing by train, see Rex v. Logan, 6 Col-linson 86.

⁹⁰ 37 and 38 Vict. c. 49, § 10.

by railroad.” Patterson⁹¹ says of this section that “there is no clear limit to the hours of closing, for at any time during day or night there may be persons wanting to depart from the station, so that, strictly speaking, no hours of closing are defined. The exemption of railway travelers arriving at or departing from the station was already established.”⁹² Thus, it was held that persons supplied ten minutes before the train started were travelers. It was also held that the fact of two non-travelers being amongst other travelers supplied, was not of itself evidence of the offense.⁹³ It has been held [under this section] that a person who buys a ticket at a railway station and departs from such station by train, for the sole purpose of obtaining liquor at the refreshment room at such station, is entitled to come within the section as being a person ‘departing from such station by railroad.’⁹⁴ ‘If, in fact,’ said Channel, J., ‘a person is not departing or about to depart by train, he is not a *bona fide* traveler, or a traveler at all. If the justices had found that when he was supplied with liquor the appellant never intended to go by the train, and that he only went because the police inspector came in, I think that their decisions [convicting the appellant] would have been right.’ This express exemption in [this section] extends to travelers whether living near the railway station or not, if they have just arrived from or are about to depart from such station. The distance of the journey by railway seems immaterial. And the words ‘persons arriving at or departing from such station by railroad’ are obviously wider than the ordinary word ‘travelers.’ ”

Sec. 679. What time statute adopts.

It is a matter of much importance to ascertain by what time the keeper's of saloons and public houses are to be controlled.

⁹¹ Patterson's Licensing Acts v. Burton, L. R. 5 C. P. 489; 39 (19 ed.), p. 509. L. J. M. C. 141; 22 L. T. 888.

That is, before the enactment of this section. ⁹⁴ Citing Williams v. Macdonald [1899], 2 Q. B. 308; 63 J. P.

⁹³ Citing Fisher v. Howard, 34 L. J. M. C. 42; 11 L. T. 373; 29 R. 701; 80 L. T. 758; 15 T. L. R. 343. J. P. 246; 13 W. R. 145; Copley

Thus, in this country it is a universal practice to adopt the time used by railroads in the vicinity as the local time of the place, though, as is well known, the actual time of the place and the railroad time will vary nearly thirty minutes in some places, while in a very few the two times coincide. In England the practice has been to follow the medium time of the place,⁹⁵ but now Greenwich time is followed throughout Great Britain whenever any expression of time occurs in any act of Parliament, deed, or other legal instrument, unless it is otherwise specifically stated.⁹⁶ Where it was unlawful to sell after 9 P. M., and the sale took place at 9:10 P. M. local time, but by railroad time it was about 8:50 P. M., the sale was held illegal, for local time controlled. The defendant had that day bought a clock which had been set on railroad time. The railroad station was four hours' drive away. The telegraph office at the place of sale kept railroad time.⁹⁷ Where a statute was adopted before the standard or railroad time was adopted by railroads, requiring saloons to be closed at 11 P. M., and after the adoption of such time it was amended but saloons under it were still required to be closed at 11 P. M., it was held that the statute as amended referred to standard time as established at the time of its passage and which was in use when the alleged offense was committed.⁹⁸

⁹⁵ *Curtis v. March*, 23 J. P. 633; 3 H. & N. 866; 28 L. J. Exch. 36.

⁹⁶ 43 and 44 Vict. c. 9 s. 1.

⁹⁷ *Queen v. Rubenstein*, 7 Juta 115.

In London five minutes before

closing time the electric lights are dimmed by shutting off the supply of electricity in part, from the central plant, as a warning of the approach of the time to close.

⁹⁸ *State v. Johnson*, 74 Minn. 381 77 N. W. 293.

CHAPTER XXI.

SALES AND GIFTS.

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Sec. 680. Illegal sale a statutory offense.

A sale of liquor without a license is a statutory offense. At common law it was no offense whatever to sell intoxicating liquor in any quantity to any person or for any purpose. To make out an offense the transaction must come within the provisions of the statute forbidding it and inflicting a penalty therefor.¹ And the terms of a statute will not be stretched to cover a transaction and punish the participators. This is very well illustrated by a statute which required each "dealer" to pay a license tax; but where the owner of liquor sold it in bulk at one sale, it was held that he had not violated the statute, a dealer being one "who makes successive sales as a business."² So a statute forbidding the gift of liquor on an election day is not violated by a sale,³ and a statute forbidding generally a sale, barter or loan is not violated by a gift.⁴ But under a license to sell beer wine cannot be sold, and it may be stated generally a license authorizing the sale of a particular kind of liquor cannot be so extended as to authorize a sale of any other kind.⁵

Sec. 681. Sale by child.

When the sale is by a child under fourteen years of age the presumption is that it had no capacity to commit the crime, and before there can be a conviction of it its legal capacity must be established by the evidence.⁶ But if the child is over that age then it is liable the same as a person of full age.⁷

¹ *State v. Gillilen*, 51 W. Va. 278; 41 S. E. 131; 57 L. R. A. 426; *State v. Hapsoos*, 1 S. D. 382; 47 N. W. 400; *Stiekrod v. Commonwealth*, 86 Ky. 285; 5 S. W. 580; *Evans v. Hall*, 45 Pa. 235; *Manning v. State*, 36 Tex. 670; *State v. Haines*, 35 Ore. 379; 58 Pac. 39; *Combs v. Commonwealth (Ky.)*, 104 S. W. 270; 31 Ky. L. Rep. 822.

² *Overall v. Bezeau*, 37 Mich. 506.

³ *State v. Edwards*, 134 N. C. 636; 46 S. E. 766.

⁴ *Commonwealth v. Dickerson (Ky.)*, 76 S. W. 1084; 25 Ky. L. Rep. 1043; *Allen v. State*, 14 Tex. 633.

⁵ *Regina v. King*, 57 L. J. M. C. 20; 20 Q. B. Div. 430; 58 L. T. 607; 36 W. R. 600; 52 J. P. 164; *Ex parte Ryan*, 1 W. N. C. 122.

⁶ *Commonwealth v. Mead*, 10 Allen 398.

Cagle v. State, 87 Ala. 38; 6 So. 300; *Brown v. State*, 47 Tex. Cr. App. 326; 83 S. W. 378.

Sec. 682. Licensee under no obligation to sell liquor.

A person holding a license to sell intoxicating liquors is under no obligation to sell to all suitable applicants, and he may refuse to sell to one and sell to another. In his licensed premises "no one has a right to insist on being served any more than in any other shop."⁸ Nor is a druggist, whom a statute provides "may" sell intoxicating liquor, subject to any liability if he refuse to sell, even to a proper person and on a proper occasion.⁹

Sec. 683. Sale or gift without a license.

Statutes universally require a license or the payment of a tax, except in prohibition districts, before the owner of intoxicating liquor can sell it. The securing of the license or the payment of the tax is a prerequisite of the validity of the sale, unless in some exceptional instance, and an inability to secure the license or because it has been wrongfully withheld, is no excuse.¹⁰ Nor is it any excuse, in a prosecution for an illegal sale, that the licensing court or board had not met, and could not meet, to grant a license to the defendant until long after the application had been made, where the sale is made pending the application,¹¹ or that the defendant was not able to get the requisite number of subscribers to his petition for a license or the requisite number of consents.¹² And although the defendant had performed all the things on his part neces-

⁸ Regina v. Rymer, 2 Q. B. Div. p. 140; Regina v. Armagh [1897], 2 Irish Rep. 57.

⁹ Treahy v. Holliday, 43 Kan. 29; 22 Pac. 1004; Pendennis Club v. Louisville, 7 Ky. L. Rep. (abstract) 831.

¹⁰ Brock v. State, 65 Ga. 437; State v. Jamison, 23 Mo. 330; Kansas City v. Flanders, 71 Mo. 281; Kadgihn v. Bloomington, 58 Ill. 229; New York v. Mason, 4 E. D. Smith, 142; Commonwealth v. Blackington, 24 Pick. 352; State v. Downer, 21 Wis. 274; Com-

monwealth v. Fontz, 135 Pa. St. 389; 19 Atl. 1025; Beckham v. Howard, 83 Ga. 89; 9 S. E. 784; Messenger v. Parker, 6 R. & G. 237; 6 C. L. T. 444; Queen v. Calhoun, 20 N. S. 395; 9 C. L. T. 62.

¹¹ *Ex parte* Driscoll, 27 N. B. 216; State v. Scampini, 77 Vt. 92; 59 Atl. 201.

¹² Hodge v. State, 116 Ga. 852; 43 S. E. 255; State v. Totman, 82 Mo. App. 56; Montpelier v. Mills, 171 Ind. 175; 85 N. E. 6.

sary to be performed in order to secure a license, but for some unknown reason the authorities had neglected to grant or even issue one after it had been granted, is not a protection as against a charge of a sale without it.¹³ And even if a district has voted in favor of the granting licenses, yet if the defendant had not obtained one, he is liable for an unlawful sale.¹⁴ Nor is it a defense that the licensing board had arbitrarily refused to grant any license for the district;¹⁵ nor that there was not any board or court empowered to issue one;¹⁶ nor empowered to issue one for the particular place where the sale took place;¹⁷ nor that the licensing clerk was so ill he could not issue a license;¹⁸ nor that a license had been granted and pending an appeal thereon the sale had been made.¹⁹ A sale after the adoption of local option is an indictable offense.²⁰ If a new law concerning licensing the sale of intoxicating liquors be adopted so that it operates as a repeal of an old licensing statute under which licenses have been granted that are still in force, the repeal operates to revoke such licenses, and a sale thereafter under them is an indictable offense under the new law.²¹ And the fact that the defendant only sold liquors he had on hand when the licensing law under which he is indicted took effect, is no defense.²² So a sale after a license has been surrendered is an offense though within the time such license would have run if it had not been surrendered;²³ and a license issued without the payment of the fee for it is no protection for sales made under it, even though arrangements had been made by the licensee

¹³ *State v. Huntley*, 29 Mo. App. 278; *Carry v. State*, 28 Tex. Cr. App. 477; 13 S. W. 773.

¹⁴ *State v. Cron*, 23 Minn. 140.

¹⁵ *State v. Tucker*, 45 Ark. 55; *State v. Brown*, 41 La. Ann. 771; 6 So. 638.

¹⁶ *State v. McNeary*, 88 Mo. 143.

¹⁷ *Indianapolis v. Fairchild*, 1 Ind. 315; *Welsh v. State*, 126 Ind. 71; 25 N. E. 883; *Siloam Springs v. Thompson*, 41 Ark. 456.

¹⁸ *Reese v. Atlanta*, 63 Ga. 344.

¹⁹ *State v. Barnett*, 111 Mo. App. 552; 86 S. W. 460.

²⁰ *State v. Funk*, 27 Minn. 318; 7 N. W. 359.

²¹ *State v. Mullenhoff*, 74 Iowa 271; 37 N. W. 329.

²² *Commonwealth v. Logan*, 12 Gray 136.

²³ *Cullinan v. Garfinkle*, 114 N. Y. App. Div. 509; 99 N. Y. Supp. 1119.

with another to pay it, who did not do so.²⁴ A sale made on Sunday without a license can be prosecuted either as a violation of the statute prohibiting sales on that day or as a sale without a license, and if the salesman be indicted for a sale without a license he cannot insist he is liable only for a violation of the statute prohibiting sales on Sunday.²⁵ A sale under a license that has been revoked or has expired subjects the licensee to prosecution for a sale without a license.²⁶ But a mere executory sale of liquors does not require a license to render it legal.²⁷ The fact that the purchaser did not drink the liquor purchased is no defense.²⁸

Sec. 684. Definition of sale—Example.

“A sale,” said Justice Gray of the Supreme Court of the United States, “in the ordinary sense of the word, is a transfer of property for a fixed price in money or its equivalent.”²⁹ It will be observed that the learned justice does not confine the definition of a sale strictly to a payment “in money,” but admits “its equivalent.” Mr. Benjamin has given a definition of “sale” which points out its essentials. “To constitute a valid sale,” says he, “there must be a concurrence of the following elements, viz.: (1) parties competent to contract; (2) mutual consent; (3) a thing, the absolute or general property in which is transferred from the seller to the buyer; and (4) a price in money paid or prom-

²⁴ *Meroney v. State*, 49 Tex. Cr. App. 337; 92 S. W. 844; *Dudley v. State*, 91 Ind. 312.

²⁵ *O'Brien v. State*, 91 Ala. 16; 8 So. 560.

²⁶ *McGehee v. State*, 114 Ga. 833; 40 S. E. 1004; *Alexander v. State*, 77 Ark. 294; 91 S. W. 181.

²⁷ *Banchor v. Warren*, 33 N. H. 183; *State v. Shields*, 110 La. 547; 34 So. 673; *Sortwell v. Hughes*, 1 Curt. 244; *Fed. Cas. No. 13177*.

²⁸ *Tompkins v. State*, 2 Ga. App.

639; 58 S. E. 1111; *Brown v. State*, 4 Ga. App. 73; 60 S. E. 805.

A manufacturer selling from his delivery wagon violates a law requiring vendors of liquors to have a license. *Michels v. State*, 115 Wis. 43; 90 N. W. 1096.

²⁹ *Iowa v. McFarland*, 110 U. S. 471; 4 Sup. Ct. 210; 28 L. Ed. 198; *Harper v. State* (Ark.), 121 S. W. 738; *State v. Bohen* (Del.), 74 Atl. 1; *Commonwealth v. Packard*, 5 Gray 101.

ised.”³⁰ And in commenting upon this definition and the following section of this work the Supreme Court of Oregon said, in considering the price, “it must be in money paid or promised, accordingly as the agreement may be for cash or a credit sale, but, if any other consideration than money is given, it is not a sale.”³¹ “To sell property is,” said the Supreme Court of Kentucky, “in the strict sense of the word ‘sell,’ to transfer it from one to another in consideration of a price paid or agreed to be paid in current money.”³² “Sale,” said the Supreme Court of the United States, “is a word of precise legal import, both at law and in equity. It means, at all times, a contract between parties to give and pass rights of property for money, which the buyer pays or promises to pay the seller for the thing bought and sold.”³³ But if a physician administer to his patient whisky, charging him a fee for his services, there is no sale of the whisky, for the giving of the whisky was merely incidental to the major transaction—the rendition of professional services of the physician.³⁴ So if the title to liquors is transferred by mere operation of law—as a recovery in trespass of liquors held for unlawful sale—there is no sale.³⁵ So if A sell B pool checks which are each receivable by A for a glass of beer, and B give them to C, who gives A one of them for a glass of beer, there is no sale of beer.³⁶ But if A owe B, and by agreement

³⁰ Benjamin on Sales, §§ 1, 2. Followed in Mathews v. Freker, 68 Ark. 190; 57 S. W. 262; Keaton v. State (Tex.), 36 S. W. 440; Butler v. Thompson, 92 U. S. 412; 23 L. Ed. 684; Martin v. State, 59 Ala. 34.

³¹ Coulter v. Portland, 20 Ore. 469; 26 Pac. 565.

³² Commonwealth v. Davis, 12 Bush 240; Mensinger v. Steiner-Medinger (Neb.), 94 N. W. 633; Schenck v. Saunders, 13 Gray 37; Northern Pacific R. Co. v. Sanders, 47 Fed. 604; Laboree v. Klosterman, 33 Neb. 150; Madison, etc. Church v. Baptist Church,

46 N. Y. 131; Cooper v. State, 37 Ark. 412; Brown v. Fitz, 13 N. H. 283; Goodwin v. Kerr, 80 Mo. 276.

³³ Williams v. Berry, 8 How. 495.

³⁴ Schaffner v. State, 8 Ohio St. 642.

³⁵ Hamilton v. Goding, 55 Me. 419.

³⁶ Massey v. State, 74 Ind. 368. The indictment charged a sale, but the proof showed the exchange of the pool checks, and this was held to be a material variance. The transaction was a barter.

between them A lets B have liquor from time to time by the drink at an agreed price, the amount of the price to be credited on the account, each delivery of liquor under the agreement is a sale.³⁷ A sale of liquor and a hat at a lump amount, without any specific price for either, is a sale of the liquor within the meaning of a statute forbidding its sale.³⁸ A distiller who receives grain or fruit to be distilled into liquor on shares, and who delivers the owner his share of the distilled product therefrom, does not violate a law which prohibits a sale, gift or other disposition of intoxicating liquors.³⁹ The fact that the sale was a conditional one does not deprive the transaction of the fact that it is a sale, although the condition is never complied with.⁴⁰ One who sells bills of lading, at his bank even, to anyone applying, whereby the purchaser is enabled to obtain the liquors the bills represent, is more than a mere collecting agent, and is guilty of selling liquors without a license.⁴¹ A transfer of liquors in a bonded warehouse, with the duty unpaid, has been held a sale and to render the transferer guilty, where the warehouse was located in prohibition territory.⁴² A sale to be paid for in property is such a sale as the law prohibits.⁴³ So a sale to be paid for in work or as commissions on sales is a sale within the meaning of a statute. Thus, where a licensed wholesaler gave his agent one quart of liquor on each five gallons sold, the transaction was construed to be a sale.⁴⁴ So the payment of a

³⁷ State v. Poteet, 86 N. C. 612.

³⁸ Commonwealth v. Worcester, 126 Mass, 256; State v. Hall, 39 Me. 107.

³⁹ Maxwell v. State (Ala.), 25 So. 235.

⁴⁰ Taylor v. State (Ala.), 25 So. 701.

⁴¹ State v. Snyder, 108 Iowa, 205; 78 N. W. 807.

⁴² *Ex parte* Morris, 34 Can. L. J. 46.

⁴³ Cook v. State, 124 Ga. 653; 53 S. W. 104.

It is not error for the court to

use in its instructions to the jury the word "sale," that being a word too well known to need an explanation. State v. Green, 69 Kan. 865; 77 Pac. 95.

⁴⁴ Friedman v. Commonwealth (Ky.), 83 S. W. 1040; 26 Ky. L. Rep. 1276.

In South Dakota, under Rev. Pol. Code, §§ 2838 and 2834 the offense of "engaging in the business without a license" is the same as selling without a license. State v. Ely (S. D.), 118 N. W. 687.

certain number of gallons of whisky per month as rent for a building is a sale of the whisky.⁴⁵

Sec. 685. Executory contract of sale.

A statute prohibiting sales of intoxicating liquors without a license has no application to executory contracts of sales of such liquors.⁴⁶

Sec. 686. Sale where statute does not forbid a barter or exchange.

In earlier instances of legislation liquor statutes were not drawn with the fullness or accuracy followed in more recent years. Thus, not infrequently a sale or gift only was forbidden, and a way to evade the statute was quickly discovered by barter or exchange. In this way the intent of the Legislature was defeated unless it could be said that a barter or exchange was a sale, and this construction of such statutes has been adopted in several such instances. Thus, in Massachusetts it was considered, in a case where liquor was given for a horse and suit was brought upon the warranty that the horse was sound, that the intention of the Legislature in the enactment of the liquor statute making it unlawful to sell without license should be considered. "There is no room," said the court, "for doubt as to the intention of the Legislature in enacting the provisions of the statute restraining and prohibiting the sale of intoxicating liquors. The object was not to regulate or prohibit a particular form or mode of disposing of such kind of property. It was designed and framed to accomplish a much higher and more comprehensive purpose. Its aim was the prohibition of the trade or traffic in such liquors in whatever mode it was carried on, with a view to

⁴⁵ *Griffin v. State*, 115 Ga. 577; 41 S. E. 997.

Four persons made up a purse to purchase liquor, and one of them took the money, bought the liquor and divided it among them. This was held not to be a sale by the one so purchasing and divid-

ing it. *Dial v. State* (Ala.), 49 So. 230.

⁴⁶ *State v. Shields*, 110 La. 547; 34 So. 673; *Bancher v. Warren*, 33 N. H. 183; *Pulse v. State*, 5 Humph. 108; *Sortwell v. Hughes*, 1 Curt. 244; Fed. Cas. No. 13177.

prevent their common and indiscriminate use in the community. The mischief which it was intended to reach and suppress was the vice of intoxication, with the evils and crimes which it engenders. It is too obvious to admit of debate that the main purpose of the statute would fail of accomplishment if intoxicating liquors could be freely obtained without restraint by barter or exchange of other property therefor. The prohibition of sales, in the technical sense of the word, would be of little effect if the trade was left open to be carried on in other modes. Indeed, the construction for which the plaintiff contends would amount to a virtual repeal of the statute in its practical operation as a means of checking and restraining the evils which it was intended to prevent. In a general and popular sense, the sale of an article signifies the transfer of property from one person to another for a consideration of value, without reference to the particular mode in which the consideration is paid. It was in this sense that the Legislature used the word and not in the technical and narrow sense of a transfer for a price paid or agreed to be paid in money. The legal distinction between a sale and an exchange is purely artificial; the rules of law are the same as applied to both transactions. Practically there is no difference between them. To make such refinement the turning point of the interpretation of a statute, contrary to the plain intent of the Legislature, would be a violation of all sound rules of construction.”⁴⁷ Where the statute made it an offense, “directly or indirectly, on any pretense or by any device [to] sell, or in consideration of the purchase of any other property give to any person any spirituous or intoxicating liquor,” it was held that an exchange of grain for liquor was a sale, and, therefore, the person owning the liquor had committed an offense, even though he was a distiller and wanted the grain for manufacturing liquor.⁴⁸ But if two

⁴⁷ Howard v. Harris, 8 Allen 297; Mason v. Lathrop, 7 Gray, 354; Commonwealth v. Davis, 12 Bush 240; Cunningham v. State, 105 Ga. 676; 31 S. E. 585.

⁴⁸ Commonwealth v. Clark, 14 Gray 367; State v. Teahan, 50 Conn. 92.

persons unite and purchase liquors and then divide them between themselves, the division is not a sale.⁴⁹ And a mere loan of whisky, by a neighbor, to be returned in a like quantity, cannot be construed into a sale,⁵⁰ though it has been as between dealers.⁵¹ A giving of liquor in payment for services rendered has been held a sale,⁵² and where even the word "barter" was in the statute and the services had already been performed, and after its performance the liquor was given and accepted as a payment, the transaction was held a sale.⁵³ So it has been held that the giving of whisky for the use of a buggy was a sale.⁵⁴

Sec. 687. Barter or exchange.

"A sale differs from a barter in this that in the latter the consideration instead of being paid in money is paid in goods or merchandise susceptible of a valuation."⁵⁵ "A sale is an exchange of goods or property for money paid or to be paid, as distinguished from barter, which is an exchange of one commodity or article of property for another; an exchange of goods; a commutation; transmutation or transfer of goods for other goods."⁵⁶ "Where one commodity is exchanged for another of a same or a different kind, without agreement as to the price or reference to money payment, the transaction is not a sale, but a barter or exchange."⁵⁷ But an exchange of

⁴⁹ Commonwealth v. Pomphret, 137 Mass. 564; 50 Am. Rep. 340; Whitmore v. State, 72 Ark. 14; 77 S. W. 598.

⁵⁰ Ray v. State, 46 Tex. Cr. App. 176; 79 S. W. 535; Skinner v. State, 97 Ga. 690; 25 S. E. 364.

Contra, Kenton v. State, 36 Tex. Cr. App. 259; 38 S. W. 522.

⁵¹ Commonwealth v. Ahrens, 150 Mass. 393; 23 N. E. 53.

⁵² Mason v. Lathrop, 7 Gray. 354; Howard v. Harris, 8 Allen, 297.

⁵³ Bescher v. State, 32 Ind. 480.

⁵⁴ Paschal v. State, 84 Ga. 326; 10 S. E. 821.

⁵⁵ Commonwealth v. Davis, 12 Bush, 240.

⁵⁶ Coker v. State, 91 Ala. 92; 8 So. 874.

⁵⁷ Gillan v. State, 47 Ark. 555; 2 S. W. 185; Labaree v. Klosterman, 33 Neb. 150; 49 N. W. 1102; Jenkins v. Mapes, 53 Ohio St. 110; 41 N. E. 137; Forkner v. State, 95 Ind. 406; Speigle v. Meredith, 22 Fed. Cas. 910; Hatfield v. State, 9 Ind. App. 296; 36 N. E. 664.

grain with a distiller for liquor he had manufactured has been held to be a sale, the word "exchange" not being used in the statute forbidding a sale of liquors.⁵⁸ A loan of intoxicating liquors until the borrower could obtain a like quantity and return it cannot be construed to be a loan.⁵⁹

Sec. 688. Exchange of liquors—Loan.

As has been elsewhere stated, a sale of grain to a distiller for whisky he has manufactured—a delivery of grain to be used in the manufacture of whisky for whisky—is a sale under the Massachusetts statute.⁶⁰ But a transaction with relation to intoxicating liquors may not amount to a sale, though one of the parties receive and consume the liquor he receives under it. Thus, where a neighbor loaned some whisky to another neighbor on condition he would return a like amount of the same kind, it was held to be only a loan and not a sale, the court considering that the statute never contemplated to inflict a punishment upon a neighbor who was not a dealer in liquors merely loaning his fellow neighbor liquor for his personal use.⁶¹ But an exchange of liquors, in a commercial sense, is construed to be a sale, and to be prohibited.⁶² And it would seem that under the latter decisions of Texas that a loan of liquors, not as a commercial transaction, to be returned in kind, is an offense.⁶³ If a distiller

⁵⁸ Commonwealth v. Clark, 14 Gray 367; State v. Teahan, 50 Conn. 92.

⁵⁹ Ray v. State, 46 Tex. Cr. App. 176; 79 S. W. 535.

⁶⁰ Commonwealth v. Clark, 14 Gray 367. See also State v. Teahan, 50 Conn. 92; Barnes v. State (Tex. Cr. App.), 88 S. W. 804; Stanley v. State, 43 Tex. Cr. App. 270; 64 S. W. 1051.

⁶¹ Ray v. State, 46 Tex. Cr. App. 176; 79 S. W. 535; Robinson v. State, 59 Ark. 341; 27 S. W. 233; Skinner v. State, 97 Ga. 690; 25 S. E. 364; Huby v. State,

111 Ga. 842; 36 S. E. 310; Beall v. State, 48 Tex. Cr. App. 105; 86 S. W. 334.

⁶² Bruce v. State (Tex. Cr. App.), 39 S. W. 683; Kravek v. State, 38 Tex. Cr. App. 44; 41 S. W. 612; Keaton v. State, 36 Tex. Cr. App. 259; 38 S. W. 522; Taggart v. State (Tex. Cr. App.), 97 S. W. 5.

⁶³ Tombeaugh v. State, 50 Tex. Cr. App. 286; 98 S. W. 1054; Henderson v. State, 50 Tex. Cr. App. 413; 98 S. W. 1055; Sparks v. State (Tex. Cr. App.), 99 S. W. 546; Beekham v. State, 54 Tex.

receive grain or fruit to manufacture into liquors, and deliver the manufactured liquor to the owner of the grain or fruit, the transaction is not a sale by the distiller;⁶⁴ but it is a sale if for every bushel of peaches received a pint of peach brandy be given to the owner of the peaches.⁶⁵ Where the claim is that the whisky was a loan, evidence that the borrower was a tenant of the defendant is admissible to show familiarity with the defendant.⁶⁶ It is usually a question for the jury whether the transaction amounted to a loan or a sale. Thus, where the testimony was that the defendant approached the witness for a loan, but as he had less than two dollars, and he desired to order whisky with it for his family, but he loaned it to him and received half a gallon of whisky from him as a loan, and the defendant paid back fifty cents of the money—about one-fourth of the amount loaned—and the witness testified he intended to return the whisky to him though he had not done so, it was held to be a question for the jury whether there was a *bona fide* loan of the whisky by the defendant to the witness to be loaned, or whether it was a mere subterfuge to cover a loan.⁶⁷ But if the borrower gives the loaner the money to buy liquor to take the place of the liquor loaned, the transaction will be construed to be a sale.⁶⁸

Sec. 689. “Otherwise dispose of” liquors.

In its efforts to cover all phases of liquor transactions the Legislature often uses language that is merely tautological of language previously used. Thus, where a statute forbade “the selling, giving or otherwise disposing of” liquor, it was held that the words “or otherwise disposing of” meant transactions

Cr. App. 28; 111 S. W. 1017;
Coleman v. State, 53 Texas Cr.
App. 578; 111 S. W. 1011; Wil-
son v. State, 54 Tex. Cr. App. 13;
111 S. W. 1018.

⁶⁴ Barnes v. State (Tex. Cr.
App.), 88 S. W. 805.

⁶⁵ Stanley v. State, 43 Tex. Cr.
App. 270; 64 S. W. 1051. See

Maxwell v. State, 120 Ala. 375;
25 So. 235.

⁶⁶ Coleman v. State, 53 Tex. Cr.
App. 578; 111 S. W. 1011.

⁶⁷ Buckner v. State, 48 Tex. Cr.
App. 558; 89 S. W. 829.

⁶⁸ State v. Brown (Ark.), 102
S. W. 394.

similar to either a sale or gift.⁶⁹ And under a statute providing that anyone selling, furnishing or giving away liquor, contrary to law, should be fined, it was held that a selling was not a different offense from furnishing, the object of the statute being to prevent the illegal providing of liquor.⁷⁰

Sec. 690. Furnishing intoxicating liquors.

Where a statute made it a penal offense to furnish intoxicating liquor to a minor, upon a charge of having furnished liquor to a minor it is not admissible to prove that the transaction was a sale. Under such a statute furnishing refers to any mode of providing a minor with liquor other than a sale.⁷¹ But where a statute forbidding a gift of liquor was repealed by another statute forbidding the furnishing of liquor, it was held that the latter statute, under the term "furnish," covered a transaction which was nothing more than a gift.⁷²

Sec. 691. Sale of saloon business.

Statutes prohibiting sales of liquors are intended to prevent retail sales to consumers of the liquors, or in case of wholesalers, as matters of revenue rather than restrictions upon sales. It is, therefore, held that if a saloon keeper sells his business to another, together with all his liquors on hand, the sale is not within the provisions of the statute prohibiting sales of intoxicating liquors without a license.⁷³ So an auctioneer selling out the stock of the owner at auction, who sends the liquor to his premises, does not carry on the business of a spirit merchant, and cannot be convicted because he

⁶⁹ *Roberson v. State*, 100 Ala. 37; 14 So. 554.

⁷⁰ *State v. Hodgson*, 66 Vt. 134; 28 Atl. 1089; *Jerseyville v. Becker*, 117 Ill. App. 86.

In South Africa "dispose of" is held to mean a sale. *Rex v. Gontshe*, 6 East. Dist. Ct. Rep. 280; and in North Dakota to "dispose" of means to deal out in portions,

to distribute, to give. *State v. Ball* (N. D.), 123 N. W. 826.

⁷¹ *Leo Ebert Brewing Co. v. State*, 25 Ohio Cir. Ct. Rep. 601.

⁷² *State v. Tague*, 76 Vt. 118; 56 Atl. 535.

⁷³ *Smith v. Heneman* (Ala.), 24 So. 364; *Forwood v. State*, 49 Md. 531. See also *Overall v. Bezeau*, 37 Mich. 506.

has not the license required of such merchants.⁷⁴ It is no offense to sell liquors on execution, and the title thereto passes.⁷⁵ So one partner or joint owner of liquors may sell without license his interest in the partnership liquors to his partner or to the other owner.⁷⁶

Sec. 692. Sale by corporation.

It has been held that a corporation cannot be guilty of an illegal sale because the act of sale is *ultra vires*. But while the corporation is not liable for that reason, the manager of it is personally liable.⁷⁷ But it cannot be said to be the accepted rule, for if a corporation be organized to engage in the liquor traffic, when it makes an illegal sale the act is as productive of the thing to be regulated as if the sale were by an individual, and if the corporation for an illegal sale can not be made amenable to the liquor laws the entire scheme in the enactment of laws regulating the liquor traffic will be overthrown. Consequently it has been held that a corporation soliciting orders for intoxicating liquors in prohibition territory violates the law and is subject to a fine the same as an individual so soliciting orders.⁷⁸ And where the penal code

⁷⁴ *Ex parte* Aitkin, 1 S. R. N. S. W. 214; 18 W. N. Cas. N. S. W. 279.

⁷⁵ *State v. Johnson*, 33 N. H. 441.

Under a New York statute providing that "a bond or other instrument for the payment of money, * * * which was executed and issued by a government, State, county, public officer or municipal or other corporation, and is in terms negotiable or payable to the bearer or holder," a liquor tax certificate issued under laws 1896, ch. 112, is subject to levy under an execution and sale. *McNeely v. Welz*, 20 N. Y. App. Div. 566; 47 N. Y. Supp. 310.

It has been held that unfinished

beer, in a fermenting condition, is not subject to sale on execution. *Herman Goepper & Co. v. Phoenix Brewing Co.*, 115 Ky. 708; 74 S. W. 726; 25 Ky. L. Rep. 84.

⁷⁶ *Stamper v. Commonwealth* (Ky.), 103 S. W. 286; 31 Ky. L. Rep. 707.

⁷⁷ *Mill v. Harsher*, L. R. 9 Exch. 317; *Ex parte Baird*, 35 N. B. 213.

⁷⁸ *Rose v. State*, 4 Ga. App. 588; 62 S. E. 117; *George H. Goodman Co. v. Commonwealth* (Ky.), 99 S. W. 252; 30 Ky. L. Rep. 519; *Leo Ebert Brewing Co. v. State*, 25 Ohio Cir. Ct. R. 601; *State v. Kline*, 50 Ore. 426; 93 Pac. 237.

provided that the word "person" shall include a corporation, an illegal sale by a corporation was held to render it liable to a fine.⁷⁹ If a corporation illegally make a sale or illegally keep liquors, its officers who participate in such illegal act become liable, and it is no protection that the illegal act was the act of the corporation.⁸⁰

Sec. 693. Sale on credit.

A sale on credit is the same as a sale for cash; the one requires a license the same as the other;⁸¹ and an instruction stating that "if the evidence failed to show that defendant sold and received pay for the whisky," he must be found not guilty is erroneous, for he can be convicted without money having been paid.⁸² Even though the purchase price of the liquor cannot be collected—because the sale was void under the law—yet it is a sale for the purpose of punishing the salesman.⁸³ Nor is it necessary that the liquor be charged to the particular person who asked for it, nor delivered to him, to consummate the sale.⁸⁴ And if a statute make it unlawful to "sell, barter, or otherwise dispose of" liquor, a gift is not an offense; but any understanding, whether express or implied, that the person obtaining the liquor will pay for it, even by

⁷⁹ *State v. Mudie* (S. D.), 115 N. W. 107. See *Enterprising Brewing Co. v. Grimes*, 173 Mass. 252; 53 N. E. 855.

⁸⁰ *State v. Collins*, 28 R. I. 439; 67 Atl. 696.

⁸¹ *Perkins v. State*, 92 Ala. 66; 9 So. 536; *Riley v. State*, 43 Miss. 397; *Markle v. Akron*, 14 Ohio 586; *Commonwealth v. Burns*, 8 Gray 482; *Emmerson v. Noble*, 32 Me. 380; *State v. Cutting*, 3 Ore. 260; *Grimes v. State*, 37 Tex. Cr. App. 73; 38 S. W. 774; *Marsden v. State*, 54 Tex. Cr. App. 70; 111 S. W. 945; *State v. Duesting*, 33 Minn. 102; 22 N. W. 442; 53 Am. Rep. 12.

⁸² *Perkins v. State*, 92 Ala. 66; 9 So. 536.

⁸³ *State v. Greenleaf*, 31 Me. 517. In this case it was said: "The inability of the seller to coerce payment by legal process does not, in contemplation of the statute, so far change the character of the transaction as to prevent it from being considered a sale. It is not a gift, for there is an expectation that the price will be paid."

⁸⁴ *Kimball v. People*, 20 Ill. 348; *Alexander v. State* (Tex. Cr. App.), 60 S. W. 763.

purchasing something else because of it, renders the transaction a violation of the statute because it is a disposing of liquor.⁸⁵ So where the defendant and three others sat down and played cards, with the understanding that the loser of each game should treat the other two, and under this understanding the defendant furnished liquor to each of the three, though no money was paid down, this was held to show three separate and distinct sales.⁸⁶ A purchase on credit and a rescission of the sale does not make it any less a violation of the law.⁸⁷

Sec. 694. Burden on defendant to show he was not the salesman.

While the burden is always on the prosecution to show beyond a reasonable doubt that the defendant made the illegal sale charged, yet the evidence may be such as to require him to account for his actions if he desires an acquittal. As has been said, it is immaterial whether or not the defendant owned the liquor he sold, if he sold it as his own or without authority.^{87*} So likewise a sale of liquor by a defendant, unexplained, raises the presumption that the liquor he sold was his own liquor. And so where the evidence showed that the defendant received money from A, accompanied by a request to procure him some whisky, and in a short time the defendant delivered him whisky, it was held that the burden was on the defendant to show where and from whom he got the liquor, and if the jury did not believe his explanation they might convict him.⁸⁸ So one who delivers the liquor and receives the money for it will be treated as the seller unless other facts clearly show that he was acting in the capacity of purchaser and not of seller.⁸⁹

⁸⁵ State v. Cutting, 3 Ore. 260.

⁸⁶ Commonwealth v. Hogan, 97 Mass. 120.

⁸⁷ Lupo v. State, 118 Ga. 759; 45 S. E. 602.

^{87*} Polk v. State (Tex. Cr. App.), 97 S. W. 467.

⁸⁸ Mack v. State, 116 Ga. 546;

42 S. E. 776; Bray v. Commerce (Ga.), 63 S. E. 596.

⁸⁹ State v. Kiger, 63 W. Va. 450; 61 S. E. 362; State v. Russell (Del.), 69 Atl. 839; Fisher v. State, 55 Fla. 17; 46 So. 422; Bonner v. State, 2 Ga. App. 711; 58 S. E. 1123.

Sec. 695. Gifts.

“In its strict and primary sense the word ‘give’ signifies ‘to confer or transfer without any price or reward; to bestow.’ In its more enlarged sense it signifies ‘to furnish, to supply,’ and it was in this latter sense that the word was used in the statute [a statute prohibiting the gift of liquor to a minor]. The statute was not enacted because the mere act of selling, loaning, or giving spirituous, vinous, or malt liquors to minors was in and of itself mischievous, but because such acts place the liquor in their hands and enable them to drink it, whereby they may be debauched and ruined. The object was to make it unlawful for any person other than the father or guardian of a minor, to place such liquors in his hands, and thereby to protect him against the formation of habits of intemperance until his character could be so formed as to enable him to withstand the allurements of strong drink. To give the words ‘sell, loan, or give’ their strict primary signification would be to render insufficient and almost worthless a wise and beneficent statute enacted in the best interest of society to protect it against an evil whose ravages are outstripping our growth in civilization, population, or wealth.”⁹⁰ But under an indictment charging a gift of liquor, a sale cannot be proven or a conviction had.⁹¹ And the word “give” cannot be construed to mean “let,” as the letting a minor procure liquor.⁹² But a gift of liquors falls within the meaning of a statute forbidding “furnishing liquors,” though not expressly forbidding a giving.⁹³

⁹⁰ Commonwealth v. Davis, 12 Bush 240.

⁹¹ Siegel v. People, 106 Ill. 89; Parkinson v. State, 14 Md. 184; 74 Am. Dec. 522. These two cases are not at one with the Kentucky case. Humpler v. People, 92 Ill. 400.

⁹² Siegel v. People, 106 Ill. 89; State v. Munson, 25 Ohio St. 318.

⁹³ State v. Tague, 76 Vt. 118; 56 Atl. 535.

The local option law of Kentucky forbidding a sale, loan or gift of intoxicating liquors does not apply to a gift of liquors where it was not intended the liquor was to be resold. Hoskins v. Commonwealth (Ky.), 102 S. W. 276; 31 Ky. L. Rep. 309; Sigmores v. Commonwealth (Ky.), 102 S. W. 277; 31 Ky. L. Rep. 310.

Evidence showing that defend-

Sec. 696. A gift of liquors as an act of hospitality or in kindness.

Whether or not a gift in a private house as an act of hospitality or as an act of kindness is an offense under a statute prohibiting a gift of liquor without a license,⁹⁴ has been differently decided by the courts. In Indiana, a man, who was not a dealer, gave away champagne, as an act of hospitality, at his private office on New Year's Day to persons there assembled, and although he was convicted the case was reversed on appeal. While his act was within the prohibition of the letter of the statute, yet the court did not consider it was within its spirit, and upon a review of all previous legislation in the State the court thought that it had never been the intention of the Legislature to forbid a man treating his guests in his house, or giving away liquors as an act of hospitality. "Appellant," said the court, "was not a dealer in liquors. He was in no way connected with the liquor traffic. He furnished liquor to an adult friend as his guest in his own private apartments and without any intention to evade the provisions of any law. How far a Legislature might go in restricting the purely personal rights and privileges of an individual in such matters is not before us in this case. But we cannot escape the conclusion that an affirmance of this judgment would logically lead to an infringement of personal privileges never contemplated by the Legislature in its enactment of our present liquor laws." "That the Legislature has power to restrict its sale and regulate its use has long been settled. Whether a legislative prohibition of its use in a case like that at bar would be an invasion of private rights we have nothing to do. We simply mean to hold that, in our opinion, the Legislature has not yet gone that far. A court should hesitate to carry the provisions of any statute into the private life of the individual and declare for him a rule of

ant gave an old friend two quarts of whisky and afterwards borrowed from him five dollars, does not show a sale. *Scott v. State*,

52 Tex. Cr. App. 164; 105 S. W. 796.

⁹⁴ A gift to a minor or intoxicated person or drunkard is not here under discussion.

conduct therein, unless the Legislature has plainly directed it should be done. True it is, the home or private apartments of the individual will not shield him in the violation of a penal code. But we believe that when the Legislature concludes to add to the restraint of the sale of liquors the restraint of their use by the individual in his home, it will expressly say so in language which cannot be doubted."⁹⁵ Other courts reach the same conclusion.⁹⁶ And it has been held that if an inn-keeper gratuitously furnish liquor at his bar to his domestic servant it is not a violation of the statute.⁹⁷ But it has been held that if one give away liquors in a room where he conducts no business, and which is not in his dwelling, he violates the statute.⁹⁸ And in the same State it has been held that if one furnish liquor to his boarders as a part of their meals, the transaction is a sale and not a giving away at his private residence as the statute permits.⁹⁹ And in Canada it has been held that even if a gift be made to a friend in a private room by a licensed hotel keeper it is illegal and an offense.¹ But to treat an adult friend is no offense if it be not a subterfuge to evade the law.² In Maryland it has been held that to treat a friend on election day in one's own private dwelling is a violation of the statute forbidding the giving away of liquors on that day. But certainly the Legislature never intended such a result.³

⁹⁵ Austin v. State, 22 Ind. App. 221; 53 N. E. 481.

⁹⁶ Reynolds v. State, 73 Ala. 3; Albrecht v. People, 78 Ill. 510; State v. Standish, 37 Kan. 643; 16 Pac. 66; Commonwealth v. Carey, 151 Pa. St. 368; 25 Atl. 140; Powers v. Commonwealth, 90 Ky. 167; 13 S. W. 450. See Corbett v. Haigh, 5 C. P. Div. 50.

⁹⁷ State v. Jones, 39 Vt. 370. In this case, however, liquors given to musicians employed to play in his inn for a dance was held to be an offense. See Altenberg v. Commonwealth, 126 Pa.

St. 602; 17 Atl. 799; 4 L. R. A. 543.

⁹⁸ State v. Danforth, 62 Vt. 188; 19 Atl. 229.

⁹⁹ State v. Lotti, 72 Vt. 115; 47 Atl. 392.

¹ Queen v. Walsh, 1 Can. Cr. Cas. 109.

² State v. Hutchins, 74 Iowa 20; 36 N. W. 775.

³ Cearfoss v. State, 42 Md. 403.

Where a traveling salesman of liquors makes a gift of a drink of whisky to a prospective purchaser, he makes an illegal gift. State v. Jones, 88 Minn. 27; 92 N. W. 468.

Sec. 697. Treating guests at a social gathering.

A statute forbidding the giving away of liquors without a license has no application to the giving of liquors to one's guests, brought together by him at a social gathering. It is not an offense for a person to give his guests a drink of intoxicating liquor, at a social gathering, the giving being simply an incident of the coming together and the gathering not for the sole purpose to obtain the liquor, for if the gathering is for the purpose of drinking intoxicating liquors as a beverage, then the person giving the liquor to the persons so coming together violates the statute. The question of guilt or no guilt turns upon the object or purpose of those present coming together.⁴

Sec. 698. Sale neither a gift or barter.

A sale is neither a gift nor a barter. A barter is an exchange of property; a sale, a transfer of property for money, as we have seen; but a gift is a transfer of property with no intention of receiving remuneration therefor. As soon as the question of consideration is introduced, then the transaction assumes the character of a sale or barter. Therefore, upon a charge of selling liquors illegally there can be no conviction if the evidence shows it was a gift.⁵ So if the charge is that the transaction was a gift proof of a sale will not sustain a conviction.⁶ So upon a charge of a sale there can be no conviction if the evidence shows there was a barter or exchange in those States where an exchange of property is not construed

⁴ State v. Thomke (N. D.), 92 N. W. 480. See Hoskins v. Commonwealth (Ky.), 102 S. W. 276; 31 Ky. L. Rep. 309; Sizemore v. Commonwealth (Ky.), 102 S. W. 277; 31 Ky. L. Rep. 310.

⁵ Stevenson v. State, 65 Ind. 409; Chenoweth v. State, 50 Tex. Cr. App. 238; 96 S. W. 19; Keiser v. State, 82 Ind. 379; State v. Briggs, 81 Iowa 585; 47 N. W. 665; Keller v. State, 23 Tex. App.

259; 4 S. W. 886; McGruder v. State, 83 Ga. 616; 10 S. E. 281; Gillan v. State, 47 Ark. 555; 2 S. W. 185; Siegel v. People, 106 Ill. 94; Holley v. State, 14 Tex. App. 505; Williams v. State, 91 Ala. 14; 8 So. 668; Young v. State, 58 Ala. 359; Dalton v. Bowden, 23 N. Z. 165; Rex v. Mathebus, 20 Juta 403; State v. Lotti, 72 Vt. 115; 47 Atl. 392.

⁶ Harvey v. State, 80 Ind. 142.

as a sale.⁷ A statute, however, may be so broad as to vary these rules, as where it uses the word "dispose."⁸ But where a statute forbade anyone to "barter, sell, or dispose of in any manner, any spirituous liquor," it was held error to instruct the jury that under it a charge of a gift could be sustained by proof of a sale.⁹ Under a charge of "furnishing" liquor, where a statute makes it an offense to "furnish" liquor, it has been held that a conviction may be had though the evidence shows a sale or gift.¹⁰ Yet where a statute made it a penal offense to "furnish" a minor liquors, it was held that proof of a sale did not sustain the charge.¹¹ What are gifts and what are sales, as distinguished one from the other, must rest upon the facts of each particular transaction. Thus, where a witness said he called for liquor at defendant's saloon, and the defendant directed a waiter to deliver it to him, and that he paid neither the defendant nor the waiter, though he offered to pay, the defendant declining to accept pay, it was held that there was no evidence of a sale.¹² But where a landlord furnished his boarders, as a part of their meals, ale and wine, it was held that the transaction constituted a sale of liquors, and was not the giving away of liquors at one's

⁷ *Stevenson v. State*, 65 Ind. 409; *Gillan v. State*, 47 Ark. 555; 2 S. W. 185.

⁸ *Queen v. Walsh*, 1 Can. Cr. Cas. 109.

⁹ *Wood v. Territory*, 1 Ore. 223. But see *State v. Duesting*, 33 Minn. 102; 22 N. W. 442; 53 Am. Rep. 12.

¹⁰ *Dukes v. State*, 77 Ga. 738; *State v. Freeman*, 27 Vt. 520.

¹¹ *Leo Ebert Brewing Co. v. State*, 25 Ohio Cir. Ct. Rep. 601.

Whether or not the court would have held a giving a furnishing does not appear.

¹² *Commonwealth v. Packard*, 5 Gray 101.

Where a witness testified that defendant invited him and an-

other to "take one on" him after they had partly drunk a bottle of soft drink bought by the witness, it was held that the court should have instructed the jury, as to the State's testimony tending to show a sale as to the essential elements of a sale. *Tippit v. State*, 53 Tex. Cr. App. 180; 109 S. W. 190.

An instruction that if there be a reasonable doubt growing out of the evidence, or any part of it, whether there was "neither a sale or a gift," there can be no conviction, is erroneous; for it requires an acquittal on a doubt arising on a part of the evidence. *Winter v. State*, 133 Ala. 176; 31 So. 717.

private dwelling as a statute permitted.¹³ The difference between a sale and a gift is strikingly illustrated in a case in North Carolina. In that State a statute forbade the giving away of liquors on election day, but it was held no offense to sell them on that day.¹⁴ So in Kentucky where a statute forbade the sale, barter, or loan of liquor in local option districts, it was held not to forbid a gift.¹⁵ But the words "sale or other disposal" in a statute regulating the use of liquors at a hotel includes a gift.¹⁶

Sec. 699. Delivery.

No sale or gift is complete unless there has been a delivery, either actual or constructive. The vendor must lose his dominion, as it were, over the liquor sold, and the purchaser must be vested with dominion over it. Unless this be done there is no sale, and no offense is committed.¹⁷ And in some

¹³ *State v. Lotti*, 72 Vt. 115; 47 Atl. 392.

For a discussion of "sale," "barter" and "traffic," see *Graves v. Roth*, 29 Vict. L. R. 841; 26 Austr. L. T. 58; 10 Austr. L. R. 158.

A statute providing, "All persons are hereby prohibited from selling intoxicating liquors, and all persons are hereby prohibited from giving away any such intoxicating liquors," prohibits both the selling and giving away of such liquors. *Litch v. People* (Colo. App.), 75 Pac. 1079.

¹⁴ *State v. Edwards*, 134 N. C. 636; 46 S. E. 766.

¹⁵ *Commonwealth v. Dickerson* (Ky.), 76 S. W. 1084; 25 Ky. L. Rep. 1043.

Where a statute makes it unlawful to give away liquor in a local option district, the criminal intent is complete where the liquor is given away. *State v.*

Handler, 178 Mo. 38; 76 S. W. 984.

In Vermont a statute forbade "furnishing" liquor, but it did not expressly forbid a gift of it, and this statute repealed a law forbidding a gift of liquor, yet it was held that the new statute, under the word "furnish" prohibited a gift. *State v. Tague*, 76 Vt. 118; 56 Atl. 535.

¹⁶ *Queen v. Walsh*, 1 Can. Cr. Cas. 109. See *State v. Deusting*, 33 Minn. 103; 22 N. W. 442; 53 Am. Rep. 12.

Under a clause in a statute providing that "No person shall sell, supply or give to any aboriginal native" intoxicating liquor, the word "give" does not require a consideration to make the transaction illegal. *Rex v. Mathebus*, 20 Juta 403.

¹⁷ *Riley v. State*, 43 Miss. 397; *State v. Wahl* (Mo.), 119 S. W. 453; *Auburn Excise Commrs. v.*

States proof of a delivery is by statute made sufficient proof of an actual sale.¹⁸ Where the defendant sold a quart of liquor to a purchaser for ten cents and drew a pint of it in a bottle brought by the purchaser for that purpose, and the remaining pint remained in the cask until the purchaser called for it, at the time bringing back the bottle to have the liquor drawn into it, it was held that there was no delivery of the second pint at the time of the purchase, but the transaction amounted to separate sales of two pints; and as a sale of less than a quart was forbidden, there was a violation of the statute.¹⁹ In determining whether the sale was a violation of the law of the place, the place of the sale is the place where the control of the liquor sold actually passed from the vendor to the vendee.²⁰ In case of a shipment by a common carrier, the place of delivery is where it, duly consigned, is delivered to the carrier, for on such a delivery the title passes.²¹ If there be a reasonable doubt concerning whether or not there was a delivery, there can be no conviction.²² One with whom liquor is left to deliver to the purchaser and collect the money for it does not make a sale of it.²³ And proof of soliciting orders as agent of another and so collecting the money for the liquors delivered on such orders by his principal does not show a completed sale by such agent.²⁴

Merchant, 34 Hun, 19; affirmed 103 N. Y. 143; 8 N. E. 484; *Smith v. State* (Tex. Cr. App.), 91 S. W. 592.

¹⁸ *State v. Prescott*, 67 N. H. 203; 30 Atl. 342.

¹⁹ *Murphy v. State*, 1 Ind. 366.

²⁰ *Harding v. State*, 65 Neb. 238; 91 N. W. 194.

²¹ *Harding v. State*, 65 Neb. 238; 91 N. W. 194; *Weathered v. State* (Tex. Cr. App.), 60 S. W. 876.

²² *Isom v. State*, 49 Tex. Cr. App. 610; 95 S. W. 518.

²³ *Glass v. State*, 68 Ark. 266; 57 S. W. 793.

²⁴ *Salter v. Columbus*, 121 Ga. 829; 49 S. E. 734.

Where a jury is charged that a sale of liquors "directly or indirectly" made is an offense, they should be told what is the meaning of "directly or indirectly." *State v. Bowerman* (Mo. App.), 124 S. W. 41.

What is a "delivery" depends largely on the intention of the parties. *Goodrich v. Wheeler* (Iowa), 123 N. W. 950.

A purchasing and payment for liquor without, but a delivery within, a State is a sale within the State. *Anglin v. State* (Miss.), 50 So. 728.

Sec. 700. Ownership of liquors.

To incur an offense under a statute forbidding sales without a license the ownership of the liquors, except in the case of agency, is immaterial, for an offense can be committed in selling the liquor of another as effectually as in the sale of one's own liquor.²⁵ But a sale of liquor in "assisting" its owner, or making the sale for him, the seller receiving no part of the consideration or having no interest therein, is not his sale; it is the sale of the owner.²⁶ And where A applied to B for liquor, and B told him he must get a bottle, which A did, and B then took the bottle, went away and returned with it filled, and then told A he would have to pay a small sum for getting the liquor, it was held error to charge the jury the transaction amounted to a sale by B to A.²⁷ But if one sells liquor, delivers it and receives the money for it, he may be treated as the owner in the absence of proof of ownership of the liquor;²⁸ and in some States the statute requires him to be so treated, unless the actual owner be shown.²⁹ The question whether the seller is authorized to sell the liquor is really immaterial. And if he receives the price to be used in replacing the liquor sold, he is a seller and not a mere agent of the transferee to replace the liquor sold.³⁰ A gave B a dollar to purchase a bottle of liquor which he did. A gave C, D and E a drink from the bottle, and thereafter they drank all the liquor. C and D

²⁵ *Evans v. State*, 54 Ark. 227; 15 S. W. 360; *State v. Wadsworth*, 30 Conn. 55; *People v. Metzger*, 95 Mich. 121; 54 N. W. 639; *Commonwealth v. Williams*, 4 Allen 587; *Winter v. State*, 133 Ala. 176; 31 So. 717; *State v. Lucas*, 94 Mo. App. 117; 67 S. W. 971; *Taylor v. State*, 121 Ala. 39; 25 So. 701; *Hinkle v. Commonwealth (Ky.)*, 66 S. W. 1020; 23 Ky. L. Rep. 1979; *State v. English*, 79 N. H. 328; 68 Atl. 129; *Winter v. State*, 133 Ala. 176; 32 So. 125; *State v. Small (S. C.)*, 60 S. E. 676; *Commonwealth v.*

Heffner, 8 Leg. Gaz. 166; *Commonwealth v. Sinclair*, 138 Mass. 493.

²⁶ *Morgan v. State*, 81 Ala. 72; 1 So. 472; *White v. State*, 93 Ga. 47; 19 S. E. 49; *State v. Wiggins*, 20 N. H. 449.

²⁷ *State v. Taylor*, 89 N. C. 577.

²⁸ *Paschal v. State*, 84 Ga. 326; 10 S. E. 821; *Goode v. State (Fla.)*, 39 So. 461.

²⁹ *Grant v. State*, 87 Ga. 265; 13 S. E. 554.

³⁰ *Taylor v. State*, 121 Ala. 24; 25 So. 689.

each paid A twenty-five cents for their share, and E paid A a like sum for his share. A paid B the fifty cents he had received of C and D, and also twenty-five cents for himself. It was held that the receipt of fifty cents by A and his delivery of the whisky rendered him liable to a criminal prosecution.³¹ But one who merely delivers liquor for another, in a local option territory, and collects the money due on it, does not make a sale of the liquor.³²

Sec. 701. Purchase by request of unlicensed dealer.

If A, at the request of B, with money given him by B for the purpose of purchasing liquor for him of C, who is not licensed to sell liquor, makes the purchase as requested, and delivers it to B, A is liable just as much as if it was his own liquor he had sold B, not at the time having a license authorizing him to make the sale. In this instance the line of argument is that C took the hand of A to deliver the liquor to B, whatever his intention was and however his connection with the matter arose. The essential of delivery was the sole act of A. And as in misdemeanors all persons who participate in doing any of the acts which constitute the elements of crime are, in law, guilty as principals, A may not deny responsibility on his part in the transaction. He is not the agent of B in the purchase of the liquor.³³ Where A gave M money to buy whisky for him, and M and defendant went into the latter's store where M gave him the money and took the liquor, it was held that M and not A purchased the liquor.³⁴ But where

³¹ *Nixon v. State* (Tex. Cr. App.), 97 S. W. 703.

³² *Glass v. State*, 68 Ark. 266; 57 S. W. 793.

³³ *Wortham v. State*, 80 Miss. 205; 32 So. 50; *Wiley v. State*, 74 Miss. 727; 21 So. 797; *Beck v. State*, 69 Miss. 217; 13 So. 835; *Bruce v. State*, 39 Tex. Cr. App. 26; 44 S. W. 852; *McLeod v. State* (Tex. Cr. App.), 44 S. W. 1090; *Loveless v. State*, 40 Tex. Cr. App. 131; 49 S. W. 98; *Bruce v. State* (Tex. Cr. App.),

53 S. W. 867; *Ledbetter v. State*, 143 Ala. 52; 38 So. 836; *Hawkins v. State*, 51 Tex. Cr. App. 37; 100 S. W. 956; *Shaw v. State*, 3 Ga. App. 607; 60 S. E. 326; *Bray v. Commerce* (Ga.), 63 S. E. 596. See *Hunter v. State*, 55 Tex. Cr. App. 269; 116 S. W. 604.

³⁴ *McClellan v. State*, 117 Ala. 140; 23 So. 653.

Contra, *Armstrong v. State* (Tex. Cr. App.), 47 S. W. 981.

one F requested B to order whisky for him from a dealer and he delivered it to F under the order, it was held that B could not be convicted of an illegal sale.³⁵ When asked for liquor, the defendant said he had none, and he then wrote an order to be sent to another county, which he directed the buyer to sign. The bill for the liquor was tendered to the defendant, and he said he had no change, but would get it, and the buyer could pay him the next day when the liquor was delivered. A delivery was made the next day. It was held to be a question for the jury whether the defendant sold the liquor to the buyer or acted as his agent.³⁶ But where the buyer took away only a part of the whisky, at the time paying for it, and he afterwards, at times, took away the remainder in small quantities, paying for each quantity as he took it away, it was held that the person so ordering the whisky was liable.³⁷ The mere fact that the defendant made no profit out of the transaction is no defense.³⁸

Sec. 702. Sale by restaurant or hotel keeper.

Where statutes generally forbid sales without licenses, a restaurant keeper who furnishes liquor to his guests at their meals, the price of the meals covering the price of the liquor, is guilty of having sold liquors without a license authorizing him to make a sale of intoxicating liquors.³⁹ So a hotel keeper has no right to furnish his guests liquor merely because they are guests;⁴⁰ and in the same cases this has been

³⁵ *Waddle v. State* (Miss.), 24 So. 311; *Tate v. State*, 91 Miss. 382; 44 So. 836; *Bowerman v. Commonwealth*, 14 Ky. L. Rep. (abstract) 174.

³⁶ *Strickland v. State* (Tex. Cr. App.), 47 S. W. 470, 720.

³⁷ *Armstrong v. State* (Tex. Cr. App.), 47 S. W. 981; *Armstrong v. State* (Tex. Cr. App.), 47 S. W. 1006; *Billups v. State*, 107 Ga. 766; 33 S. E. 659; *Leach v. State* (Tex. Cr. App.), 53 S. W. 630.

³⁸ *Ludwig v. State*, 40 Tex. Cr. App. 585; 51 S. W. 390.

Evidence showed the liquor was handed by the accused to A on a note sent by B. This was held a sale to B and not to A. *Levi v. Rex* [1906], East. Dist. Ct. Rep. 272.

³⁹ *Nierosi v. State*, 52 Ala. 336; *Commonwealth v. Everson*, 140 Mass. 292; 2 N. E. 839.

⁴⁰ *State v. Intoxicating Liquors*, 44 Vt. 208.

But see *Burner v. Commonwealth*, 13 Gratt. 778.

held true of a boarding house keeper.⁴¹ Statutes occasionally permit sales at all times by a hotel keeper to his guests, but usually only by those who hold licenses. To make such sales legal the purchasers must be strictly guests (usually within the statutory definition), and not persons who do not resort to the hotel for the purpose of obtaining meals therein in good faith.⁴²

Sec. 703. Purpose for which liquor was obtained.

The purpose for which liquor was obtained is immaterial unless that purpose was the vendor's purpose in making the sale. So that, if the vendor sold the liquor for a lawful purpose, and he had a right to make such a sale, but the vendee purchased it for a purpose, unknown to the vendor, which would have made the sale an illegal one for the vendor to make, the vendor cannot be held to have violated the statute, and an instruction making his guilt to depend upon the purpose of the vendee in securing the liquors and not upon the vendor's purpose in making the sale is erroneous.⁴³ But a sale with the intention of devoting the proceeds of the sale to charitable purposes will not relieve the vendor from his liability to a prosecution.⁴⁴ Where, however, a licensing inspector bought a sample of liquor to analyze it, it was held not to be a sale to the prejudice of the purchaser.⁴⁵

Sec. 704. Motive in making sale.

The motive in making the sale is immaterial. Whatever benevolent intention the defendant may have had in making the sale will not relieve him of the charge that it was an illegal

⁴¹ *State v. Lotti*, 72 Vt. 115; 47 Atl. 392.

⁴² *In re Cullinan*, 41 N. Y. Misc. Rep. 3; 83 N. Y. Supp. 581; affirmed 93 N. Y. App. Div. 427; 87 N. Y. Supp. 660; *Cullinan v. O'Connor*, 100 N. Y. App. Div. 142; 91 N. Y. Supp. 628; *In re Kinzel*, 28 N. Y. Misc. Rep. 622; 59 N. Y. Supp. 682.

⁴³ *Houtz v. People*, 123 Ill. App. 445.

⁴⁴ *United States v. Dodge*, Deady 186, Fed. Cas. No. 14974.

⁴⁵ *Lenthall v. Crow*, 16 N. S. W. L. R. 111. But see as to wholesale selling to licensed dealer under the Vermont statute. *State v. Scampini*, 77 Vt. 92; 59 Atl. 201.

one, and an instruction to the jury on the question of the sale which omits all mention of the spirit in which it was made is not erroneous on that ground.⁴⁶ The prosecution need not prove a guilty intent on the part of the defendant in making the sale,⁴⁷ and it is no defense in the defendant that he overlooked, or forgot or made a mistake as to the things required of one before he can sell liquors;⁴⁸ and evidence that he had no intention to violate the law when he sold the whisky is not admissible,⁴⁹ for belief that he was not violating the law is no defense.⁵⁰

Sec. 705. Mistake in selling intoxicating liquor—Intent.

The offense in selling or giving away intoxicating liquor involves a sale or gift of a liquor knowing at the time it is intoxicating. Therefore, if a person, in good faith and using ordinary diligence to ascertain the qualities of the liquor he is selling, sell intoxicating liquor, not knowing it is intoxicating, he has committed no offense, for his act is a mistake of fact and not of law. It therefore follows that if the accused testify he did not know the liquor he sold was intoxicating, and shows he was not negligent in not ascertaining its intoxicating quality,⁵¹ he is entitled to have the jury instructed that

⁴⁶ *Wortham v. State*, 87 Miss. 205; 32 So. 50. See *Goode v. State*, 87 Miss. 495; 40 So. 12. Belief of a right to make the sale is no defense. *People v. Corey* (N. Y.), 118 N. Y. Supp. 23; *State v. People*, 139 Ill. App. 500; affirmed (Ill.), 86 N. E. 236.

⁴⁷ *Backhaus v. People*, 87 Ill. App. 173.

⁴⁸ *State v. Swallum*, 111 Iowa, 37; 82 N. W. 439; *State v. Scampini*, 77 Vt. 92; 59 Atl. 201.

⁴⁹ *Cantwell v. State*, 47 Tex. Cr. App. 511; 85 S. W. 18; *Daxanbeklar v. People*, 93 Ill. App. 553.

⁵⁰ *Weiss v. Green*, 26 N. Z. 942.

A statute requiring the applicant for liquor to state "the actual purpose for which the request is

made, and for what use desired" is binding, and a sale without such a statement is illegal. *State v. Swallum*, 111 Iowa 37; 82 N. W. 439.

Under a statute making anyone subject to prosecution who sells, exchanges or gives away liquor with the purpose of evading the law, the intent to evade the law is an essential ingredient in the case. *State v. Emmons* (Ore.), 104 Pac. 883.

⁵¹ And, of course, this rule would not require him to taste the liquor to ascertain that fact, if he had reason to believe it was not intoxicating, as if he had purchased it as a non-intoxicating liquor.

if he acted in good faith believing the liquor was not intoxicating, and was not negligent in failing to ascertain that it was intoxicating liquor, he has not violated the law in making a sale of the liquor sold and which turned out to be intoxicating.⁵² But it has been held that the defendant was not entitled to show he had no knowledge that the liquor sold would not intoxicate;⁵³ and also where the charge was a sale of malt liquor, that he did not believe the liquor he sold was intoxicating;⁵⁴ and it has also been held that his belief that the liquor was not intoxicating is no defense,⁵⁵ for he is bound to know they were not intoxicating.⁵⁶ Evidence that a judge and United States commissioner told the defendant before the sale that it was not a violation of the law to sell the particular liquor is not admissible.⁵⁷ So is evidence that the defendant in making the sale acted under advice of his counsel;⁵⁸ or

⁵² *Uloth v. State* (Tex. Cr. App.), 87 S. W. 822, 823; *Pattick v. State* (Tex. Cr. App.), 87 S. W. 947; *State v. Powell*, 141 N. C. 790; 53 S. E. 515.

⁵³ *Williams v. State*, 45 Tex. Cr. App. 477; 77 S. W. 215; *State v. Lindven*, 87 Iowa 702; 54 N. W. 1075.

⁵⁴ *State v. Gill*, 89 Minn. 502; 95 N. W. 449.

⁵⁵ *State v. Eaton*, 97 Me. 289; 54 Atl. 723; *Allen v. State* (Tex. Cr. App.), 59 S. W. 264; *Commonwealth v. Goodman*, 97 Mass. 117; *Commonwealth v. Hallett*, 103 Mass. 452.

⁵⁶ *Peters v. District Court*, 114 Iowa 207; 86 N. W. 300; *State v. Renneker*, 75 Kan. 685; 90 Pac. 245.

It is no defense that the seller did not know the liquors to be intoxicating. See *Carl v. State*, 89 Ala. 93; 8 So. 156; *Compton v. State*, 95 Ala. 25; 11 So. 69; *State v. Valure*, 95 Iowa 401; 64 N. W.

280; *State v. Schaefer*, 44 Kan. 90; 24 P. 92; *State v. Moulton*, 52 Kan. 69; 34 P. 412; *Com. v. Savery*, 145 Mass. 212; 13 N. E. 611; *Com. v. Daly*, 148 Mass. 428; 19 N. E. 209; *Com. v. O'Kean*, 152 Mass. 584; 26 N. E. 97; *People v. Ingraham*, 100 Mich. 530; 59 N. W. 234; *State v. Tomasi*, 67 Vt. 312; 31 A. 780; *Allen v. State* (Tex. Cr. App.), 59 S. W. 264; *Stelle v. State*, 77 Ark. 441; 92 S. W. 530; *Haynes v. State*, 118 Tenn. 709; 105 S. W. 251; 13 L. R. A. (N. S.) 559.

Contra, *Walker v. State*, 50 Tex. Cr. App. 495; 98 S. W. 843; *McRoberts v. State*, 49 Tex. Cr. App. 288; 92 S. W. 804; *Gilmore v. State*, 37 Tex. Cr. App. 178; 39 S. W. 105.

⁵⁷ *Hinton v. State*, 132 Ala. 29; 31 So. 563; *Steinberger v. State*, 35 Tex. Cr. Rep. 492; 34 S. W. 617.

⁵⁸ *State v. Downs*, 116 N. C. 1064; 21 S. E. 689.

had no criminal intent.⁵⁹ Evidence that the accused had no intention to violate the law is usually not admissible;⁶⁰ but evidence to show he had knowledge of its intoxicating quality is admissible.⁶¹ Where the defendant was a mere agent in making the sale, and the sale was illegal if the liquor sold was intoxicating, it was held admissible to prove that he had been told by his principal that the liquor was not intoxicating, and that he sold it under a belief that it was such.⁶²

Sec. 706. Purchase of liquor by one person for another.

If A at B's request take B's money and with it purchase liquor for him, it is not a sale of liquor by A to B. And so where one B requested A to sell him liquor, but A said he had none, but as he was going to the city next morning he would get him some, and A got it and gave B the money, it was held that a sale from A to B was not shown, though on four other times he had in the same manner obtained liquor. B on each occasion had paid A the exact sum he, A, had paid for the liquor. It was considered that as between B and A the transaction was merely one for the accommodation of B.⁶³ A gave B money to purchase liquor for him, which he did, and at the same time purchased a like quantity for himself, the two quantities being put into one receptacle. After that they divided the liquor between them. It was held that there was no retail transaction between them.⁶⁴ One who purchases liquor for another, and even pays for it before he receives pay from such other, does not make a sale of the liquor to such other person; and this is true even

⁵⁹ *Commonwealth v. Holstine*, 132 Pa. 357; 19 Atl. 273; 25 W. N. C. 423.

⁶⁰ *McDaniel v. State* (Tex. Cr. App.), 65 S. W. 1068.

⁶¹ *Murry v. State*, 46 Tex. Cr. App. 128; 79 S. W. 568.

⁶² *Reed v. State*, 53 Tex. Cr. App. 4; 108 S. W. 368.

⁶³ *Brignon v. State*, 37 Tex. Cr. App. 71; 38 S. W. 786; *Tren v.*

State (Tex. Cr. App.), 44 S. W. 829; *Skidmore v. Commonwealth* (Ky.), 57 S. W. 468; 22 Ky. L. Rep. 409; *Davis v. State*, 53 Tex. Cr. App. 373; 109 S. W. 938; *Armstrong v. State* (Tex. Cr. App.), 47 S. W. 981.

⁶⁴ *Meadows v. State*, 127 Ga. 283; 56 S. E. 404; *Dial v. State* (Ala.), 49 So. 230.

though he solicited such other to permit him to order it, if he acted in good faith.⁶⁵ Where the evidence showed that A had been treating B, and A said he was going to a distillery to get some liquor, whereupon B gave him some money "to even up with him" for the treats, and it further showed B afterwards drank some of the whisky which A said he had gotten at the distillery, it was held that the evidence did not show beyond a reasonable doubt there was a sale.⁶⁶

Sec. 707. Purchase with view to prosecute seller.

A sale to a person who makes the purchase solely with a view to prosecute the salesman is as much an offense as a sale to one who purchases with the sole intention to drink the liquor purchased, and this is true even though the prosecuting witness purchased the liquor with a view to obtain a statutory reward.⁶⁷ But where a city procured one to purchase liquor of a person with a view to determine what constituted a violation of its ordinance, and the seller was innocent of the city's purpose, the court refused to give an opinion on appeal

⁶⁵ *Whitmore v. State*, 72 Ark. 14; 77 S. W. 598; *Crawford v. State* (Tex. Cr. App.), 76 S. W. 576; *Killman v. State*, 53 Tex. Cr. App. 570; 112 S. W. 92.

⁶⁶ *Dorsett v. State* (Tex. Cr. App.), 58 S. W. 1003.

Statutes sometimes make the procuring of liquor for another a sale in the person procuring it. If the liquor purchased is to be used as a beverage, that must be shown. *Commonwealth v. Russell*, 11 Ky. L. Rep. 576; *State v. Whisemant* (N. C.), 63 S. E. 91.

A in one town bought liquor for B living in another town, and had it shipped to him, and sent a bill of lading for it to the bank in B's town for collection. B declined to receive it. A then got the bill of lading and had B to

endorse it in blank. A then paid the storage charges on the liquors and took it from the railroad station house. Under an agreement previously made he divided the liquor in four equal parts, receiving from C, D and E one-fourth each of the money paid and delivered to each one-fourth of the whisky. This was held to be sales by A to C, D and E. *Skyles v. State* (Neb.), 123 Pac. 447.

⁶⁷ *People v. Everts*, 112 Mich. 194; 70 N. W. 430; *People v. Rush*, 113 Mich. 539; 71 N. W. 863; *Armstrong v. State* (Tex. Cr. App.), 47 S. W. 981; *State v. Shaw*, 8 Kan. App. 679; 57 Pac. 137; *Baehner v. State*, 25 Ind. App. 597; 58 N. E. 741; *State v. Gibbs* (Minn.), 123 N. W. 810.

whether the ordinance had been violated.⁶⁸ When the conviction rests solely upon paid detectives, it is error to refuse an instruction to the jury that their evidence must be closely scrutinized.⁶⁹ Evidence showing a sale to special agents of the excise commissioner, without any inducements being offered to the seller by them to make the sale, is sufficient to support the seller's conviction;⁷⁰ and it is error for the court to charge the jury that the officers were persons hired to obtain evidence and their testimony subject to scrutiny, for they are in no sense detectives, but public officers.⁷¹ A sale to a police officer on Sunday is an offense, as much so as a sale to any other individual, and the vendor cannot plead as an excuse that the officer requested to be furnished with the liquor.⁷² One purchasing liquor, with a view to prosecute the vendor, does not thereby become the vendor's accomplice, is not barred from testifying, and his testimony may be sufficient to justify a conviction.⁷³ And it has been held that the owner of a slave who gives money to him in order to secure evidence to convict a person whom he suspects of selling liquor unlawfully to slaves is not an accomplice of the seller.⁷⁴

⁶⁸ *Ford v. City of Denver*, 10 Colo. App. 500; 51 Pac. 1015; *People v. Braisted*, 13 Colo. App. 532; 58 Pac. 796; *Wileox v. People*, 17 Colo. App. 109; 67 Pac. 343; *Walton v. Canon City*, 13 Colo. App. 77; 59 Pac. 840.

⁶⁹ *State v. Shaw*, 8 Kan. App. 679; 57 Pac. 137; *King v. Rogers*, 11 Can. Cr. Cas. 257.

⁷⁰ *Lyman v. Oussani* 33 N. Y. Misc. Rep. 409; 68 N. Y. Supp. 450, citing *Commissioners v. Backus*, 29 How. Pr. 33; *People v. Smith*, 28 Hun 626; *Tripp v. Flanigan*, 10 R. I. 128; *Mayor v. Dickerson*, 45 N. J. L. 38. See *Clement v. Martin*, 117 N. Y. App. Div. 5; 102 N. Y. Supp. 37.

⁷¹ *Cullinan v. Trolley Club*, 65 N. Y. App. Div. 202; 72 N. Y. Supp. 620. In this case it was

held error to refuse to charge that the State's excise agents drew a salary and had no financial interest in the outcome of the case.

⁷² *Borek v. State* (Ala.), 39 So. 580.

⁷³ *Commonwealth v. Downing*, 4 Gray 29; *State v. Baden*, 37 Minn. 212; 34 N. W. 24; *People v. Smith*, 28 Hun 626; 1 N. Y. Cr. Rep. 72; *Sears v. State*, 35 Tex. Cr. Rep. 442; 34 S. W. 124; *Huntington v. State*, 36 Ala. 236; *Fox v. State*, 53 Tex. Cr. App. 150; 109 S. W. 370.

⁷⁴ *Harrington v. State*, 36 Ala. 236.

An informer may testify. *Regina v. Stranahan*, 20 Can. Cr. Cas. 182.

In South Africa a spy of the

Sec. 708. In what quantities sales prohibited.

The original object in the enactment of statutes prohibiting the sale of intoxicating liquors was to regulate its immediate consumption as a beverage in order to restrain its excessive use. The idea of revenue involved in requiring a license was altogether secondary and merely incidental to the restraint imposed by requiring a license and the payment of a fee therefor. In the course of time, however, the statutes on the subject were broadened and the amount forbidden sold without a license was greatly increased, but the original idea of retailing has never been entirely eliminated in licensing States. In many States the limitation was fixed at a quart, as it was considered that few persons would buy that amount for immediate consumption; but gradually that amount has been increased in many States until now the amount that must be sold at a time is practically a sale at wholesale. Whatever the amount may be, a sale of less than the quantity permitted by the statute without a license is a violation of the provisions of the statute providing that a license must be in force authorizing the vendor to make the sale at the time and place it is made.⁷⁵ If a license be granted for sales of liquor at wholesale, a sale at retail under it is no justification.⁷⁶ It is no defense that the liquor was sold in corked or sealed bottles or packages if the amount sold be a prohibited amount.⁷⁷ The burden is upon the State to show that the amount sold was less than the amount that may be sold without a license.⁷⁸ Under a license to sell not less than a pint, a sale of a less

police is not an informer within the meaning of the statute giving an informer a part of the fine. *Queen v. Fourie*, 17 Juta 24; *Queen v. Pols*, 2 H. C. R., p. 580.

⁷⁵ *Bennett v. People*, 16 Ill. 160; *State v. Parker*, 15 La. Ann. 231; *Pierce v. State*, 13 N. H. 536; *Roberson v. Lambertville*, 38 N. J. L. 69; *Espy v. State*, 47 Ala. 533; *Nicrosi v. State*, 52 Ala. 336; *Whaley v. State*, 87 Ala. 83; 6 So. 380; *Commonwealth v. Kim-*

ball, 24 Pick. 366; *State v. Benz*, 41 Minn. 30; 42 N. W. 547; *State v. Brackett*, 41 Minn. 33; 42 N. W. 548; *State v. Brosius*, 39 Mo. 534; *Schum v. Gardener*, 25 Ill. App. 633.

⁷⁶ *Whaley v. State*, 87 Ala. 83; 6 So. 380.

⁷⁷ *State v. Benz*, 41 Minn. 30; 42 N. W. 547; *State v. Brackett*, 41 Minn. 33; 42 N. W. 548.

⁷⁸ *State v. Brosius*, 39 Mo. 534.

quantity than that amount is a sale without a license.⁷⁹ It is often difficult to determine whether less than the amount that may be lawfully sold has been sold owing to attempts made to evade the law. Thus, where sales could be made of a quart or over, and a customer went to the defendant and purchased a quart, but had it drawn in a pint bottle that he took to the defendant for that purpose, and afterwards went back for the other pint, it was held that there was a sale by the pint only. At the time of the purchase of the quart the second pint was not drawn and set aside for him but remained in the cask, and the court did not deem that it made any difference whether he paid for the quart when he got the first or second pint.⁸⁰ In this case if the second pint had been drawn from the cask in another bottle and set aside for the purchaser, then there would have been a sale of a quart—only one sale—and the title would at once have passed to the purchaser, and if destroyed he would have been the loser. In such an instance it is immaterial what may have been the vendor's motive or purpose in making the sale in the manner he did.⁸¹ Where, however, two persons went into a saloon together, each called

⁷⁹ *United States v. Squagh*, 1 Cranch C. C., 174; Fed. Cas. No. 16370.

⁸⁰ *Murphy v. State*, 1 Ind. 366. The court said: "There was a sale of the pint of whisky drawn from the vessel and delivered to the witness, at the time of each contract. For a conversion of such pint, after delivery, the buyer could have maintained trover. But there was no valid sale of the other pint, which remained in the vessel at the time of each contract. Trover for that portion, whilst it remained undrawn, could not have lain by the buyer, because, for the want of being identified, the property in that portion still remained in the seller. If, after any one of these con-

tracts mentioned by the witness, the vessel with the liquor in it had been destroyed whilst in the defendant's possession, the loss of the undrawn portion contracted for must have been sustained by the defendant." See also *Tripp v. Hennessy*, 10 R. I. 129; *Richardson v. Commonwealth*, 76 Va. 1007; *State v. Kirkham*, 1 Ind. 384; *Thomas v. State*, 33 Miss. 353; *People v. Luders*, 125 Mich. 440; 85 N. W. 1081; 8 *Detroit L. N.* 81.

A statute permitting a sale without a license of a certain amount "at one time" means at one delivery. *Fairelough v. Roberts*, 54 J. P. 421.

⁸¹ *Dobson v. State*, 57 Ind. 69; *State v. Bell*, 2 Jones (N. C.), 337.

for a pint of whisky, and one of them, at the request of the other, paid for both of the pints, this was held to be two sales of a pint each and not one sale of a quart to the person making the payment.⁸² So where a witness testified he took fifteen or twenty men into a saloon and told the defendant "to set up the beer for the crowd," which he did, and he testified that he presumed "they drank two or three gallons of beer," and "there was nothing said as to whether I bought by the glass, quart or gallon, it was all one purchase," and the beer was drawn from a keg into glasses holding a pint each, and each person present, together with the witness, drank one glass, it was held there was a sale by the pint and not by the quart or gallon, and that the defendant could be convicted upon an indictment charging a sale of a gill of intoxicating liquor "and no more."⁸³ But if the sale consists of a sale of a pint of whisky, a half pint of wine and a half pint of gin, all made at one time and paid for in a lump sum, there is a sale of a quart, and not sales of a pint and two half pints.⁸⁴ And the same would be true if three persons had made up a purse and sent one of their number to make the purchase, and thereafter they divided up the liquor in the proportion of their several contributions.⁸⁵ Under an ordinance prohibiting the sales of less than a gallon, the amount sold to be in a single vessel and not in separate ones, a sale of four quarts in separate bottles is a violation of its terms.⁸⁶

Sec. 709. Sale at wholesale.

A license to sell at wholesale does not authorize a sale at retail, and frequently a license to sell at retail does not

⁸² Commonwealth v. Ney, 12 Gray 124.

⁸³ Klein v. State, 76 Ind. 333.

⁸⁴ Cobb v. Billings, 23 Me. 470; Browne v. Hilton, 23 Pick. 319; *Contra*, Queen v. Cunerty, 2 Can. Cr. Cas. 325; 26 Ont. Rep. 51.

⁸⁵ Johnson v. State, 63 Miss. 228.

⁸⁶ Paola v. Williford, 65 Kan. 859; 69 Pac. 331.

Where accused purchased four quarts of whisky practically at the same time, it is not error to refuse to tell the jury if they found the accused guilty, they should state in their finding of which one of the four transactions they convicted him. Cotton v. State (Tex.), 120 S. W. 432.

authorize a sale at wholesale.⁸⁷ What is and what is not a sale at wholesale or retail is often defined by statute.⁸⁸ Where there are no statutory definitions, the term "wholesale" would cover a sale by the barrel, or cask, or unbroken parcels, and a sale in broken portions of such quantities would be a sale by retail.⁸⁹ A sale of a bottle for sixty cents has been held a sale at retail;⁹⁰ so a bottle for double that amount.⁹¹ It has been held that a sale of two dozen quart bottles of beer, to be drunk by the purchaser, was not a sale at wholesale, but one of retail.⁹² Yet where a statute required a dealer to sell not less than four and a half gallons or not less than two dozen reputed quart bottles at one time, a sale of four dozen pint bottles was held not to be a violation of the statute.⁹³ Whether or not a license is a wholesale or retail license is to be determined by the license and the application for it.⁹⁴ Under a statute defining the amount of liquor neces-

⁸⁷ *Maxwell v. State*, 27 Ala. 660; *Curd v. Commonwealth*, 14 B. Mon. 386; *Lillensteine v. State*, 46 Ala. 498; *In re Pittsburg Brewing Co.*, 29 Pittsburg Leg. J. (N. S.) 350; *Appeal of Meenan*, 11 Pa. Super. Ct. 579; *State v. Quinn*, 94 Mo. App. 59; 67 S. W. 974; *Regina v. Faulkner*, 26 Up. Can. Rep. 529; *O'Connor v. Gillespie*, 17 Vict. L. R. 374; *Rex v. Reese*, 21 Juta 197; *Ex parte Eisenmonger*, 21 N. S. W. L. R. 387; *Terre Haute Brewing Co. v. State*, 169 Ind. 242; 82 N. E. 81.

⁸⁸ *United States v. Clare*, 2 Fed. 55; *Biese v. State*, 79 Ga. 326; 4 S. E. 257; *People v. Wilcox*, 152 Mich. 39; 115 N. W. 973; *Commonwealth v. Paulin*, 187 Mass. 568; 73 N. E. 655; *State v. Scampini*, 77 Vt. 92; 59 Atl. 201.

⁸⁹ *Gorsuth v. Butterfield*, 2 Wis. 237; *Webb v. Laird*, 11 Lea 667; *Harris v. Livingston*, 28 Ala. 577.

⁹⁰ *Regina v. Strahan*, 20 Can. P. 182.

⁹¹ *Regina v. Dunham*, 35 Up. Can. Rep. 503.

⁹² *Kaufmann v. Hillsboro*, 45 Ohio St. 700; 17 N. E. 557.

⁹³ *Fairclough v. Roberts*, 24 Q. B. Div. 350; 54 J. P. 421; 59 L. J. M. C. 54; 62 L. T. 700; 38 W. R. 330; 54 J. P. 421.

⁹⁴ *In re Ryon*, 85 N. Y. App. Div. 621; 83 N. Y. Supp. 123, affirming 39 N. Y. Misc. Rep. 698; 80 N. Y. Supp. 1114.

In Michigan by statute sales of three gallons and over and of three dozen quarts and over are sales at wholesale. *People v. Leying*, 74 Mich. 579; 42 N. W. 139.

Under a statute prohibiting a wholesaler from selling less than five gallons, if he sell less than that amount, and has no license, he may be prosecuted under the general law prohibiting sales

sary to make a sale at wholesale, a sale, at the same time, of two different kinds of liquor, the amount of each kind being less than that required to constitute a sale at wholesale (and shipped in the same box), is a sale at retail and not wholesale.⁹⁵ So where a wholesaler gave his agent a quart of liquor on each five gallons he sold it was held that the transaction amounted to a sale at retail.⁹⁶ So if a dealer at wholesale cannot sell less than a certain number of bottles, a sale of that number, but a taking away of only a part of that number and no segregation of the remainder is not a sale at wholesale.⁹⁷ If several persons contribute money to a common fund, and one of their number purchase such a quantity of liquor as the dealer may sell at wholesale, intending to divide the amount purchased among themselves, and the method devised is for the purpose of evading the statute, of which purpose the

without a license, or he may be prosecuted under the wholesaler's statute. *State v. Quinn*, 94 Mo. App. 59; 67 S. W. 974.

⁹⁵ *Rex v. Reese*, 21 Juta 197.

⁹⁶ *Friedman v. Commonwealth* (Ky.), 83 S. W. 1040; 26 Ky. L. Rep. 1276.

The combining of a license for retail with another for wholesale, and charging a separate fee for each is within the powers of a city. *Strauss v. Galesburg*, 203 Ill. 234; 67 N. E. 836, affirming 89 Ill. App. 504.

⁹⁷ *People v. Luders*, 126 Mich. 440; 85 N. W. 1081; 8 Detroit Leg. News 81.

In Canada under a statute permitting sales "in casks or vessels containing not less than five gallons," the court left undecided the question whether a sale of five gallons in bottles was a violation of its terms. *Regina v. Scott*, 34 Up. Can. Rep. 20.

A by-law prohibiting a sale at retail without a license need not define what a sale by retail is where the statute defines it. *Bunker v. Maripose*, 22 Ont. Rep. 120.

Under the Vermont statute of 1902, No. 90, a wholesaler can sell only to persons holding a license to sell direct to consumers, and the liquor purchased must be sold by such licensees for that purpose. *State v. Scampini*, 77 Vt. 92; 59 Atl. 201. And this is true in Indiana. *Skelton v. State* (Ind.), 89 N. E. 860.

A sale of the requisite quantity to constitute the transaction a sale at wholesale made to persons clubbing together and raising a purse to purchase the liquor will be construed to be a sale at retail, if not made in good faith and as a device to evade the law. *Griffin v. Commonwealth* (Ky.), 66 S. W. 1034; 23 Ky. L. Rep. 2205.

seller knows, he is guilty of selling at retail, especially so if he devises the scheme or participates therein.⁹⁸

Sec. 710. Sale by distillers or brewers.

A statute which requires a license to retail liquor requires a manufacturer, distiller or brewer to have a license before he can retail his own liquors to consumers or as beverages.⁹⁹ But under a license authorizing the distilling or brewing of liquors there is an implied license to sell them to the trade, though not at retail for consumption.¹ But in prohibition sections of a State he may not sell liquors, except to persons who are authorized by statute to make sales under specified conditions;² and under a license to manufacture liquors for mechanical, medicinal and culinary purposes which has been declared forfeited a sale for such purposes cannot be justified.³

⁹⁸ *Farris v. Commonwealth*, 126 Ky. 463; 104 S. W. 281, 290; 31 Ky. L. Rep. 847, 850.

A brewery or distiller could not sell less than five gallons. A non-resident brewer connected with accused to take out a license in a local option district (which could be done) as a wholesaler, and shipped beer to him to be sold by him. Accused furnished his own team, made sales in his discretion, reshipped empty casks to the brewer, who credited him at the schedule rate. The accused's pay for his services was the difference between the price of the beer at the brewery and the selling price after deducting his expenses. The cases of beer contained 48 bottles, being slightly less than five gallons. The accused put in six extra bottles to make up the difference. This was held, as only distillers and manufacturers could only sell at wholesale in such a district, to be a mere trick to

evade the local option law. *Davis v. Commonwealth*, 82 S. W. 277; 26 Ky. L. Rep. 597.

⁹⁹ *Keller v. State*, 11 Md. 525; 69 Am. Dec. 226; *State v. Stiefel*, 74 Md. 546; 22 Atl. 1; *State v. Schroeder*, 43 Minn. 231; 45 N. W. 149; *Pietz v. State*, 68 Wis. 538; 32 N. W. 763.

¹ *Scanlan v. Childs*, 33 Wis. 663; *State v. Lovell*, 47 Vt. 493. But see *King v. Niederstalt*, 10 Can. Cr. Cas. 292.

² *Prohibitory Amendment Cases*, 24 Kan. 700; *Coggeshall v. Groves*, 16 R. I. 18; 11 Atl. 296; *Franklin v. Westfall*, 27 Kan. 614; *State v. Clark*, 15 R. I. 383; 5 Atl. 635; *State v. Kane*, 15 R. I. 395; 6 Atl. 783.

³ *Pearson v. International Distillery*, 72 Iowa 348; 34 N. W. 1.

A statute declaring it unlawful for any person "except manufacturers selling liquors of their own make" to sell liquor by wholesale in a local option county has no

Where a farmer raising apples is permitted to sell cider made from them, if it does not contain over three per cent. of alcohol, a sale of such cider containing over that per cent. of alcohol is an offense unless under a license.⁴ Under a statute permitting a manufacturer to sell liquors in not less than a certain quantity at one time, if several persons club together and contribute money to purchase that amount and then divide the liquor according to the amounts of their several contributions, and the manufacturer sells to them that amount, he has violated the statute if the sale was not made in good faith, and the method used was a device to evade the operation of the law.⁵ But where the purchaser borrowed a part of the money necessary to make the purchase, and after taking the liquor from the premises gave the lender of the money a part of the liquor, it was held that the vendor had not violated the statute forbidding sales in a less quantity than the specified

application to a person handling the products of a brewery on his own account, the products sold by him not being the property of the brewery. *Adair v. Commonwealth* (Ky.), 89 S. W. 1132; 28 Ky. L. Rep. 659.

Occasionally it is a nice question who is a manufacturer. It has been held that a person compounding ginger brandy for sale is a rectifier or compounder of spirits within a statute requiring rectifiers or compounders to have a license. *Rex v. Bell*, 8 East. Dist. Ct. Rep. 3.

A statute permitting a person who raises grapes and manufactures wine from them to sell the wine "in sealed bottles" means more than a "corked" bottle. It requires the mouth of the bottle to be incased in wax after it has been corked. *Koban v. State*, 72 Ark. 407; 81 S. W. 235.

⁴ *Commonwealth v. Boyden*, 183 Mass. 1; 66 N. E. 202.

A statute permitting a farmer to sell intoxicating cider made from his own apples is repealed by a subsequent statute imposing a fine on one not having a saloon license who sells "any intoxicating liquor" in less amount than a specified quantity—in this case a gallon. *Hewitt v. People*, 186 Ill. 336; 57 N. E. 1077, affirming 87 Ill. App. 367.

⁵ *Griffin v. Commonwealth* (Ky.), 66 S. W. 1034; 23 Ky. L. Rep. 2205.

In Australia the Commonwealth Constitution Act requires the duties of customs to be uniform. The State of New South Wales enacted a statute requiring a license to make beer. This statute was held void, because a duty of custom. *Peterswald v. Beatley*, 4 S. R. (N. S. W.) 290; 21 W. N. (N. S. W.) 81.

amount.⁶ A statute authorizing a farmer, gardener, and fruit and vine grower to sell the product of his farm, orchard, vineyard and garden without a license, has no application to a vendor of cider at his place of business, although he produced the apples from his own farm from which he made the cider; nor does it authorize a farmer or fruit grower as such to sell any kind of intoxicating liquor.⁷ An ordinance imposing a tax on manufacturers or wholesale dealers in malt liquors within a city has no application to a brewery manufacturing liquors without and selling them within the city.⁸

Sec. 711. Device to avoid charge of illegal sales—Examples.

Any device to avoid the charge of an illegal sale must fail if there be an actual sale. Whether the liquor was sold directly or indirectly, or by whatever device or pretense, it is still a sale forbidden by the statute and not another offense.⁹ Thus, where a liquor dealer sold pasteboard checks and these he accepted in exchange for liquor, the transaction was nevertheless a sale.¹⁰ And so where a person walked into the defendant's barber shop, the defendant at the time standing at the door, and took a bottle marked bitters, but which was in fact whisky, left some money on a chair which the defendant afterwards took, it was held not improper to refuse to instruct the jury that the defendant was not guilty if he did not tell the person entering the shop to get the bottle or did not see him get it; and also it was not error to refuse to instruct that if the person took the bottle without the defendant's knowledge the fact that when he discovered the bottle had

⁶ Howard v. Commonwealth (Ky.), 89 S. W. 256; 28 Ky. L. Rep. 239.

⁷ Hewitt v. People, 186 Ill. 336; 57 N. E. 1077, affirming 87 Ill. App. 367.

⁸ Consumers Brewing Co. v. Norfolk, 101 Va. 171; 43 S. E. 336.

⁹ Devine v. State, 4 Clarke (Iowa), 443; Looney v. State, 43

Ark. 389; Archer v. State, 45 Md. 33; State v. McMinin, 83 N. C. 668; Commonwealth v. Thayer, 8 Mete. 525; State v. Redden, 5 Har. (Del.) 505.

¹⁰ Billingsley v. State, 96 Ala. 114; 11 So. 408; Duke v. State, 146 Ala. 138; 41 So. 170; Ford v. State, 45 Tex. Cr. App. 288; 77 S. W. 800; State v. Mudie (S. D.), 115 N. W. 107.

been taken he took the money and got another one, it did not show a sale.¹¹ And where a person went into a room which the defendant occupied, dropped a nickel into a slot, took up a vessel on the table containing liquor, poured out a glass and drank it, returning the vessel to its place, it was held not error to refuse to instruct the jury that there was no evidence of a sale, but it was proper to charge that if they believed the liquor drank was the defendant's, and he received the money put into the slot as payment for the liquor, and that their conduct was a device to evade the statute, the defendant was guilty.¹² So where two persons went into a room, placed some money on a dumb waiter, went out a few minutes, returned and found some cigars and two glasses of beer on the waiter and their money gone, such facts were held to show a joint sale to them.¹³ In the case of a loan of a bottle of whisky to one promising to return it in kind, it was held that the transaction was not a sale unless it was a subterfuge to avoid the statute, when it would be.¹⁴ A sale of whisky by another name, as turpentine, is still a sale of intoxicating liquor.¹⁵ Where a grocer gave away whisky with sales of groceries, claiming it was done to increase his trade, it was held to be a question for the jury whether it was not a device to evade the law.¹⁶ So where the defendant took some liquors from his wagon, giving it to certain persons and saying he had no liquor for sale but had for his friends, and persons getting it threw some money into his wagon seat, but no one saw him take it, it was held that the evidence justified a conviction of an illegal sale.¹⁷ But where a witness testified that he helped himself to some liquor laid down the money for it, and

¹¹ Roberson v. State, 99 Ala. 189; 13 So. 532.

¹² State v. McMinn, 83 N. C. 668.

¹³ Henry v. State, 113 Ind. 304; 15 N. E. 593; Williamson v. State (Tex. Cr. App.), 40 S. W. 286; Willis v. State, 37 Tex. Cr. App. 85; 38 S. W. 777.

¹⁴ Robinson v. State, 59 Ark.

341; 27 S. W. 233; *Contra*, Keaton v. State (Tex. Cr. App.), 36 S. W. 440. See Ray v. State, 46 Tex. 176; 79 S. W. 535.

¹⁵ Looney v. State, 43 Ark. 389.

¹⁶ Kober v. State, 10 Ohio St. 444.

¹⁷ State v. Cooper, 26 W. Va. 338; Diltz v. State (Tex.), 119 S. W. 92.

it was not shown that the defendant was present, or knew of the transaction, or took the money, it was held that he could not be convicted.¹⁸ If another article be sold at the time the liquor is furnished, but the price paid for the article is intended to cover the cost of the liquor, though nothing be so said, the transaction is nevertheless a sale of liquor.¹⁹ Where a person applied to the defendant for liquor, who told him he would have to procure a bottle, which he did, and the defendant then went away and shortly came back with the bottle filled, and said he would have to charge a small sum for his services, it was held error to charge the jury that if they believed the evidence they should find the defendant guilty;²⁰ but in the same State where the evidence showed that the witness sent for whisky by the defendant, that he had forgotten how much money he gave him, that the defendant brought a quart of whisky, and he paid him nothing for it, it was held that a sale by the defendant was shown.²¹ A sale of a "soft" drink accompanied by a treat of whisky is a sale of the whisky.²² Where a statute provides that "any shift or device" to evade its provisions prohibiting sales shall not be a defense, it is not error to charge the jury, on an indictment for a sale without a license, that such is the fact, although the indictment does not allege a sale by a "shift or device."²³ Such a statute does not mean that the device must be confined to mechanical devices, such as are frequently used in "blind tigers."²⁴ Under a statute providing that "no trick, device, subterfuge or pretense shall be allowed to evade the operation or defeat the policy of the law against selling spirituous liquors without a license," it is proper to instruct the jury

¹⁸ *State v. Ferrell*, 22 W. Va. 759.

¹⁹ *Archer v. State*, 45 Md. 33; *Commonwealth v. Thayer*, 8 Metc. 525; *Marcus v. State*, 89 Ala. 23; 8 So. 155; *Meadows v. State*, 121 Ga. 362; 49 S. E. 268.

²⁰ *State v. Taylor*, 89 N. C. 577.

²¹ *State v. Smith*, 117 N. C. 809; 23 N. E. 449.

²² *Regina v. Richardson*, 20 Ont. Rep. 514; *Renfro v. State* (Tex. Cr. App.), 91 S. W. 576.

²³ *State v. Green*, 69 Kan. 865; 77 Pac. 95.

²⁴ *Rowe v. Commonwealth* (Ky.), 70 S. W. 407; 24 Ky. L. Rep. 974.

that they may find for the prosecution if they believed the defendant "pretended to sell the witness ten gallons, and let him have it by the small." ²⁵

Sec. 712. What facts show a sale.

The defendant and two others drove his wagon down from a mountain into a field near the place where they all three were to stay temporarily. In this wagon was a keg of whisky from which S made sales in the defendant's presence. The defendant brought several persons to S, who desired to purchase whisky, and said he owned a one-third interest in the whisky. His conviction was sustained.²⁶ B asked S to get him some whisky, and S said he thought he could. B gave S fifty cents, and S then went away but came back in a few minutes with a bottle of whisky which he gave B. S's conviction was upheld.²⁷ S offered to get A some whisky, went out and returned with a box, and taking A into the back room of a store, gave him a jug which he said contained three pints of whisky, and A then paid him some money. This was held sufficient evidence of guilt.²⁸ M kept a saloon, and on a Sunday A went into it and D was there behind the bar. A asked D to let him have a glass of beer, and he then took a tumbler and filled it full of beer from a keg in the saloon and handed it to A, who drank the beer. A did not request D to *give* him the beer, and when he drank it he did not pay him for it nor tell him to charge it to him. A had got beer there before and always paid for it and ran no account at the saloon. D was one of M's barkeepers. The price of a glass of beer was five cents. It was held that the evidence showed a sale and not a gift. The transaction having taken place on Sunday, when it was unlawful to even give away intoxicating liquor, the court would not presume there was a gift and not a sale.²⁹ And where A in a saloon asked B for

²⁵ Griffin v. Commonwealth (Ky.), 66 S. W. 817; 23 Ky. L. Rep. 1992.

²⁶ Cook v. State, 100 Ga. 72; 25 S. E. 919.

²⁷ Wiley v. State, 74 Miss. 727; 21 So. 797.

²⁸ Thomas v. State, 117 Ala. 134; 23 So. 636.

²⁹ Dant v. State, 106 Ind. 79; 5 N. E. 870.

whisky, and B gave A a bottle having in it a liquid of the appearance of whisky, and B was the only person in charge of the saloon at the time, a conviction of a sale by B was sustained.³⁰ A was the keeper of a saloon of which the door was open on the day a sale was charged to have been made. B, standing on the sidewalk, in front of the saloon, testified he saw S drink something out of a small-sized glass—a glass “about the size of a whisky glass”—containing a liquid the color of whisky; that S laid down a piece of money about the size of a silver half-dollar, and received back some change. A judgment of conviction was affirmed.³¹ A owned a saloon, in the rear part of which was a partition wall. B stood on one side of this wall and A on the other. In the wall was a hole, through which a small box, containing money of B, was pulled. Shortly thereafter it was thrust back and it contained a bottle of whisky. The court refused to grant a new trial.³² Two witnesses testified they purchased whisky of a negro at a place where the defendant ran a cold storage business, that the defendant was present during the conversation, said nothing to them, but did say something to the negro. The defendant denied that he had ever seen or sold whisky to the witnesses. The judgment of conviction was affirmed.³³ A went into B's saloon and called for a pint of whisky. B put a bottle of whisky on the bar and A laid fifty cents on the bar which B's brother put in the cash drawer. The brother was standing nearby at the time of the transaction. A conviction was

³⁰ *Parker v. State*, 39 Tex. Cr. App. 262; 45 S. W. 812.

³¹ *Dant v. State*, 83 Ind. 60. “The character of the business carried on by him, the character of the articles which he usually sold and the appearance of the liquid purchased and drank by S justified the inference that the article purchased was intoxicating liquor. It is not necessary that the character of the thing sold should be proved by direct or pos-

itive testimony; it may be established by circumstantial evidence.” “The facts stated by the witness supplied grounds for the inference made by the trial court that the liquor which appellant sold to S was intoxicating.”

³² *Stamper v. Commonwealth*, 102 Ky. 33; 42 S. W. 915; 19 Ky. L. Rep. 1014; *Thompson v. State*, 109 Ga. 272; 34 S. E. 579.

³³ *Stiles v. State* (Tex. Cr. App.), 43 S. W. 993.

sustained.³⁴ A negro with a jug was seen to go, in the nighttime, into defendant's house, and in ten minutes return with the jug full of whisky. The defendant kept liquor for sale. It was held not error to charge the jury that they might infer a sale of liquor by the defendant.³⁵ Circumstantial evidence is sufficient to uphold a conviction.³⁶ A said to B, in C's hearing, he would like to get some whisky. B said he would see if he could make arrangements for him to get some. B and C left A and went into an adjacent room, and B soon came back alone and nodded to A, and they two then went into the room, where was some whisky on a table. A took the whisky and laid some money on the table. This was held sufficient to show that C sold A the whisky.³⁷ Where an accomplice of the defendant, partners in the restaurant business, testified that he sold beer with the consent and knowledge of the defendant, who later shared in the profits, it was held sufficient to convict the defendant, his testimony being corroborated by another witness that he had been formerly in partnership with the defendant in the same business and sold out to him because of the insistence of their patrons for beer, and the defendant at once sold the business to a former saloon keeper and put him in charge.³⁸ A asked B for some whisky, and B wrote his own name on a blank piece of paper and gave it to A, who carried it to an express agent and gave it to him with some money. The agent delivered to A some whisky, but not a word was said between them. This was held to be a sale by B to A.³⁹ A package of whisky was sent to A by express, and he gave B an order on the express agent for it. B got the whisky and paid the charges on it. This was held to be a sale of the whisky by A to B.⁴⁰ On a charge of a sale

³⁴ *Wade v. State* (Tex. Cr. App.), 43 S. W. 995; *Hodge v. State* (Tex. Cr. App.), 43 S. W. 994.

³⁵ *State v. Long*, 7 Jones L. (N. C.) 24.

³⁶ *State v. Jones*, 73 Mo. App. 525.

³⁷ *Dixon v. State*, 67 Ark. 495; 55 S. W. 850.

³⁸ *Bower v. State* (Ark.), 57 S. W. 800.

³⁹ *Bennett v. State*, 87 Miss. 803; 40 So. 554.

⁴⁰ *McNeely v. State*, 49 Tex. Cr. App. 286; 92 S. W. 419. See

by A to B, who was the only person known in the transaction as the purchaser, it is immaterial that B purchased the liquor for C, and that they two thereafter consumed it.⁴¹ A ordered liquor sent him C. O. D. by express. He gave an order for it to B on the express agent's wife, and under this order the express agent delivered it to B. It was held that the delivery was with authority and A was guilty.⁴² A operated a billiard hall. He took orders for the drinks and filled them by procuring them from a licensed bar in the same building. He made no charge for procuring the liquors, nor did he make any statement to his customers that the proprietor did not himself furnish the liquors. This was held to show a sale of the liquor by him to be drunk on the premises.⁴³ So a restaurant keeper, who procures liquor for a guest in a non-licensed town, but who is unable to state from whom his servant obtained the liquor, is guilty of the offense of delivering liquor, which is equivalent to a sale of it unless the delivery is gratuitous.⁴⁴ The fact that the defendant repaid the money he received for the liquor does not necessarily convert the transaction into a loan.⁴⁵ A went to the rear of a restaurant and told B what he wanted. B turned around and went into the cook room, and then opened a door into a side room. At B's invitation A helped himself to the whisky, paying B for what he took. This was held to be a sale.⁴⁶

Sec. 713. What facts show a sale, continued.

A purchaser signed an order for a quart of whisky, gave it to the defendant and paid him a dollar. The next day, in the

Boyd v. State, 49 Tex. Cr. App. 197; 92 S. W. 845; Fulds v. State (Tex. Cr. App.), 107 S. W. 857; Walker v. State, 52 Tex. Cr. App. 293; 106 S. W. 376.

⁴¹ Smart v. State, 49 Tex. Cr. App. 373; 92 S. W. 810.

⁴² McElroy v. State, 49 Tex. Cr. App. 604; 95 S. W. 539; Caton v. State (Tex. Cr. App.), 95 S. W. 540.

⁴³ Cullinan v. Garfinkle, 114 N. Y. App. Div. 509; 99 N. Y. Supp. 1119.

⁴⁴ King v. Gunn, 10 Can. Cr. Cas. 148.

⁴⁵ Chorán v. State, 49 Tex. Cr. App. 301; 92 S. W. 422.

⁴⁶ Robinson v. State, 53 Tex. Cr. App. 567; 110 S. W. 905.

presence of the purchaser the defendant poured something into a bottle from a jug, then placed on the bar a quart bottle of whisky, and all present drank from it. It was then labeled with the purchaser's name and set to one side. It was held that proof of these facts showed a sale.⁴⁷ In one case the following instruction was held to state the law correctly: "It is claimed by the State that one of the ingredients of the offense was a sale to the defendant's hired man of a keg of beer under the circumstances as disclosed by the evidence. In that behalf, I charge you that if you believe, from the evidence, beyond a reasonable doubt, that defendant procured a keg of beer or other intoxicating liquor, so that the title and ownership thereof was in him, and that he thereafter transferred the title to his hired man, by charging its value to him or in any other manner constituting a sale thereof, then he would be guilty of selling intoxicating liquors in violation of law."⁴⁸ A testified he laid half a dollar on the defendant's table, and half an hour later defendant turned over to him a pint of whisky. The defendant told A, at the time of the delivery, that he had induced B to bring the whisky to the place and he deposited it on the table for A's benefit. This evidence was held to warrant a conviction.⁴⁹ An employe of a wholesale liquor house situated outside the State, solicited orders for liquor. If the house approved the order he sent in the liquor was shipped to the person ordering it, and if such person failed to pay for and receive it, the liquor remained in the railroad freight house until an order for the same amount and kind of liquor was secured by the employe, when it was turned over to the new purchaser on another bill of lading upon the payment of the price. It was held that in the latter instance the employe made a sale of the liquor to the new purchaser.⁵⁰ On the presumption that a transaction is a sale rather than a gift, where it is shown that the defendant delivered liquor he owned to another, and nothing else appears, the evidence

⁴⁷ *Blodgett v. State*, 37 Tex. Cr. App. 70; 38 S. W. 783.

⁴⁸ *State v. Thoemke* (S. D.), 92 N. W. 480.

⁴⁹ *Latham v. State* (Tex. Cr. App.), 72 S. W. 182.

⁵⁰ *State v. Cohen*, 65 Kan. 849; 70 Pac. 600.

is sufficient to show a sale.⁵¹ Whisky was consigned to A C. O. D., and while in the express office B gave him money with which he paid for the whisky. He then gave the whisky to B. It was held that this justified the jury in finding that A sold B the whisky.⁵² A testified that B took down the names of persons who wanted whisky, including his own, and he gave him money to pay for a pint of whisky, and that they then went toward a distillery. Some time afterwards he heard the whisky was made and he then went to a house not far from the distillery and received a pint from some person. This evidence was held to justify the court in finding B guilty if it believed he directly or indirectly sold A whisky, or acted as agents of others doing so. The court regarded the evidence as showing an attempt to evade the law forbidding the sale of liquor by retail.⁵³ A went to B's house and B directed him to go inside where he found a bottle of whisky. He took the bottle and left some money on the table. The court told the jury that if one in possession of personal property permitted another to take it, they having an understanding he was to pay for it, and the person taking it left money to pay for it where the other person could get it, which he afterwards did, the transaction was a sale; and if B knew A "wanted whisky at the time, and A got the whisky, and B afterwards found it out, it would make no difference that B accepted the money afterwards if he had the whisky in his control when A got it." It was held that the construction, construed as a whole, was not erroneous because of the part in quotation marks.⁵⁴ A said to B he would like to get some whisky and asked what a pint would cost. B said he did not know of any but possibly he might find some, and thought it would cost fifty cents. A then threw that amount of money on the ground, and they then parted. In about thirty minutes A saw B and asked

⁵¹ *Groves v. Panam* [1905],
Vict. L. R. 297; 26 Austr. L. T.
232; 11 Austr. L. R. 180.

⁵² *Treadway v. State* (Tex. Cr.
App.), 62 S. W. 574; *Bills v.*
State (Tex. Cr. App.), 64 S.

W. 1047; *State v. Kiger*, 63 W.
Va. 450; 61 S. E. 362.

⁵³ *Hinkle v. Commonwealth*
(Ky.), 66 S. W. 1020; 23 Ky. L.
Rep. 1979.

⁵⁴ *Winter v. State*, 133 Ala. 176;
32 So. 125.

about the whisky, and B told him where he had put it, to which place A went and found the whisky. The court instructed the jury that if they "believed from the evidence, beyond a reasonable doubt, B's conduct was a subterfuge to sell his own whisky, or that he was acting as agent for some one else who owned the whisky in making the sale, if such sale was made he was guilty." The instruction was held correct and the conviction was sustained.⁵⁵ A and B were charged with illegally selling liquor. C testified that A was the proprietor of a saloon on the ground floor of a hotel which was connected with a storeroom. From the saloon a dumb waiter ran to a room upon an upper floor of the hotel. B took orders for drinks, and C put his money on the dumb waiter, and it then disappeared and returned with the liquor ordered. It was held that both A and B were rightfully convicted of an illegal sale.⁵⁶ In one case the evidence showed A received a written order from B, who was a non-resident, for a case of beer. A money order accompanied the order. On the same day B took from a warehouse a case of beer, and this he delivered to an express company for shipment to A. This was held to show an unlawful sale to A, though no evidence of ownership of the beer was offered.⁵⁷ Testimony that the witness, on two occasions, obtained whisky from defendant in a storeroom, the place where it was kept, and that he placed some money each time on a barrel head, tends to show a payment for the liquor and justifies the court in telling the jury that if there was such an understanding the transaction was a sale, notwithstanding the witness said there was none.⁵⁸ In South Carolina it has been held that one who represents a foreign liquor house and takes an order in that State for liquors, receiving the money therefor, makes a sale, it not appearing that the order was taken subject to approval of the

⁵⁵ *Winter v. State*, 133 Ala. 176; 32 So. 125.

⁵⁶ *State v. McCabe*, 94 Mo. App. 122; 67 S. W. 973.

⁵⁷ *State v. Johnson*, 83 Minn. 121; 90 N. W. 161; *State v. Story*, 87 Minn. 5; 91 N. W. 26;

State v. Russell (Del.), 69 Atl. 839; *Fisher v. State* (Fla.), 46 So. 422; *Harper v. State* (Ark.), 121 S. W. 738.

⁵⁸ *Tatum v. Commonwealth* (Ky.), 59 S. W. 32; 22 Ky. L. Rep. 927.

house.⁵⁹ If B loan or furnish A money to get whisky out of an express office, and the whisky be turned over to B by A in discharge of the debt, the transaction is a sale by A to B.⁶⁰ A was both the postmaster and express agent at a certain railroad station to which liquor was consigned by express to B without any charges and was received by A. B having been notified of the shipment applied to A as postmaster for a postal money order, which A issued to him, and he sent it to the seller of the liquor and then called at the express office and received the liquor from A as express agent. Upon this state of facts it was held error to refuse to instruct the jury A was not guilty unless the issuing of the money order was a mere device adopted by him and the seller of the liquor to enable A to collect the purchase money without giving to the transaction the appearance of collecting it.⁶¹ B testified he had agreed to take a quart of whisky at a depot sent to A, the price payable on delivery, and he gave A one dollar to pay for it, and afterwards concluding not to take the whisky he delivered it to C who paid him one dollar for it. It was held proper to say to the jury that if A was the owner of the whisky at the time of its delivery to C, and A made a sale to C, and B assisted and was present at the sale, B had violated the law.⁶² If the contract of sale be made without the State, and the price there paid, yet the liquor be delivered in such State, the sale takes place at the point of delivery and not at the place of the agreement and payment of the money.⁶³

Sec. 714. What facts show a sale, continued.

One O gave A a dollar, and A let him have some brandy he had bought at the request of B. A had paid one dollar for the brandy, B having given him it for that purpose. A then gave B the dollar O had given him. This was held to show a sale of the brandy by A to O.⁶⁴ A bought of B a certain

⁵⁹ *State v. Small* (S. C.), 60 S. E. 676.

⁶⁰ *Fields v. State*, 52 Tex. Cr. App. 451; 107 S. W. 857.

⁶¹ *England v. State*, 82 Ark. 488; 102 S. W. 373.

⁶² *Hawkins v. State*, 51 Tex. Cr. App. 37; 100 S. W. 956.

⁶³ *Angelin v. State* (Miss.), 50 So. 492.

⁶⁴ *Mitchell v. State*, 141 Ala. 90; 37 So. 407.

number of bottles of beer, and paid for them in advance. As evidence of his purchase B gave A a printed ticket representing the amount of the beer purchased. On presentation of this ticket so much of the beer as he desired was delivered to A, and a hole was punched in it for each bottle delivered. It was held that the punching of the hole showed a completed sale.⁶⁵ Liquor was shipped to A and was lying in the express office C. O. D. B wanted to purchase of A some liquor, and A gave him an order for the liquor in the express office. B went to the express office and obtained the liquor by paying the express company the charges on it. This was held to be a sale.⁶⁶ A had some whisky in an express office sent him C. O. D. B let him have a dollar to assist him in getting it out, and A let him have a part of the whisky for his pay. This was held a sale.⁶⁷ A went into B's place of business, obtained some liquor and left its price where B could and did find and accept it. B's conviction was sustained, the manner of the sale being a mere subterfuge to evade the law.⁶⁸ Liquor was consigned to B cash on delivery. B had received money from A to pay for the liquor, under an agreement that A was to receive a part of the liquor for the money advanced, and A did receive a part of the liquor. It was held that the transaction was a sale by B to A.⁶⁹ Liquor was shipped C. O. D.

⁶⁵ *Harper v. State*, 85 Miss. 338; 37 So. 956.

⁶⁶ *Cantwell v. State*, 47 Tex. Cr. App. 521; 85 S. W. 18.

In this case the defendant had given directions to the agent of the express company not to deliver liquor on his written orders, but subsequently gave a written order, and this was held to revoke his former directions and to estop him claiming that he did not intend the person receiving the written order should get the liquor.

⁶⁷ *Holman v. State* (Tex. Cr. App.), 89 S. W. 977; *Hutchinson v. State* (Tex. Cr. App.), 90 S. W. 178; *Beall v. State* (Tex. Cr.

App.), 86 S. W. 334 (a joint assignment to A and B); *Sliger v. State*, 48 Tex. Cr. App. 341; 88 S. W. 243.

⁶⁸ *Fitze v. State* (Tex. Cr. App.), 85 S. W. 1156; *Walker v. State*, 122 Ga. 747; 50 S. E. 994; *Price v. State* (Miss.), 38 So. 41; *Cable v. State* (Miss.), 38 So. 98; *State v. Nelson*, 14 N. L. 297; 103 N. W. 609.

⁶⁹ *Beall v. State* (Tex. Cr. App.), 86 S. W. 334.

But it is said that if A merely loaned the money to B and never received the liquor in return, except in the way of a treat, B was not guilty.

to A, and B gave him money to pay one-half the charges. A paid the charges on the whole shipment, receipted for the package, and each party took away one-half of the liquor. This was held a sale by A to B.⁷⁰ Without his knowledge liquor was shipped C. O. D. to A. On being informed of the arrival, others gave him money to pay the expressage, which he did, and turned the whisky over to them. This was held to be a sale.⁷¹ Where forwarding agents at East London received a consignment of liquor for a Johannesburg firm, and, acting on instruction from this firm, instead of forwarding the liquor, handed it to a broker at East London with instructions to sell, and gave cession and received the purchase money, this was held to be an illegal sale.⁷² Appellants were promoters of a dance at which they sold liquors and other refreshments to the subscribers in consideration of the sum of eight shillings and six pence paid by each subscriber. There was a loss on the transaction which was paid by the promoters, but if there had been a profit they would have been entitled to it. It was held that there had been a sale.⁷³ G was given money beforehand to buy a certain quantity of liquor for others and was allowed to keep the difference between the purchase price and the money given him, besides receiving a certain sum per bottle for carriage. It was held that he had sold liquors and was guilty of selling without a license.⁷⁴ A closed his saloon in C when local option was adopted and went into the saloon business in P, in the same county. He met B in C and B gave him a dollar and asked him to send him some whisky. A accepted the dollar, and shortly thereafter B received in C some liquor by shipment from P. A and a witness testified that on A reaching P he gave the money to D, another saloonkeeper, in whose business he had no interest, and that D shipped the liquor to B. It was held that A was not entitled, on the charges of having sold the liquor, to

⁷⁰ Hillard v. State, 48 Tex. Cr. App. 314; 87 S. W. 821.

⁷¹ Dunn v. State, 48 Tex. Cr. App. 107; 86 S. W. 326.

⁷² Queen v. Atwell, 9 East. Dist. Ct. Rep. 174.

⁷³ Rex. v. Walker, 21 Juta 195.

⁷⁴ Queen v. Goldman, 16 Juta 118.

an instruction that if the jury believed their evidence they should acquit him.⁷⁵ A met B and asked him if he could get her some whisky, and he said he would try but did not know. She then gave him the customary price of a pint of liquor, and he went up the street and returned in ten minutes, and gave her a pint of whisky. It was held that this showed a sale by him to her.⁷⁶ A went to B's livery stable and asked him "if he had anything" and B said he "might look around," and then A went into the stable, found a pint of liquor, took it and laid down some money in its place. The next day A again went to the stable and asked B for whisky, and B nodded his head toward a buggy where A found a pint of liquor, took it and gave B a dollar and received back from him fifty cents. It was held that the evidence was sufficient to sustain a conviction.⁷⁷ Proof that before B applied to C to get him whisky C bought whisky from A, and then let B have it in consideration of money paid him, is evidence of a sale.⁷⁸ A expressed a desire for some whisky. B said he had ordered whisky and said what it was worth and A then gave him the price. In half an hour A found a quart of whisky lying on his table, it having been placed there in his absence. Proof of these facts were held to show a sale by B to A.⁷⁹ On proof that one received money and delivered intoxicating liquor in exchange for it, the one so receiving the money may be treated as the seller, no other person being shown to have filled that capacity.⁸⁰ Liquor was sent by express in packages to A payable C. O. D. He did not know the liquor had been sent and on being informed of its arrival he refused to take it out. Afterwards he was asked to sell some liquor but said he had none. However, he gave an order to the person desiring to purchase, for the liquor at the express office. The person to

⁷⁵ *Brown v. State* (Tex. Cr. App.), 76 S. W. 475.

⁷⁶ *Johnson v. State* (Tex. Cr. App.), 77 S. W. 225.

⁷⁷ *Hargrove v. State* (Tex. Cr. App.), 76 S. W. 926.

⁷⁸ *Taylor v. State* (Tex. Cr. App.), 77 S. W. 221; *Arnold v.*

State, 46 Tex. Cr. App. 110; 79 S. W. 547.

⁷⁹ *James v. State*, 45 Tex. Cr. App. 592; 78 S. W. 951.

⁸⁰ *Reese v. Newman*, 120 Ga. 198; 47 S. E. 560.

whom the order was given went to the express office, paid the charges and obtained the liquor. It was held that A had unlawfully sold the liquor.⁸¹ A gave B a dollar to buy something to drink. B said he would try to get it. He went away and shortly afterward returned, saying to A that he could "find it by some barrels by the bath room." A went to the place indicated and found two small bottles of alcohol. This was held sufficient to convict B of an illegal sale.⁸² A minor gave accused an order on a firm without the State directing the firm to deliver a case of beer to the defendant as the signer's agent. The order was on a printed form kept by the defendant. When the case arrived the defendant put the beer on ice, and the signer on procuring a bottle paid for it. It was held that the defendant illegally sold the bottle of liquor so delivered to the minor.⁸³

Sec. 715. What evidence shows a sale.

A witness testified that he parted with a certain named amount of money to buy whisky, that the defendant or another got the money, that defendant was behind a saloon bar superintending the business; it was held there was sufficient evidence to convict him, although he denied he got the money.⁸⁴ The testimony of a single witness that he bought the liquor, paid for it, and that it was intoxicating, is sufficient to sustain a conviction.⁸⁵ There need be no positive testimony of an agreement for a sale, for the sale may be established by facts showing an implied sale, and proof of an implied sale is as effective

⁸¹ *Ashley v. State*, 46 Tex. Cr. App. 471; 80 S. W. 1015.

⁸² *Sebastian v. State*, 44 Tex. Cr. App. 508; 72 S. W. 849.

⁸³ *State v. Field* (Mo.), 119 S. W. 499.

⁸⁴ *Hartgraves v. State* (Tex. Cr. App.), 39 S. W. 661; *State v. Shelton*, 16 Wash. 590; 48 Pac. 258; *Willis v. State*, 37 Tex. Cr. App. 82; 38 S. W. 776; *Roberson v. State* (Tex. Cr. App.), 91 S. W. 578.

⁸⁵ *Mitchell v. State* (Tex. Cr. App.), 40 S. W. 284; *Brigham v. State* (Tex. Cr. App.), 39 S. W. 572; *Brown v. State* (Tex. Cr. App.), 39 S. W. 578; *Jordan v. State* (Tex. Cr. App.), 38 S. W. 782; *Williamson v. State* (Tex. Cr. App.), 43 S. W. 983; *Hodge v. State* (Tex. Cr. App.), 43 S. W. 994; *Taylor v. State* (Tex. Cr. App.), 75 S. W. 536; *State v. Wheeler*, 87 Mo. App. 580 (two witnesses).

as proof of any other sale.⁸⁶ The fact that the seller cannot identify the purchaser out of a dozen or so of men who were drinking does not render the evidence insufficient to sustain a conviction.⁸⁷ In New Zealand it has been held that if the proof show liquor was passed over the bar the magistrate may find there was a sale, although both persons testify it was a gift, if he disbelieves the story of a gift.⁸⁸ If the accused be positively identified as the one who made the sale he may be convicted, although he testifies he had nothing to do with the sale and was not present.⁸⁹

Sec. 716. What facts do not show a sale.

Proof of an agreement to sell is not proof of a sale, even though the quantity and price be agreed upon.⁹⁰ Where the evidence showed the liquor was purchased when dark, that it looked like whisky, that the seller's voice sounded like the defendant's, but the witness was not certain of it, and the witness identified a bottle three-fourths full of liquid as the bottle, but the bottle was not put in evidence, a conviction was set aside.⁹¹ Mere proof of drinking beer in the defendant's saloon, though the evidence show the drinker carried no beer into the saloon, and there was no other person except the bartender in the saloon, will not support a charge of a sale.⁹² Where a statute defined a "blind tiger" to be a place in which liquors are sold by a device whereby the seller is concealed from the buyer, it was held that where the evidence showed a

⁸⁶ Roach v. State, 47 Tex. Cr. App. 500; 84 S. W. 583; Hays v. State, 47 Tex. Cr. App. 150; 83 S. W. 201; Kelly v. Commonwealth (Ky.), 83 S. W. 99; 26 Ky. L. Rep. 1038; State v. McCabe, 94 Mo. App. 122; 67 S. W. 973; State v. Clow, 131 Mo. App. 548; 110 S. W. 632.

⁸⁷ State v. Durein, 70 Kan. 1; 78 Pac. 152; 70 Kan. 13; 80 Pac. 987.

⁸⁸ Schultheis v. Wilson, 13 N. Z. L. R. 295. See also Taylor v.

State (Tex. Cr. App.), 75 S. W. 536.

⁸⁹ Carnes v. State, 53 Tex. Cr. App. 509; 111 S. W. 402; Schmidt v. State, 53 Tex. Cr. App. 465; 110 S. W. 897.

⁹⁰ Fleming v. State, 106 Ga. 359; 32 S. E. 338.

⁹¹ McDonald v. State (Tex. Cr. App.), 49 S. W. 589.

⁹² State v. Bach Liquor Co., 67 Ark. 163; 55 S. W. 854.

customer deposited money in a side room, winked at a man there, withdrew and shortly returned finding a bottle of whisky in place of the money, he could not be convicted under the statute.⁹³ One who assists in the procurement of money from certain persons in order to pay the charges on whisky shipped to another person C. O. D., and who also aids one of such persons to get his share of the whisky, is not a seller of the whisky.⁹⁴ Whisky was sent to A through the express office, and on being told by B it was there, A told him he could have it if he could get it. B wrote an order for it, signed A's name to it, and sold the order to C, who got the whisky. This was held not to be a sale by A to B.⁹⁵ A purchased the receipts of a bar for the day at a certain sum, and at the close of the day the receipts were paid over to him. It was held that he was not guilty of selling without a license.⁹⁶ The defendant went to a reunion of soldiers, having whisky in his wagon. The prosecuting witness, in the absence of the defendant and without any evidence to show he knew what the prosecuting witness did, went to the wagon, took out two bottles and threw two dollars under the wagon. It was not shown that the defendant ever got the money. It was held that the evidence did not justify a conviction.⁹⁷ B went into A's store, telephoned C at his saloon and asked C to send him a quart of whisky, saying he was at A's store. C told him to leave the money for the whisky with A. The whisky was left at the store and B got it and left the money for it with A, asking him to give it to C, which he did. It was held that A had not sold the liquor to B.⁹⁸ A, at B's request, made out an order for one dozen bottles of beer. The order was sent to another city and the beer sent C. O. D. to B, who paid the charges and placed the beer in A's cold storage warehouse, paying him one dollar for the storage. When B wanted beer he went to the warehouse and got it. It was held that the

⁹³ *Smith v. State*, 42 Tex. Cr. App. 414; 57 S. W. 815.

⁹⁴ *Hilterbrand v. State*, 49 Tex. Cr. App. 342; 91 S. W. 537.

⁹⁵ *Boyd v. State*, 49 Tex. Cr. App. 399; 92 S. W. 845.

⁹⁶ *Regina v. Westlake*, 21 Ont. Rep. 619.

⁹⁷ *Lane v. State*, 49 Tex. Cr. App. 335; 92 S. W. 839.

⁹⁸ *Mitchell v. State*, 148 Ala. 678; 41 So. 951.

transaction was neither a sale nor a gift by A to B.⁹⁹ A testified he bought liquor of P, in a house run by him and H, in which was a billiard table, tobacco, cigars, etc., but he could not recollect if H was present. It was shown that the occupation tax register was issued to H for a confectionery establishment. On this evidence it was held that H was not guilty, no partnership being shown, though P was.¹ A sick man gave money to the defendant who went away and returned with whisky. The defendant testified that he went to a restaurant and bought the whisky, and the restaurant keepers refused to testify whether they sold the whisky. Witnesses testified as to the defendant's good character, and his partner testified they kept no liquor in store. It was held that the evidence did not show a sale.² Unless the evidence connect the defendant with the sale, he cannot be convicted, and proof that he shipped liquor to another State is not proof of a sale in the State from which he shipped it.³ A went into B's store and took a bottle of whisky without B's knowledge. When A informed B of it he told him to charge the cost of the liquor to his account, which B did not do. B told A if he did it again he would prosecute him. It was held that B was not guilty.⁴

Sec. 717. What facts do not show a sale, continued.

If there be an agreement to sell and the money be paid but returned and the liquor be not delivered, there is no sale.⁵ On request of A, B ordered some whisky for him. B was a druggist. Before A called for it B sold most of it to his customers, and when A did call, B gave him, free of charge, what was left and returned his money. It was held that there was no sale to A.⁶ Where the evidence showed A gave B a dollar and

⁹⁹ Potts v. State (Tex. Cr. App.), 96 S. W. 1084.

¹ Jordan v. State, 37 Tex. Cr. App. 222; 38 S. W. 782; Shea v. Muncie, 148 Ind. 14; 46 N. E. 138.

² Johnson v. State (Tex. Cr. App.), 44 S. W. 834.

³ Henry v. State, 64 Ark. 662; 43 S. W. 499.

⁴ Moss v. State (Tex. Cr. App.), 44 S. W. 833.

⁵ White v. State, 47 Tex. Cr. App. 551; 85 S. W. 9.

⁶ Blasingame v. State, 47 Tex. Cr. App. 582; 85 S. W. 275.

afterwards took a bottle of whisky from a box, there being nothing to connect A with the box, it was held that no sale was shown.⁷ A gave B eighty cents and told him to bring him a quart of whisky. B took the money. Afterwards A found a bottle of whisky on a work bench in his shop. B was working for A, and the eighty cents was afterwards allowed as a credit on work done by him. Before A found the liquor he had given other persons' money accompanied with like requests, so that it was uncertain who put the whisky on the bench. It was held that B could not be convicted on the evidence, he not being connected with the bottle found on the bench.⁸ Liquor was shipped by express to a consignee without his knowledge or order. The express agent at its destination, in ignorance of that fact, delivered it to the consignee. It was held that the agent had not made a sale of the liquor, the consignor remaining the owner of the liquor until it had been accepted by the consignee.⁹ B shipped goods C. O. D. to A. The sale was held to be made at the place of shipment and B was not guilty, being outside the prohibited territory, though a statute made the sale an offense at the point of destination.¹⁰ The defendant kept an oyster saloon and a customer went to it and ordered oysters. Afterwards he ordered a bottle of beer, and the waiter told him the price was one shilling and six pence, and asked for the money, and the defendant gave it to him. The waiter handed the two coins to the defendant at the counter and he put the six pence in the cash register and handed the shilling to a boy who went out and bought the bottle of beer at another place and brought it back and gave it to the waiter who opened it and gave it to the customer, who knew the defendant intended to retain the six pence for himself and that only one shilling

⁷ Williams v. State, 48 Tex. Cr. App. 75; 85 S. W. 1144.

⁸ Bittix v. State, 48 Tex. Cr. App. 232; 87 S. W. 348.

⁹ Ellington v. State (Tex. Cr. App.), 86 S. W. 330; Webb v. State (Tex. Cr. App.), 86 S. W. 331.

¹⁰ Otto v. State (Tex. Cr. App.), 87 S. W. 698; Sedgwick v. State, 47 Tex. Cr. App. 627; 85 S. W. 813; Taggart v. State (Tex. Cr. App.), 85 S. W. 1155; Hickcox v. State (Tex. Cr. App.), 85 S. W. 1198; Angelin v. State (Miss.), 50 So. 492.

would be used to purchase the beer at the place of purchase, as he had seen it done on other occasions. It was held that the defendant had not sold liquors to the customer.¹¹ A requested B, a store keeper and carrier at X, to get him two gallons of whisky. B sent a written order for the whisky, signed by himself (but stating the whisky to be for A), to C, a licensed dealer at Y. C sent the whisky by B's pack horse to X, addressed to A with an invoice made out in A's name. A, on being shown the invoice, paid B the price charged by C and three shillings for packing, and received the whisky from B. B sent the invoice with the identical moneys received from A for the price of the whisky to C. C's books showed that the whisky had been entered against A and that he had paid for it. It was held there was no sale by B without a license, no sale by C at X, away from his licensed premises, but a sale by C to A at Y, and that B was the agent of A and not of C.¹² R obtained a bottle of brandy for two natives. They gave him two shillings and he paid one shilling six pence for the brandy, and was told by them to keep the six pence for his trouble. It was held that he did not sell the brandy to the natives.¹³ B and others made up a fund which C received, and with which he purchased a keg of beer from a brewing company. The persons making up the fund and C drank the beer. C aided in making up the fund but did not himself contribute to it. There was no evidence to show that C was the agent of the brewing company, nor any to show he had any interest in the beer. It was held that C had not sold the beer to the persons making up the fund for its purchase.¹⁴ If several persons buy beer and divide it among themselves according to the amount of their contributions, there is no sale by them.¹⁵ On receipt of money a

¹¹ *Graves v. Panam* [1905], *Vict. L. R.* 297; 26 *Austr. L. T.* 232; 11 *Austr. L. R.* 180.

¹² *Batley v. Cullen*, 6 *N. Z. L. R.* 755.

¹³ *Rex. v. Barlow*, 18 *Juta* 478; *Contra*, *Queen v. Goldman*, 16 *Juta* 118.

¹⁴ *Creasy v. Commonwealth* (Ky.), 76 *S. W.* 509; 25 *Ky. L. Rep.* 893. See also *Hugg v. People*, 15 *Ill. App.* 288.

¹⁵ *Miller v. Commonwealth* (Ky.), 76 *S. W.* 515; 25 *Ky. L. Rep.* 848.

defendant forwarded it to a liquor dealer outside the county with orders for liquor. The liquor was shipped to third persons and defendant kept it for them in his refrigerator if they desired him to do so. He issued checks which entitled the owner to a bottle on presentation. It was held that the defendant was not guilty of a sale.¹⁶

Sec. 718. What facts do not show a sale, continued.

A defendant neither owned nor had possession of liquor. At the request of B he got it and gave it to him, it being at the time in the possession and the property of C. He took it without authority from C. It was held that there was neither a sale, gift, or other disposal of the liquor.¹⁷ A gave B some money and requested him to get some whisky for him, and he promised to give B a drink of it. B went away and soon returned and said he had paid for some whisky, though he did not have it with him, but he again went away and soon returned with it. This was held not to show a sale by B.¹⁸ On a charge of sale there can be no conviction unless there was payment made for it, or an understanding to pay for it, and calling for the liquor by an officer seeking evidence upon which to convict the defendant and then seizing and carrying it away is not a sale.¹⁹ Where the defendant admitted he took an order from B on A in payment for the liquor, saying he did so in order to get rid of him, and that he had not and did not intend to present the order for payment, it was held proper to say to the jury that if this be true he was not guilty.²⁰ A testified that he and B lived together and occasionally they sent together out of the State for liquor. He would put in a dollar for a couple of quarts, and it would come with B's liquor and in B's name most of the time,

¹⁶ Kirby v. State, 46 Tex. Cr. App. 584; 80 S. W. 1007.

¹⁷ Maxwell v. State, 140 Ala. 131; 37 So. 266.

¹⁸ Burrell v. State (Tex. Cr. App.), 65 S. W. 914.

¹⁹ Dooley v. State, 52 Tex. Cr.

App. 491; 108 S. W. 676. The transaction showed that the officer never intended to pay for the liquor.

²⁰ Kilgore v. State, 52 Tex. Cr. App. 447; 108 S. W. 662.

though not always. A put in his money before the order was sent. On the occasion in question B told A he was going to have some liquor come and asked him if he wanted to send with him, but A told B he did but he had no money. The cost of A's amount was fifty cents. When the liquor came B set out a bottle and said to A, "That is what you sent for." At the time of the trial A had never paid B the fifty cents. On this evidence it was held error to hold these facts showed a sale rather than a purchase by A for himself.²¹ If whisky be taken from the owner without his consent there can be no conviction of him for an illegal sale.²² B asked A to get him some whisky and A said he had none but would try to get him some, and then B gave him some money and asked him to buy the whisky. In an hour A met B, said he had bought the whisky and gave it to him. It was held that no sale was shown.²³ If the evidence shows no payment or charge was ever made for the liquor there can be no conviction of a sale.²⁴ The fact that liquor, with the defendant's consent, was sold on his premises, even in his presence, will not make a sale by him, and if the evidence shows no more he cannot be convicted because it is not shown that the liquor sold was his;²⁵ nor is it an offense to take a person desiring to purchase liquor to a place where it is being illegally sold and thereby a sale is made by a third person.²⁶ A had liquor at a railroad station. He needed a dollar to procure it, and obtained that amount from B who owed him an account. A then procured the liquor and gave B a part of it. It was held that there had been no sale to B.²⁷ A received from B an order for liquor to be forwarded to C. At A's request C agreed to send the liquor. Some time after the liquor should have been received in the usual course of transportation, D told A that B's liquor had

²¹ State v. Smith, 81 Vt. 291; 69 Atl. 762.

²² Howell v. State, 53 Tex. Cr. App. 536; 110 S. W. 914.

²³ Crawford v. State (Tex. Cr. App.), 58 S. W. 1006.

²⁴ Alexander v. State (Tex. Cr. App.), 60 S. W. 763.

²⁵ Blankenship v. State, 112 Ga. 402; 37 S. E. 732.

²⁶ Black v. State, 112 Ga. 29; 37 S. E. 108.

²⁷ Button v. State (Tex. Cr. App.), 100 S. W. 148.

come. A, relying upon the statement, delivered liquor to B, believing it to be the liquor ordered. It was held that A was not guilty.²⁸ Whisky was sent to B payable on delivery. B, before he received it, agreed with A that if he would pay part of the purchase price he should have a part of the whisky, and in pursuance of the agreement received some money, which he took and with his own paid for the whisky and took it out of the express office. B and A divided the bottles of whisky between them in each other's presence in the express office. It was held that B had made no sale in violation of the license law.²⁹ So an express company agent making a delivery of the liquors, collecting the price of them and remitting the money to the seller, does not make a sale;³⁰ nor does the express company.³¹

Sec. 719. Aiding and abetting a sale.

Under a statute making an aider, abettor, counselor or procurer in the violation of the liquor law liable, one who purchases liquor of a saloon keeper when the sale is an unlawful sale—as a sale without a license—cannot be held to have violated the statute.³² Where a tenant licensee absconded and the owner of the premises put in a new tenant, whom he supplied with liquors for sale, and the new tenant had no license to sell, it was held that the owner aided and abetted in the illegal sales.³³ As a rule, it may be stated that all who

²⁸ Byrd v. State, 51 Tex. Cr. App. 539; 103 S. W. 863.

²⁹ State v. Johnson, 62 W. Va. 154; 57 S. E. 371; 11 L. R. A. (N. S.), 872.

³⁰ State v. Carins, 64 Kan. 782; 68 Pac. 621; Queen v. Cahill, 35 N. B. 240; 6 Can. Cr. Cas. 204; State v. Kenney, 62 W. Va. 284; 57 S. E. 823.

³¹ Adams Express Co. v. Commonwealth (Ky.), 103 S. W. 721; 31 Ky. L. Rep. 812.

³² Regina v. Heath, 13 Ont. Rep.

471; *Ex parte* Armstrong, 30 N. B. 423; *Ex parte* Barker, 30 N. B. 406; Fox v. State, 53 Tex. Cr. App. 150; 109 S. W. 370; Marmer v. State, 47 Tex. Cr. App. 424; 84 S. W. 830; State v. Baden, 37 Minn. 212; 34 N. W. 24; People v. Smith, 28 Hun 626; 1 N. Y. Cr. Rep. 72; Gears v. State, 35 Tex. Cr. Rep. 442; 34 S. W. 124; *Contra*, Bonds v. State, 130 Ala. 117; 30 So. 427.

³³ Owen v. Langford, 55 J. P. 484.

counsel or procure a sale to be made unlawfully may be treated as principals in the unlawful sale and indicted as such.³⁴ But where a master gave money to his slave so he could buy liquors with it in order to entrap a person he suspected of selling liquors to slaves unlawfully, it was held that he was not an accomplice of the seller.³⁵ Where a statute provided that it should be a violation of the local option law in the purchaser to buy whisky, one purchasing as a detective for the purpose of securing evidence of such violation does not become an accomplice of the seller.³⁶ In order to charge one as an accomplice who is not present when the illegal act is done, he must have been doing something in furtherance of the act in order to charge him as an accomplice.³⁷ But it has been held that if two or more persons act in concert to induce a sale in violation of the Sunday law—as by persuasion or artifice—they are guilty of a conspiracy to violate the law.³⁸ One who goes into a saloon with a minor and purchases liquor for him with the minor's money is guilty of aiding the saloon keeper in making an unlawful sale;³⁹ and though one only makes change for the purchaser or seller, in order that the sale may be actually accomplished, but counseling the sale to be made, he is likewise guilty.⁴⁰ A sale without a license is a misdemeanor, and all participating therein may be treated as principals and held liable.⁴¹ But if a sale be made by another, though made in the defendant's

³⁴ *State v. Shenkle*, 36 Kan. 43; 12 Pac. 309; *Topper v. State*, 118 Ind. 110; 20 N. E. 699; *Summer v. State*, 4 Ind. App. 403; 30 N. E. 1105; *Miller v. State*, 55 Ark. 188; 17 S. W. 719.

³⁵ *Harrington v. State*, 36 Ala. 236.

³⁶ *Marmer v. State*, 47 Tex. Cr. App. App. 424; 84 S. W. 830; *Fox v. State*, 53 Tex. Cr. App. 150; 109 S. W. 370.

³⁷ *Eddens v. State*, 47 Tex. Cr. App. 327; 84 S. W. 828.

³⁸ *Commonwealth v. Leeds*, 9 Phila. 569.

There may be an unlawful conspiracy in order to wring money from a saloon keeper by fear of prosecution, even though his act be legal. *People v. Saunders*, 25 Mich. 119.

³⁹ *Foster v. State*, 45 Ark. 361; *Cagle v. State*, 87 Ala. 38, 93; 6 So. 300.

⁴⁰ *Johnson v. People*, 83 Ill. 431.

⁴¹ *Commonwealth v. Willard*, 22 Pick. 476; *Commonwealth v. Drew*, 3 Cush. 279.

presence and at his request, he is not guilty of a sale without a license unless he owned the liquor sold.⁴² So where an adult goes with a minor into a saloon, calls for liquor for them both, and pays for it, he is guilty of aiding in an illegal sale,⁴³ the transaction not being a gift by the seller to the minor.⁴⁴ So where a general statute provided that anyone who should abet, procure, command or counsel others to commit a crime or misdemeanor should be deemed an accomplice and be punished as a principal, it was held that a person in possession of liquor may be guilty of an illegal sale in a local option district if he aids and assists in the transaction, though he be not the owner of the liquor.⁴⁵ While the handing over of liquors by the manager of a club to the general body of its members is not a sale,⁴⁶ yet a sale by him to a person not a member of the club of the club's liquors and on its premises, even though the transaction goes through the form of a member paying for it, is illegal, and he is guilty of aiding and abetting the sale.⁴⁷ So a licensee permitting an illegal sale to be made on his premises is guilty of aiding and abetting it.⁴⁸

Sec. 720. Purchaser not liable to prosecution.

Unless some statute expressly makes a purchaser liable who participates in an unlawful sale of liquor—whether it be a sale without license, on Sunday, or on election day, or off the

⁴² *South v. Commonwealth*, 79 Ky. 493; 3 Ky. L. Rep. 276.

⁴³ *Ward v. State*, 45 Ark. 351; *Siegel v. People*, 106 Ill. 89.

⁴⁴ *Kurz v. State*, 79 Ind. 488; *Contra*, *Topper v. State*, 118 Ind. 10; 20 N. E. 699; *Page v. State*, 84 Ala. 446; 4 So. 697.

⁴⁵ *State v. Fullman* (Del.), 74 Atl. 1; *Oldham v. State*, 52 Tex. Cr. App. 516; 108 S. W. 667.

⁴⁶ *Graff v. Evans*, 51 L. J. M. C. 25; 8 Q. B. Div. 373; *Regina v. Hodgins*, 24 Ont. Rep. 433.

⁴⁷ *Slavens v. Wood*, 54 J. P.

742; *Queen v. Langford*, 55 J. P. 484.

⁴⁸ *Peckover v. Defries*, 95 L. T. 883; 71 J. P. 38; 21 Cox, C. C., 323; 23 T. L. R. 20. The person making a sale is also guilty of an unlawful sale.

If several persons confederate together to purchase liquor on Sunday of a saloon keeper, so they can prosecute him and get the penalty allowed by a statute, they are not guilty of a conspiracy. *Hazen v. Commonwealth*, 23 Pa. L. 355.

licensed premises—he is not liable either as an aider or abettor or accomplice or as principal.⁴⁹

Sec. 721. Serving police officers on duty.

An English statute forbids any licensee to supply any liquor or refreshment, whether by gift or sale, to any constable on duty, unless by authority of some superior officer of the constable.⁵⁰ Under this statute it is held that the licensee is not liable unless he, or his servant who supplies the liquor, knows that the constable is on duty at the time he is supplied, and in order to determine the question of his knowledge of that fact the personal appearance of the constable at the time of the sale may be shown.⁵¹ If a servant or manager of the premises knowingly serve a constable on duty the master may be convicted, though personally having nothing to do with the matter.⁵²

⁴⁹ *Commonwealth v. Willard*, 22 Pick. 476; *State v. Baden*, 37 Minn. 212; 34 N. W. 24; *State v. Rand*, 51 N. H. 361; *Wakeman v. Chambers*, 69 Iowa 169; 28 N. W. 498; *State v. Teahan*, 50 Conn. 92; *Harney v. State*, 8 Lea, 13; *State v. Miller*, 26 W. Va. 106; *Harrington v. State*, 36 Ark. 236.

See also *Campbell v. State*, 79 Ala. 271; *Morgan v. State*, 81 Ala. 72; 1 So. 472.

There is at least one case to the contrary. *State v. Bonner*, 2 Head 135.

⁵⁰ 135 and 136 Vict. c. 94, § 16.

⁵¹ *Sherras v. De Rutzen* [1895], 1 Q. B. 918; 59 J. P. 440; 64 L. J. M. C. 218; 72 L. T. 839; 43 W. R. 526.

⁵² *Mullins v. Collins*, L. R. 9 Q. B. 292; 43 L. J. M. C. 67; 29 L. T. 838; 27 W. R. 297.

CHAPTER XXII.

SALES AND GIFTS TO MINORS, DRUNKARDS, SLAVES, INDIANS AND NATIVES.

- ART. I. To MINORS.
ART. II. To SLAVES.
ART. III. To DRUNKARDS.
ART. IV. To INDIANS AND NATIVES.

ARTICLE I.—TO MINORS.

SECTION.	SECTION.
722. Sales and gifts to minors prohibited.	730. Furnishing liquor to minor.
723. Minor need not drink the liquor.	731. Knowledge that purchaser is a minor when essential to commission of offense.
724. Aiding in procuring liquor.	732. Vendor's ignorance of purchaser's minority no defense.
725. Minor acting as purchaser or messenger for adult.	733. Vendor's ignorance of purchaser's minority a defense.
726. Adult acting as agent for minor.	734. Sales in sealed and corked bottles or vessels.
727. Treating a minor.	735. Sales to students.
728. Permitting liquor to be given to a minor.	
729. Sale or gift with consent of parent or guardian.	

Sec. 722. Sales and gifts to minors prohibited.

Sales and gifts of intoxicating liquors to minors are almost universally prohibited. The object in the enactment of such statutes is to prevent intoxicating liquors coming into their possession before they have a full realization of the evil effects arising from their use and to keep them from temptation. In England the age limit is less than twenty-one years, but in this country that limit is universal. The fact that a minor's civil disabilities have been removed by a decree in chancery,

where that may be done, does not render the sale or gift legal.¹ The statute prohibiting sales to him applies to sales made to him by a dealer in liquors.² As the object of these statutes is to keep liquor out of his possession, the ownership of the liquor sold or given him is immaterial, for the offense is just the same whether the defendant did or did not own the liquor.³ Where the defendant placed a jug of whisky on a table and invited all present to help themselves, among whom was a minor who drank of the liquor, it was held that an offense had been committed, a gift had been made.⁴ It makes no difference whether the person placing liquor in his possession was licensed or not, for the offense in a licensed person and a non-licensed one is just the same.⁵ All concerned in placing liquor in his hands are equally guilty, as where A sells or gives it to B with intent that he shall give it to a minor present, and B so gives it.⁶ It is immaterial that the liquor was purchased by the minor at the instance of others so as to prosecute the vendor.⁷ Since a violation of the law is to be disorderly, an illegal sale to a minor in a saloon makes it a disorderly place.⁸ Where a statute makes it only an offense for dealers in liquors to give them to a minor, a prac-

¹ *Coker v. State*, 91 Ala. 92; 8 So. 874. Statutes prohibiting sales to minors are strictly construed. *Perkins v. Brais*, 20 Quebec S. C. 536.

² *Poinders v. State*, 37 Ark. 399; *State v. Schroeder*, 3 Hill (S. C.) 61. *Contra*, *Brosee v. State*, 5 Ind. 75.

³ *Hill v. State*, 62 Ala. 168; *Cagle v. State*, 87 Ala. 38; 6 So. 300; *Simons v. State*, 25 Ind. 331; *Hurney v. State*, 49 Ind. 203; *State v. Richter*, 23 Minn. 81; *State v. Amor*, 77 Mo. 568; *State v. Slaughter*, 17 Mo. App. 142; *Commonwealth v. Jessup*, 63 Pa. 34.

⁴ *Blodgett v. State*, 97 Ga. 351; 23 S. E. 830.

⁵ *Cobleigh v. McBride*, 45 Iowa 116; *Parkinson v. State*, 14 Md. 184; 74 Am. Dec. 522; *State v. McGinnis*, 30 Minn. 48; 14 N. W. 256; *State v. Dupries*, 18 Ore. 372; 23 Pac. 255; *State v. Hamilton*, 75 Ind. 238; *Commonwealth v. Terry*, 15 Pa. Super. Ct. 608. *Contra*, *State v. Whitter*, 18 W. Va. 306.

⁶ *Miller v. State*, 55 Ark. 188; 17 S. W. 719; *Topper v. State*, 118 Ind. 110; 20 N. E. 699; *Sumner v. State*, 4 Ind. App. 403; 30 N. E. 1105.

⁷ *Commonwealth v. Murphy*, 155 Mass. 284; 29 N. E. 469; *Harrington v. State*, 36 Ala. 236.

⁸ *People v. Eckman*, 63 Hun 209; 18 N. Y. Supp. 654.

tieling physician keeping "on hand intoxicating drinks or liquors for the purpose of sale or profit," who gives a minor of such liquors, is a dealer and liable to the penalty of the statute.⁹ But a statute forbidding a sale does not cover a gift;¹⁰ and one forbidding a sale or gift does not cover a barter or loan.¹¹ A license to sell liquors is no defense,¹² and if one not licensed sell or give the liquor to the minor he commits two offenses, the one selling without a license, and the other selling to a minor in violation of the statute.¹³ And if one without a license sell liquor to a minor on Sunday he usually commits three offenses: a sale without a license, a sale on Sunday, and a sale to a minor.¹⁴ If a minor invite another minor to drink with him, and the order is made and each calls for what he wants, the sale is to him who made the invitation. The fact that the liquor ordered for the minor's companion was a gift to him does not defeat the sale to the minor, for the minor was able to revoke the gift and drink the liquor himself.¹⁵ It is immaterial who drinks the liquor if it be sold to a minor.¹⁶ A law prohibiting a sale or gift to a minor is not suspended by the adoption of a local option law.¹⁷ A

⁹ State v. McBrayer, 98 N. C. 619; 2 S. E. 755.

¹⁰ Ward v. State, 45 Ark. 351; Siegel v. People, 106 Ill. 89; Allen v. State, 14 Tex. 633; Kurz v. State, 79 Ind. 488; Harvey v. State, 80 Ind. 142; State v. Fletcher, 74 Kan. 620; 87 Pac. 729; State v. Fowler, 74 Kan. 896; 87 Pac. 731.

¹¹ Gillen v. State, 47 Ark. 555; 2 S. W. 185; Coker v. State, 91 Ala. 92; 8 So. 874; Cooper v. State, 37 Ark. 412; Massey v. State, 74 Ind. 368.

¹² Commonwealth v. Tabor, 138 Mass. 496.

¹³ Blair v. State, 81 Ga. 628; 7 S. E. 855; McNeill v. Collinson, 130 Mass. 167.

In some States the sale or gift

is not a penal offense, the statute giving only a right of action to recover a penalty or a forfeiture of a sum of money. State v. Amor, 77 Mo. 568; State v. Slaughter, 17 Mo. App. 142; State v. Dupries, 18 Ore. 372; 23 Pac. 255.

¹⁴ Hunter v. State, 101 Ind. 241; Topper v. State, 118 Ind. 110; 20 N. E. 699; Sumner v. State, 4 Ind. App. 403; 30 N. E. 1105.

¹⁵ Sumner v. State, 4 Ind. App. 403; 30 N. E. 1105.

¹⁶ Sumner v. State, 4 Ind. App. 403; 30 N. E. 1105.

¹⁷ Stephens v. State, 47 Tex. Cr. App. 604; 85 S. W. 797; Deisher v. State (Tex. Cr. App.), 96 S. W. 28. The prosecution must

statute forbidding a gift to a minor has no application to serving wine in a private dwelling house at the table as an act of hospitality.¹⁸ If A purchase liquor of B, and B, at A's request, deliver it to a minor, in A's presence, B violates the statute.¹⁹ A minor requested B to make out an order for a dozen bottles of beer. This order was sent to a distant city and the beer shipped C. O. D. The minor paid the charges and placed the beer in B's cold storage warehouse, paying him one dollar for the storage, and to this place he went and got the beer himself when he wanted a drink. It was held that B neither sold nor gave the liquor to the minor.²⁰ It is not an offense to send a minor for liquor, although it be an offense to let him have it.²¹ Where a person ordering the drinks for those sitting at the table—a wedding party—and the person selling the liquor declined to serve a boy who was one of the number, whereupon the boy's aunt took the glass of liquor from the tray and gave it to the boy, it was held the person selling the liquor was not guilty, for he neither sold nor gave the liquor to the boy.²²

be, however, for a violation of the local option law. *Tracy v. State* (Tex. Cr. App.), 85 S. W. 1056.

¹⁸ *People v. Bird*, 138 Mich. 31; 100 N. W. 103; 11 Detroit Leg. N. 461; 67 L. R. A. 424.

¹⁹ *Parker v. State* (Tex. Cr. App.), 84 S. W. 822; *Nelson v. State*, 111 Wis. 394; 87 N. W. 235.

²⁰ *Potts v. State* (Tex. Cr. App.), 96 S. W. 1084.

²¹ *Ex parte Jones*, 23 N. S. W. 93; 6 S. R. (N. S. W.) 313.

²² *Perkins v. Brais*, 20 Quebec S. C. 536; *Regina v. Raynor*, 15 C. L. T. Qec. N. 403; *State v. Hannon*, 359 W. Va. 475; 53 S. E. 630.

Under a statute empowering it to so do, a city may enact an ordinance prohibiting sales to a

minor. *In re Brodie*, 38 Up. Can. Rep. 580; *In re Ross*, 14 Can. Prac. 171; *In re Barclay*, 12 Up. Can. Rep. 86.

It is immaterial on a sale to a minor who pays for the liquor, even though an adult pay for it; the transaction is still a sale to the minor. *State v. Best*, 106 N. C. 747; 12 S. E. 907.

A statute making it an offense to sell to a person after notice by his parent of his minority does not make a sale to him before receipt of such notice a legal sale. *State v. Stroeschein*, 99 Minn. 248; 109 N. W. 235.

On a charge of a violation of a local option law evidence is not admissible that the purchaser was a minor, in aggravation of the offense. *Campbell v. State*, 37

Sec. 723. Minor need not drink the liquor.

It is not necessary, under a statute forbidding a sale or gift to a minor of intoxicating liquor, that the minor should drink the liquor sold or given him in order to constitute the offense. The mere placing of the liquor in his possession is the offense. "It seems to have been the intention of the Legislature to protect those of non-age from the temptation to imbibe intoxicants by making it unlawful to put liquor in their possession or control, either by sale, barter or gift. If it were necessary to prove the minor actually drank the liquor or bought it for the purpose of drinking it, before a conviction would be authorized, the salutary influence of the restriction would be greatly reduced. We are not inclined to emasculate the statute by giving it any such construction."²³

Tex. Cr. App. 572; 40 S. W. 282.

If a person purchase liquor for a minor he causes the liquor to be sold him, although he did not disclose to the seller who was the actual purchaser. *Vincent v. State* (W. Va.), 55 S. E. 819.

A was a boy, and his father gave him money to buy some liquor for him, the father. A met the defendant on the street, ordered the liquor and paid for it. It was delivered at the father's house and not to A. The defendant on this and similar occasions knew A was acting for his father. It was held that the evidence warranted the defendant's conviction of having sold liquor to A. *Commonwealth v. Fowler*, 145 Mass. 398; 14 N. E. 457.

A minor lived in another State, and sent an order to the defendant to ship him some liquor, which he did, delivering it to a carrier. It was held that he was

guilty of selling to a minor in the State where he delivered the liquor to the carrier, for the sale was complete when he delivered it. *Harper v. State* (Ark.), 121 S. W. 738.

A minor selling to a minor is liable; and a minor as agent selling to a minor is likewise liable. *Cagle v. State*, 87 Ala. 83; 6 So. 300.

²³ *Sumner v. State*, 4 Ind. App. 403; 30 N. E. 1105; *People v. Garrett*, 68 Mich. 487; 36 N. W. 234; *Holmes v. State*, 88 Ind. 145; *State v. Fairfield*, 37 Me. 517; *Ross v. People*, 17 Hun 591; *State v. Laurence*, 97 N. C. 492; *Commonwealth v. O'Leary*, 143 Mass. 95; 8 N. E. 887.

A statute may be so drafted as to make a sale or gift of liquor to a minor an offense only when it is sold or given him for the purposes of a beverage. *Payne v. State*, 74 Ind. 203.

Sec. 724. Aiding in procuring liquor.

A statute which makes it an offense to aid in the procuring of liquor for a minor is violated by one who, with a minor's money, buys liquor for him;²⁴ and so one who purchases liquor for a minor is guilty of causing liquor to be sold to a minor.²⁵

Sec. 725. Minor acting as purchaser or messenger for adult.

It is the minor's possession of the liquor that is the thing forbidden by the statute, and the opportunity such possession affords him to drink it that which it is sought to prevent. Therefore, if the minor act as a messenger for an adult to purchase or bring the liquor to him, the person placing the liquor in his hands is liable under the provisions of the statute forbidding a sale or gift to a minor, though, strictly speaking, such a transaction is neither a gift nor a sale to him.²⁶ It has, however, been held that the word "give" in such an instance has the meaning of deliver.²⁷ This rule is particularly true where the principal is undisclosed.²⁸ However, the majority of the cases hold that a sale to a minor as the agent of a disclosed principal, known so to the vendor, is not a violation of a statute preventing sales to a minor, for the sale is, in law, to the principal, although thereby the liquor is placed within the physical control of the person from whom it was the intent of the statute to keep it.²⁹ Such a sale does

²⁴ *Foster v. State*, 45 Ark. 361; *Bonds v. State*, 130 Ala. 117; 30 So. 427.

²⁵ *Vincent v. State*, 42 Tex. Cr. App. 413; 55 S. W. 819.

²⁶ *Boatright v. State*, 77 Ga. 717; *State v. Fairfield*, 37 Me. 517; *Sumner v. State*, 4 Ind. App. 403; 30 N. E. 1105; *O'Connell v. O'Leary*, 145 Mass. 311; 14 N. E. 143; *People v. Garrett*, 68 Mich. 487; 30 N. W. 234; *Laing v. State*, 9 Tex. Civ. App. 136; 28 S. W. 1040; *Holsky v. State* (Tex.), 36 S. W. 443.

²⁷ *State v. McMahon*, 53 Conn. 407; 5 Atl. 596; 55 Am. Rep. 140.

²⁸ *Siceluff v. State*, 52 Ark. 56; 11 S. W. 964; *Neely v. State*, 60 Ark. 66; 28 S. W. 800; 46 Am. St. 148; 27 L. R. A. 503; *Commonwealth v. Joslin*, 158 Mass. 482; 33 N. E. 653; 21 L. R. A. 449; *Richter v. State*, 63 Miss. 304; *Ross v. People*, 17 Hun 591; *Queen v. Deydier*, 13 Juta 388.

²⁹ *Wallace v. State*, 54 Ark. 542; 16 S. W. 571; *Dickson v. State*, 89 Ga. 785; 15 S. E. 684; *Commonwealth v. Lattinville*, 120

not require a written order of the parent where sales can only be made to a minor upon such an order.³⁰ In making the sale to the minor for another the vendor takes the risk that the representations of the minor are true, and if they be false he has committed the offense of selling liquor to a minor.³¹ In speaking of a sale to a minor as the agent of another, the Supreme Court of Mississippi has said: "To 'sell' liquor to a minor is what is forbidden by the statute. Merely to deliver liquor to a minor, with notice that it is to be carried to an adult, is not a sale, within the meaning of the statute. We cannot extend the terms of a criminal statute beyond its clear legal meaning. We cannot construe the word 'sell' in the statute to mean something different from its ordinary legal import. Undoubtedly, a minor may be an agent or lawfully go on errands for an adult, and a person may buy through an agent, and in such case, there being no question of the fact of agency, although the dealing is with the agent, and the delivery is to him, in legal effect, the sale is to the principal. The law is that where a person contracts as agent, or he is known to be such, the contract is with the principal and not with the agent; but where the agent deals in his own name, and the principal is not disclosed or known, the contract is

Mass. 385; *St. Goddard v. Burnham*, 124 Mass. 578; *Monaghan v. State*, 66 Miss. 513; 6 So. 241; 4 L. R. A. 800; *State v. McClain*, 49 Mo. App. 398; *State v. Walker*, 103 N. C. 413; 9 S. E. 582*; *Randall v. State*, 14 Ohio St. 435; *State v. McMahon*, 53 Conn. 407; 5 Atl. 596; 55 Am. Rep. 140; *Ex parte Jones*, 23 N. S. W. 93; 6 S. R. (N. S. W.) 313; *Rex v. MacWilliams*, 7 East. Dist. Ct. Rep. 15; *Queen v. Robertson*, 9 Juta 299; *Short v. People*, 96 Ill. App. 638; *In re MacRae*, 75 Neb. 757; 106 N. W. 1020; *People v. Hartstein*, 49 N. Y. Misc. Rep. 336; 99 N. Y. Supp. 272; *Har-*

ley v. State, 127 Ga. 308; 56 S. E. 452.

³⁰ *Pollard v. State*, 4 Ohio Dec. 30; 1 Cleve. Law Rec. 35; *Waldstien v. State*, 29 Tex. App. 82; 14 S. W. 394; *Contra*, *Yakel v. State*, 30 Tex. App. 391; 17 S. W. 943; 20 S. W. 205.

³¹ *Dixon v. State*, 89 Ga. 785; 15 S. E. 684.

In a Massachusetts case, cited above, it is said that because a sale of liquor to a parent through the agency of a minor child is illegal, it does not necessarily become a sale to the child. *Commonwealth v. Joslin*, 158 Mass. 482; 33 N. E. 653; 21 L. R. A. 449.

with the agent, and he is liable.”³² Of course, a statute may be so broad as to prevent even a delivery to a child as agent of a disclosed principal, as that “no sale or delivery of liquor shall be made * * * to a minor, either for his own use, the use of his parent, or of any other person.” In such an instance the mere delivery of the liquor to a minor to carry to another is a violation of the statute.³³ Where the formality of a sale is proven, the defendant has the burden to show he delivered the liquor to the child for an adult.³⁴ Where a constable gave a shilling to a child to buy brandy, and the child went to a canteen and told the barman that he wanted the brandy for his mother, and the barman sold the brandy, and the child did not take it to his mother but took it to the constable, it was held that the barman could not be convicted of selling liquor to the child.³⁵ A sale made to a person, known by the seller to be a minor, who buys for an undisclosed principal, is a sale to the minor and subjects the seller to the penalty of the statute.³⁶

Sec. 726. Adult acting as agent of minor.

A sale to an adult who is the agent of the minor for the purpose of making the purchase where the vendor does not know of the agency, and has no reasonable ground to suspect it, is no offense in the vendor.³⁷ Of course, if the vendor knows of the agency, then he is guilty of an illegal sale, for

³² *Monaghan v. State*, 66 Miss. 513; 6 So. 241.

The person charged with selling to a minor may show that he had a contract with the minor's father to sell the latter intoxicating liquor. *Randall v. State*, 14 Ohio St. 435.

³³ *Commonwealth v. O'Leary*, 143 Mass. 95; 8 N. E. 887; *O'Connell v. Garrett*, 145 Mass. 311; 14 N. E. 234; *People v. Garrett*, 68 Mich. 487; 36 N. W. 234.

³⁴ *Queen v. Robertson*, 9 Juta 299.

³⁵ *Queen v. Goldman*, 9 Juta 313.

³⁶ *Tony v. State*, 144 Ala. 87; 40 So. 388.

In Georgia it would seem that the seller must show the minor did not drink any of the liquor. *Harley v. State*, 127 Ga. 308; 56 S. E. 452.

³⁷ *Gillan v. State*, 47 Ark. 555; 2 S. W. 185; *Siegel v. People*, 106 Ill. 89. See *State v. Scoggins*, 107 N. C. 859; 12 S. E. 59.

the sale is through the agent to the minor.³⁸ But if a minor give an adult money to purchase liquor for him, and he does and delivers it to him, the purchaser does not make a sale to the minor.³⁹

Sec. 727. Treating a minor.

A sale to an adult who treats a minor with the liquor sold is no offense in the seller, for he neither sells nor gives the liquor to the minor.⁴⁰ This proposition, however, has not been accepted by all the courts. Thus, where C was sitting in a saloon when K, a minor, came in, and C asked him if he would not have a glass of beer which he said he would, and then C directed T to give K a glass of beer, which he did, and C paid for it, it was said that both T and C were guilty of giving liquor to a minor, and T was convicted of the offense on the ground that "all persons who participate in an act or transaction which is a misdemeanor are alike guilty."⁴¹ In a case of this kind it was said: "The gist of the offense consisted in furnishing the liquor to Johnston, to be drunk by him, knowing him to be a minor. The defendant was the only one present who had liquor to furnish, and he supplied it with the understanding that one glass of it was to be drunk by Johnston. True, it was supplied by defendant at the instance of McCoy, who was to pay for it, but the unlawfulness of the act is not affected by that fact. Whether it was to be paid for or not was, under the statute, immaterial. If the liquor was supplied by the defendant to Johnston, to be drunk by him, knowing him to be a minor, the offense was com-

³⁸ Liles v. State, 88 Ala. 139; 7 So. 196; Starling v. State, 34 Tex. App. 295; 30 S. W. 445.

³⁹ Cox v. State (Miss.), 3 So. 373; Bryant v. State, 82 Ala. 51; 2 So. 670; Young v. State, 58 Ala. 358; Johnson v. State, 63 Miss. 230.

⁴⁰ Perkins v. Brais, 20 Quebec S. C. 536; Ward v. State, 45 Ark.

351; Huber v. People, 87 Ill. App. 120; Siegel v. People, 106 Ill. 89; Kurz v. State, 79 Ind. 488; Regina v. Raynor, 15 C. L. T. Qec. N. 403; State v. People, 1 Penn (Del.), 42 Atl. 622.

⁴¹ Topper v. State, 118 Ind. 110; 20 N. E. 699; Page v. State, 84 Ala. 446; 4 So. 697.

mitted, and it would be no defense that the defendant acted at the instance or under the employment of another.”⁴²

Sec. 728. Permitting liquor to be given to a minor.

In Texas a statute requires a dealer to give a bond containing a provision that he will not “give nor permit to be given” any liquors to a minor on his licensed premises.⁴³ Under this clause he is obligated not only knowingly not to permit the gift of liquor to a minor, but he must prevent the making of such gifts in his place of business. The theory is that he has absolute control over all transactions concerning liquor on his premises, and is held responsible for them. So that a sale of liquors to an adult who “treats” a minor with them on the premises is a permitted gift, which is a breach of the dealer’s bond.⁴⁴ In Hawaii it also has been held that it is no defense that the liquor was dealt out to adults who set it before minors.⁴⁵ In such an instance in Canada such an act is not a permitting of a gift to a minor.⁴⁶

Sec. 729. Sale or gift with consent of parent or guardian.

It has never been considered that a sale or gift of intoxicating liquor by a parent to his minor child was an offense. The Legislature has never gone that far. On the contrary, statutes have been enacted which permit sales or gifts to minors with the consent of their parents or guardians. This

⁴² The court considered that both parties were principals. *State v. Munson*, 25 Ohio St. 381. See also *People v. Newman*, 85 Mich. 98; 48 N. W. 290; *State v. Best*, 108 N. C. 747; 12 S. E. 907, and *Territory v. Hall*, 17 Hawaii, 536 to same effect.

In Texas it has been held that the saloon keeper is not liable where A buys the liquor, and tells him to give a minor present a glass, A intending thereby to treat the minor. *Bartman v. State* (Tex. Cr. App.), 43 S. W. 984.

⁴³ Sayles Ann. Civ. St. 1897, Art. 5060g.

⁴⁴ *Holly & Co. v. Simmons*, 38 Tex. Cr. App. 124; 85 S. W. 325. See *Starling v. State*, 34 Tex. Cr. App. 295; 30 S. W. 445.

The good faith and belief of the dealer that the minor was twenty-one years of age is no defense.

⁴⁵ *Territory v. Hall*, 17 Hawaii 536.

⁴⁶ *Regina v. Raynor*, 15 C. L. T. Qec. N. 403; *Perkins v. Brais*, 20 Quebec S. C. 536.

consent may be for a single sale, or a certain number of sales, or a continuing one. Thus, a written consent addressed to a defendant, in the form given below in the note, was held to be a continuing consent until revoked.⁴⁷ But a continuing authority is not always a defense and in reason it should not be. Thus, it is held that the authority or consent given must set some bounds to the supply, both as to quantity and time. The amount cannot be left solely to the appetite of the minor, for that would be a clear evasion of the spirit of the statute.⁴⁸ Where the statute requires the consent to specify the time and quantity of liquor to be furnished the minor, a request to let him "have what he wants to drink until you hear from me," is not sufficient.⁴⁹ Where a statute provides that the sale to a minor is illegal unless the parent, guardian or some one standing in his place or stead consent thereto, the consent of a stepfather is sufficient, though the mother of the child protest against it.⁵⁰ A statute permitting a sale of liquor, generally, in case of sickness suspends the statute forbidding gifts or sales to minors in such an instance.⁵¹ If a parent give a saloon keeper a permit or request to sell liquor to his son for his, the parent's use, the permit will not cover a subsequent sale to the minor for his own use, to be consumed in the saloon.⁵² Where a statute forbade a sale to a minor without the permit of the person having control over him, it was held that a minor who was employed by a hardware company, composed of his father and a third person, was not under the control of such third person, and a permit from him to pur-

⁴⁷ "Please let my son John have anything in reason, as a drink when he wants it, and oblige a friend." *Mascowitz v. State*, 49 Ark. 170; 4 S. W. 656; *Smith v. State*, 132 Ala. 38; 31 So. 552.

⁴⁸ *Connolly v. People*, 42 Ill. App. 36; *Gill v. State*, 86 Ga. 751; 13 S. E. 86; 12 L. R. A. 433; *Dixon v. State*, 86 Ga. 754; 13 S. E. 87; *Hamer v. People*, 104 Ill. App. 555; affirmed, 205 Ill. 570; 68 N. E. 1061. See *Grepel v.*

State, 32 Ohio St. 167; *Pressley v. State*, 114 Tenn. 534; 86 S. W. 378; 69 L. R. A. 291.

⁴⁹ *Hamer v. People*, 104 Ill. App. 555; affirmed, 205 Ill. 570; 68 N. E. 1061.

⁵⁰ *Jones v. State*, 46 Tex. Cr. App. 517; 81 S. W. 49.

⁵¹ *Atkinson v. State*, 46 Tex. Cr. App. 229; 79 S. W. 31.

⁵² *Supermant v. People*, 100 Ill. App. 121.

chase liquor for such third person's wife was no defense.⁵³ The fact that the minor had neither parents nor guardian will not justify a sale to him.⁵⁴ If a written consent is required, an oral consent, though given by the parent in the presence of the defendant and the minor at the time and place of the sale, is no defense; or given to the minor to purchase the liquor.⁵⁵ If a written consent be given, then a sale or gift made in pursuance thereof at any time after it is given, is protected by it.⁵⁶ It is immaterial for what purpose the sale be made to the minor; the mere fact of placing the intoxicating liquor in his control is the offense. Thus, a sale of alcohol to a minor to burn in his lamp is an offense.⁵⁷ A statute may be so broad as to forbid the sale or gift to a minor even with the consent of the parent. Thus, where the statute declared that a license should not authorize a sale "to any person under the age of twenty-one years" it was held to prevent a sale with the father's consent, and that such a statute was not unconstitutional on the ground of an undue interference with the relation of father and child.⁵⁸ A written consent, when one is required, to the sale to the minor must be in the hands of the vendor when the sale is made,⁵⁹ and if he desires to avail himself of such consent as a defense the burden is on him to show it was duly executed by the parent; and if there be doubt whether the parent executed it, it is not admissible in evi-

⁵³ *Tony v. State*, 144 Ala. 87; 40 So. 388.

⁵⁴ *Blair v. State*, 81 Ga. 628; 7 S. E. 855; *State v. Gary*, 124 Mo. App. 175; 101 S. W. 614; *Herschenback v. State*, 34 Tex. Cr. Rep. 122; 29 S. W. 470.

⁵⁵ *Blahut v. State*, 54 Ark. 538; 16 S. W. 582; *State v. Colnan*, 48 Iowa 567; *Commonwealth v. Davis*, 12 Bush 240; *Commonwealth v. Finnegan*, 124 Mass. 324; *State v. Bruder*, 35 Mo. App. 475 (father present when the liquor was given, was held no defense). *Hill v. State*, 37 Ark. 395.

⁵⁶ *Randall v. State*, 14 Ohio St. 435.

⁵⁷ *Rucker v. State* (Tex.), 24 S. W. 902.

⁵⁸ "The right of the parent to ruin his child either morally or physically has no existence in nature. The subject has always been regarded as within the purview of legislative authority." *State v. Clotter*, 33 Ind. 409; *State v. Lawrence*, 97 N. C. 492; 2 E. 367; *Boatright v. State*, 77 Ga. 717; *Adler v. State*, 55 Ala. 16.

⁵⁹ *Patton v. State*, 42 Tex. Cr. 496; 61 S. W. 309.

dence.⁶⁰ Consent to the sale given to the proprietor of a saloon is available as a defense for his barkeeper.⁶¹ If a statute requires a written consent of the minor's parent, the delivery of the liquor to the minor for a person who may lawfully buy it, it has been held, is a violation of its provisions.⁶²

Sec. 730. Furnishing liquor to minor.

An occasional statute forbids the furnishing of liquor to minors. This may be considered a broader term than "sell or give." In Georgia it has been construed the same as "deliver."⁶³ Under this statute if a liquor dealer ships liquor to one whom he does not know, and who is a minor, he commits the offense of furnishing liquor to a minor.⁶⁴ And in an instance where a saloon keeper, at the direction of an adult, and at the adult's expense, furnished liquor to a minor as a treat, an offense was held to have been committed by the saloon keeper. "A narrow and technical definition of the word 'giving' might," said the court, "restrict its meaning to the handing of the liquor to him direct by the person giving it, as seems to be held by the Supreme Court of Illinois; but it is not necessary that a person should hand the liquor to a minor in order to furnish it. If the liquor, belonging to the person, and under his control, is, by his consent or connivance, permitted to be taken and drunk by the minor, whether it passed to him direct or through the hands of another, is immaterial; the liquor in either case is furnished to such minor within the meaning of our statute."⁶⁵ So if one takes a

⁶⁰ *Patton v. State*, 42 Tex. Cr. App. 496; 61 S. W. 609; *Graham v. State*, 121 Ga. 590; 49 S. E. 678; *State v. McCormick* (Wash.), 105 Pac. 1037.

⁶¹ *Smith v. State*, 132 Ala. 38; 31 So. 552.

⁶² *State v. Fairfield*, 37 Me. 517.

When a statute requires the consent of the minor's parents, proof of consent by the father is sufficient, it being presumed the

mother also gave her consent. *State v. McCormick* (Wash.), 105 Pac. 1037.

⁶³ *Southern Express Co. v. State*, 1 Ga. App. 700; 58 S. E. 67.

⁶⁴ *Newsom v. State*, 1 Ga. App. 790; 58 S. E. 71.

⁶⁵ *People v. Neuman*, 85 Mich. 98; 48 N. W. 290; *State v. Best*, 108 N. C. 747; 12 S. E. 907; *State v. Mumson*, 25 Ohio St. 381.

minor's money, and at his request buys him liquor and delivers it to him, he becomes a furnisher of liquor to a minor, and the transaction is a violation of the statute against furnishing liquor to a minor.⁶⁶

Sec. 731. Knowledge that purchaser is a minor when essential to commission of offense.

Some of the statutes, especially the earlier ones on the subject, only make the sale to a minor an offense when the vendor of the liquor knew at the time of the sale he was a minor, and when that is the case the fact of knowledge is an essential element of the offense.⁶⁷ Thus, the English statute provides that, "Every holder of a license who knowingly sells or delivers or allows any person to sell or deliver * * * any description of intoxicating liquor to any person under the age of fourteen years, for consumption by any person on or off the premises," shall be fined if convicted of a violation of its provisions.⁶⁸ Here the word "knowingly" applies to the age of the child, and is an essential element in the commission of an offense in selling to such child. But under such a statute, as in all other instances of this and a similar kind, the vendor cannot escape liability by purposely or carelessly remaining ignorant of the fact that the purchaser is a minor. He must

⁶⁶ *Burnett v. State*, 92 Ga. 474; 17 S. E. 858; *Commonwealth v. Davis*, 12 Bush 240.

⁶⁷ *Williams v. State*, 23 Tex. App. 70; 3 S. W. 661; *Hunter v. State*, 18 Tex. App. 444; *Perry v. Edwards*, 44 N. Y. 223; *Williams v. State* (Tex. Cr. App.), 57 S. W. 650; *Pressler v. State*, 13 Tex. App. 95; *State v. McBryer*, 98 N. C. 619; 2 S. E. 755; *Jones v. State*, 32 Tex. Cr. Rep. 110; 22 S. W. 149; *Wakefield v. State* (Tex.), 28 S. W. 470; *Loeffler v. District of Columbia*, 15 App. D. C. 329; *Felton v. United States*, 96 U. S. 699; *People v. Welch*, 71

Mich. 548; 39 N. W. 747; 1 L. R. A. 385; *Ferguson v. State*, 50 Tex. Cr. App. 155; 95 S. W. 111; *Carson v. Devault*, 12 L. N. (Can.) 20; *Groom v. Grimes*, 89 L. T. 129; 67 J. P. 345; 20 Cox, C. C., 515; *Sinclair v. State* (Tex. Cr. App.), 70 S. W. 218; *Carwile v. State* (Tex. Cr. App.), 72 S. W. 376; *Cleveland v. State* (Tex. Cr. App.), 66 S. W. 550; *Smith v. State* (Tex. Cr. App.), 66 S. W. 780; *Gray v. State*, 44 Tex. Cr. App. 470; 72 S. W. 169; *Carlton v. Kreigher* (Tex.), 115 S. W. 619.

⁶⁸ 1 Edw. 7, c. 27, § 2.

be diligent, he must be active that he do not sell to a person under age. In a measure he is put upon inquiry as to every sale he makes. Whether he has been diligent to ascertain the fact that the purchaser was not a minor is a question solely for the jury, and the jury cannot be instructed that they may judge from the appearance of the purchaser whether or not he was a minor.⁶⁹ The jury cannot form their own examination of the personal appearance of the purchaser to determine whether or not the vendor should have known he was a minor. That is a question of proof by the testimony of witnesses. A witness may testify that from the personal appearance of the purchaser he would or would not have taken him to be of age,⁷⁰ but he cannot say that the purchaser would or would not be taken by a person of ordinary observation or prudence to be a minor.⁷¹ Where it appeared that the minor's brother-in-law told the vendor the minor was of age, and the minor had all the appearances of a person of full age, and he had been in business four years for himself, and the vendor thought him of age, a conviction was held not justifiable.⁷² And it has been also held that if the minor told the vendor he was of age, which the vendor believed, and relying on it sold him the liquor, an instruction to the effect that if this statement was made and the vendor believed and relied upon it he must be acquitted, does not change the rule that the vendor must sell the liquor to the minor knowing him not to be of age before he can be convicted.⁷³ The appearance of the purchaser may be such as to convey the information to the seller that he is a minor; and if it is, then the sale is made to him knowing he is a minor; and such is true if he has actual knowledge of that fact.⁷⁴

⁶⁹ McGuire v. State (Tex. App.), 15 S. W. 917; State v. McCormick (Wash.), 105 Pac. 1037.

⁷⁰ Garner v. State, 28 Tex. App. 561; 13 S. W. 1004; People v. Welch, 71 Mich. 548; 39 N. W. 747; 1 L. R. A. 385.

⁷¹ Koblenstlag v. State, 23 Tex. Cr. App. 264; 4 S. W. 888;

Walker v. State, 25 Tex. App. 448; 8 S. W. 644.

⁷² Wakefield v. State (Tex.), 28 S. W. 470.

⁷³ Jones v. State, 32 Tex. Cr. Rep. 110; 22 S. W. 149.

⁷⁴ State v. Constantine (Wash.), 86 Pac. 384.

To say to the jury that if the

Sec. 732. Vendor's ignorance of purchaser's minority no defense.

Where a statute does not use the word "knowingly" in making a sale to a minor an offense, or words of similar import, the courts are far from being of one opinion whether or not lack of knowledge of the minority of the purchaser, or a mistake reasonably made as to it, is a defense. In a number of States it has been held, under such statutes, the vendor must ascertain at his peril that the purchaser is of age, and no mistake in that respect is accepted as a defense.⁷⁵ These

seller knowingly gave liquor to a minor he is guilty, is error, and is not the same as saying if he gave the liquor to him knowing him to be a minor, he is guilty. *Ferguson v. State*, 50 Tex. Cr. App. 155; 95 S. W. 111.

As to what is sufficient evidence to show sale was made to a person knowing him to be a minor, see *Smith v. State* (Tex. Cr. App.), 66 S. W. 780; *Earl v. State* (Tex. Cr. App.), 66 S. W. 839; *Eckert v. State* (Tex. Cr. App.), 68 S. W. 682; *Bivens v. State* (Tex. Cr. App.), 43 S. W. 1007; *Tackaberry v. State* (Tex. Cr. App.), 72 S. W. 376; and what is not, see *Cleveland v. State* (Tex. Cr. App.), 66 S. W. 550; *Stone v. State* (Tex. Cr. App.), 39 S. W. 367; *Henderson v. State*, 37 Tex. Cr. App. 79; 38 S. W. 617; *Fielding v. State* (Tex. Cr. App.), 52 S. W. 69.

⁷⁵ *Redmond v. State*, 36 Ark. 58; 38 Am. Rep. 24; *Jenkins v. State* (Miss.), 34 So. 217; *Crampton v. State*, 37 Ark. 108; *People v. Werner*, 174 N. Y. 132; 66 N. E. 667; reversing 66 N. Y. Supp. 1139; *Paunders v. State*, 37 Ark. 399; *State v. Gilmore*, 80 Vt. 514;

68 Atl. 658; *Edgar v. State*, 37 Ark. 219; *McCutcheon v. People*, 69 Ill. 601; *People v. Curtis*, 129 Mich. 1; 87 N. W. 1040; 8 Detroit L. N. 832; *Farmer v. People*, 77 Ill. 322; *Flynn v. Galesburg*, 12 Bradw. (Ill.) 200; *McCoy v. Clark* (Iowa), 81 N. W. 159; *State v. Thompson*, 74 Iowa 119; 37 N. W. 104; *State v. Bruder*, 35 Mo. App. 475; *State v. Gully*, 41 Ore. 318; 70 Pac. 385; *In re Carlson*, 127 Pa. 330; 18 Atl. 8; 24 W. N. C. 184; *State v. Sasse*, 6 S. D. 212; 60 N. W. 853; 55 Am. St. 834; *State v. Cain*, 9 W. Va. 599; *State v. Gilmore*, 9 W. Va. 641; *State v. Baer*, 37 W. Va. 1; 16 S. E. 368; *Commonwealth v. Jessup*, 13 Smith (Pa.), 34; *Commonwealth v. Baumler*, 20 Pa. •Super. Ct. 273; *Jamison v. Burton*, 43 Iowa 282; *Fielding v. La Grange*, 104 Iowa, 530; 73 N. W. 1038; *Hale v. State*, 36 Ark. 150; *Johnson v. People*, 83 Ill. 431; *Commonwealth v. Joslin*, 158 Mass. 482; 23 N. E. 653; 21 L. R. A. 449; *Harper v. State* (Ark.), 127 S. W. 738; *Harlan v. Richmond*, 108 Iowa 161; 78 N. W. 809; *Ulrich v. Commonwealth*, 6 Bush 400;

eases rest upon the principle that a statute makes the act of sale an offense irrespective of the vendor's guilty knowledge. "The law," said the Supreme Court of Illinois, "imposes upon the licensed seller the duty to see that the party to whom he sells is authorized to buy, and if he makes a sale without this knowledge he does it at his peril. * * * It is no answer to this view to say that the licensee may sometimes be imposed upon and made to suffer the penalties of the law when he had no intention to violate its provisions. This is a risk incident to the business he has undertaken to conduct, and as he receives the gains connected therewith he must assume also with it all the hazards."⁷⁶ In discussing this phase of the question the Supreme Court of Wisconsin has put it very tersely: "Where a statute commands that an act be done or omitted which, in the absence of such statute, might have been done or omitted without culpability, ignorance of the fact, or state of things contemplated by the statute, will not excuse its violation."⁷⁷ But even in those cases hold-

Commonwealth v. Davis, 12 Bush 240; *Baer v. Commonwealth*, 10 Bush 8; *State v. Kinkead*, 57 Conn. 173; 17 Atl. 855; *Commonwealth v. Uhrig*, 138 Mass. 492; *Commonwealth v. Barnes*, 138 Mass. 511; *State v. Chastain*, 19 Ore. 176; 26 Pac. 963; *A. E. Holly & Co. v. Simmons* (Tex. Cr. App). 85 S. W. 325; *State v. Field* (Mo.), 119 S. W. 499.

⁷⁶ *McCutcheon v. People*, 69 Ill. 601.

⁷⁷ *State v. Hartfiel*, 24 Wis. 61. Of this Bishop has observed in his *Statutory Crimes* (2 ed.), § 1022, note 6: "Nothing of this is in the slightest degree adverse to the doctrine of my text. All admit that a man has no right to act while his mind is in a state of 'ignorance.' He should first inform himself, and, if he will

not, he must take the consequences. One who throws down from a loft, into the street, what will kill any man it hits, while 'ignorant,' whether or not there are men there, is properly adjudged guilty of criminal homicide if a man is killed. And by all opinions the same doctrine applies to a sale of liquor to a minor in 'ignorance' of his age. But it is a very different question whether or not it is a defense for the seller that he took pains to remove his 'ignorance,' and was duly, yet mistakenly informed, therefore believed, that the buyer had attained majority. All concede that this sort of mistake would be a perfect defense in a case of homicide. Is the sale of a glass of whisky to a youth an offense so much greater than

ing that a sale to a minor under the supposition that he is of age is no defense, it is held that the lack of knowledge may be shown as a mitigation of the punishment.⁷⁸ Pharmacists are liable for sales they make to minors and cannot claim immunity on the ground that they acted in good faith and had no intention to violate the statute prohibiting such sales.⁷⁹

Sec. 733. Vendor's ignorance of purchaser's minority a defense.

There is another line of cases which hold that if the sale was made under an honest belief and mistake that the minor was of age the vendor cannot be convicted of what would otherwise be an illegal sale because of his minority. "A sale

murdering him that it should be dealt with less leniently?"

One cannot help but be impressed with the belief that the rule adopted, holding that ignorance is no excuse for having sold liquor to a minor, has been adopted by the courts following it upon the ground of expediency, and practically upon the ground of necessity, in order to reach a class of unscrupulous offenders who, under any other rule, can trump up a convenient and plausible defense.

The case of *State v. Kinkhead*, 57 Conn. 173; 17 Atl. 855, follows the reasoning contained in the quotations in the text.

⁷⁸ *Crampton v. State*, 37 Ark. 108; *Pounders v. State*, 37 Ark. 399.

For an extended article on "Intent in Crime," see 9 Criminal Law Magazine (March, 1887), p. 139-178.

A statute providing that it is a good defense where liquor is sold to a minor in good faith and in the belief he is of age, has no

application to a sale to a student where a statute forbids sales to him. *Peacock v. Limburger*, 95 Tex. 258; 66 S. W. 764.

In Iowa a sale, if the seller does not know the purchaser is not a minor may be made by him upon a statement in writing by a reliable person known to him that the purchaser is not a minor. This statute requires such an identification upon every occasion of a sale, and a sale made upon a second occasion without a new written identification is illegal, if it turn out the purchaser is a minor. *State v. Mulhern*, 109 Iowa, 464; 106 N. W. 267.

A statute making it an offense to sell to a minor is not modified by a subsequent statute making it an offense for a minor to misrepresent his age, so as to induce the vender to sell liquor to him. *State v. Gully*, 41 Ore. 318; 70 Pac. 385.

⁷⁹ *McCoy v. Clark*, 109 Iowa, 464; 81 N. W. 159; *State v. People*, 1 Penn. (Del.) 525.

of intoxicating liquor to a minor," said the Supreme Court of Indiana, "under the belief, entertained in good faith, that he was an adult, is not within the statute."⁸⁰ This is the established rule in that State⁸¹ and in many other States.⁸² These

⁸⁰ Goetz v. State, 41 Ind. 162.

⁸¹ State v. Kalb, 14 Ind. 403; Farbach v. State, 24 Ind. 77; Rineman v. State, 24 Ind. 80; Moore v. State, 65 Ind. 382; Brown v. State, 24 Ind. 113; Werneke v. State, 50 Ind. 22; Robinius v. State, 63 Ind. 235; Robinius v. State, 67 Ind. 94; Holmes v. State, 88 Ind. 145; Ward v. State, 48 Ind. 289; Hunter v. State, 101 Ind. 241; Fitzenrider v. State, 30 Ind. 238; Kramer v. State, 106 Ind. 192; 6 N. E. 341; Johnston v. State, 74 Ind. 197; Mulread v. State, 107 Ind. 62; 7 N. E. 884; Ross v. State, 116 Ind. 495; 19 N. E. 451.

"Is the seller to ask every purchaser his age? Very well. Suppose the answer states it falsely, and the seller is thus led to sell to a minor? Again, is the seller to trace out the parents of every person and inquire of them? Suppose they give false information, and thereby liquor is sold to a minor. The State is not the party giving the false information, and, hence, would not be estopped to prove, on the trial, the true age of the person to whom the liquor was sold. What rule must govern on this point? We think it must be that of belief. We think the offense consists in selling to a minor, not believing, or having reason to believe him to be an adult. *Prima facie*, the seller would be presumed to know, un-

der the law, whether the person he sold to was a minor or an adult, and, in case of doubt, he would, if he sold, take the hazard. But we think he might be permitted to show, on a prosecution for selling to a minor, that the person was a stranger to him, and that his personal appearance would lead any person of common observation to believe him, beyond doubt, an adult—that he represented himself as such, etc. So he might prove that a person whom he did know (but not his age), was treated by his parents or friends, and the community as an adult. Such evidence would be for the jury to consider." State v. Kalb, 14 Ind. 403.

"It cannot be assumed that the Legislature would attempt such a wrong as to punish as criminal an act which involved no criminal mind. This principle is as old as the criminal law, and underlies the whole of it."

Faulks v. People, 39 Mich. 200; 33 Am. Rep. 374.

⁸² Marshall v. State, 49 Ala. 21; Adler v. State, 55 Ala. 16; Bain v. State, 61 Ala. 75; Hill v. State, 62 Ala. 168; Reich v. State, 63 Ga. 616; Harkey v. State, 89 Ga. 478; 15 S. E. 552; Faulks v. People, 39 Mich. 200; 33 Am. Rep. 374; People v. Welch, 71 Mich. 548; 39 N. W. 747; 1 L. R. A. 385; McGuire v.

cases proceed on the theory, of course, that there was a mistake of fact, and when one acts upon a mistake of fact, not having been negligent in the ascertainment of the truth, he is excused. "It cannot be assumed," said the Supreme Court of Michigan, speaking of a sale made to a minor in ignorance of his age, "that the Legislature would attempt such a wrong as to punish as criminal an act which involved no criminal intent. There can be no crime where there is no criminal mind. This principle is as old as the criminal law and underlies the whole of it."⁸³ But if the seller wishes to avail himself, as a defense, of the fact that he sold the liquor in ignorance that the purchaser was a minor, the burden of proof on that question is upon him to make out his defense by showing such facts as will justify the inference of a *bona fide* belief.⁸⁴ Mere belief that the purchaser was of age is not a defense; such a belief must be founded upon appearances which justify a reasonable conclusion of his full age.⁸⁵ While the seller cannot testify that he did not intend to violate the law,⁸⁶ yet

State (Tex.), 15 S. W. 917; Miller v. State, 3 Ohio St. 475; Aultfather v. State, 4 Ohio St. 467; Newman v. State, 63 Ga. 533; Weed v. State, 55 Ala. 13; Marshall v. State, 49 Ala. 21; State v. Bradley, 15 S. D. 148; 87 N. W. 590 (by statute); State v. Sanford, 15 S. D. 153; 87 N. W. 592 (by statute); People v. Bronner, 145 Mich. 399; 108 N. W. 672; 13 Detroit Leg. N. 492; Groom v. Grimes, 89 L. T. 129; 67 J. P. 345; 20 Cox C. C., 515; Askew v. State, 4 Ga. App. 446; 61 S. E. 737; Tinkle v. Sweeney (Tex. Civ. App.), 78 S. W. 248 (by statute).

⁸³ Faulks v. People, 39 Mich. 200; 33 Am. Rep. 374. See also Bishop Stat. Crimes (2 ed.), § 1022.

⁸⁴ Goetz v. State, 41 Ind. 162; Farbach v. State, 24 Ind. 77;

Rineman v. State, 24 Ind. 80; Swigert v. State, 99 Ind. 111; State v. Salikowski (Del.), 69 Atl. 839; Mulreed v. State, 107 Ind. 62; 7 N. E. 884; Taylor v. State, 107 Ind. 483; 8 N. E. 450; Fehn v. State, 3 Ind. App. 568; 29 N. E. 1137; Reich v. State, 63 Ga. 616; Territory v. Hall, 17 Hawaii 536; State v. Mulhern, 130 Iowa 46; 106 N. W. 267; Commonwealth v. Terry, 15 Pa. Super. Ct. 608.

⁸⁵ Mulreed v. State, 107 Ind. 62; 7 N. E. 884; Reich v. State, 63 Ga. 616; Creel v. Cordon, 44 Tex. Civ. App. 337; 98 S. W. 387; State v. Fahey, 5 Penn. (Del.), 585; 65 Atl. 260.

⁸⁶ Ross v. State, 116 Ind. 495; 19 N. E. 451; Bain v. State, 61 Ala. 75; Hill v. State, 62 Ala. 168.

he may testify he had no intention to sell to a minor and that he believed the purchaser was of age.⁸⁷ Evidence that the purchaser wore a beard may be given, but it is not sufficient, standing alone, to justify the sale;⁸⁸ but the personal appearance of the purchaser cannot be considered by the jury as he appeared at the trial. His personal appearance, however, as it was when the sale was made may be shown by the testimony of witnesses.⁸⁹ The vendor may testify to the age of the purchaser, if he know it, subject to cross-examination, of course,⁹⁰ and to his belief he was of age.⁹¹ He may show that the purchaser represented that he was of age, although such a representation is not of itself a defense. It must be coupled with other facts, as appearances and the like.⁹² Persons who personally know the purchaser may give an opinion concerning his age,⁹⁴ and may say he did or did not appear to them to be of age, but cannot say how he appeared to other people.⁹⁵

⁸⁷ *Ross v. State*, 116 Ind. 495; 19 N. E. 451.

⁸⁸ *Goetz v. State*, 41 Ind. 162; *Swigart v. State*, 99 Ind. 111; *Behler v. State*, 112 Ind. 140; 13 N. E. 272.

⁸⁹ *Ihenger v. State*, 53 Ind. 251; *Robinius v. State*, 63 Ind. 235; *Bird v. State*, 104 Ind. 384; 3 N. E. 827; *Mulreed v. State*, 107 Ind. 62; 7 N. E. 884; *Stephenson v. State*, 28 Ind. 272.

⁹⁰ *Ross v. State*, 9 Ind. App. 35; 36 N. E. 167; *Benson v. McFadden*, 50 Ind. 431.

⁹¹ *Mulreed*, 107 Ind. 62; 7 N. E. 884.

⁹² *Goetz v. State*, 41 Ind. 162.

Contra, *People v. Welch*, 71 Mich. 548; 39 N. W. 747.

⁹⁴ *Benson v. McFadden*, 50 Ind. 431.

As to what is erroneous instruction on the presumption of guilt, see *People v. Bronner*, 145 Mich. 399; 108 N. W. 672.

⁹⁵ *Ferguson v. State*, 50 Tex. Cr. App. 155; 95 S. W. 111.

By statutes in some States the honest belief of the seller that the purchaser is not a minor is made a defense. *Creel v. Cordon*, 44 Tex. Civ. App. 367; 98 S. W. 387; *Commonwealth v. Terry*, 15 Pa. Super. Ct. 608; but such a statute does not extend to an instance of a saloon keeper permitting a minor to enter and remain in his saloon, in violation of statute. *Markus v. Thompson* (Tex. Civ. App.), 111 S. W. 1074; *Krick v. Dow* (Tex. Civ. App.), 84 S. W. 245.

The vendor must use all reasonable means at hand to ascertain the age of the minor; he must use reasonable diligence to obtain accurate information concerning his age, and honestly believe he is of full age, and is not deceived. *State v. Fahey*, 5 Penn. (Del.) 585; 65 Atl. 260.

Sec. 734. Sales in sealed and corked bottles or vessels.

In England sales of intoxicating liquors may be made to minors when sold or delivered "in corked or sealed vessels in quantities not less than one reputed pint for consumption off the premises only." The word "corked" is defined to mean "closed with a plug or stopper, whether made of cork or wood or glass or some other material," and the expression "sealed" to mean "secured with any substance without the destruction of which the cork, plug or stopper cannot be withdrawn."⁹⁶ This statute applies only to licensees. What is a sealed vessel has been the subject of adjudication in that country. In this instance a licensee delivered to a boy a pint of beer in a bottle. The bottle was fitted with a glass stopper having around it a ring of cork. Over the top of the glass stopper, from one side of the neck of the bottle to the other side, the licensee, before delivery, stuck a gummed label, on which was printed: "Caution. This label must not be tampered with." After affixing the label, the licensee placed a portion of sealing wax on one side of the bottle, partly on one side of the neck of the bottle and partly over one end of the label. A constable on duty outside the premises stopped the boy and took the bottle from him. The gum on the bottle was then wet, and the constable by taking hold of the label on the end of which there was no sealing wax was able to detach the label, which came off intact, the sealing wax also coming off the bottle with the label. The court held that the licensee was properly convicted, saying that the vessel must be in fact properly corked and sealed and not in vessels believed to be properly corked and sealed. The effect of the decision is that the test of the sealing is whether the cork, plug or stopper can be withdrawn without the destruction of the sealing substance.⁹⁷ Consequently a sale in a corked bottle is not a sale in a sealed vessel.⁹⁸ Where a bottle had a screw top over which was

⁹⁶ 1 Edw. 7 c. 27, §§ 2 and 5.⁹⁸ Farndale v. Dillon, 76 L. J.⁹⁷ Brooks v. Mason [1902], 2

K. B. 922 [1907], 2 K. B. 513;

K. B. 743; 72 L. J. K. B. 19; 67

97 L. T. 284; 71 J. P. 379.

J. P. 47; 51 W. R. 224; 88 L. T.

24; 19 T. L. R. 4.

placed a gummed paper label which was continued down the sides of the neck one inch, and became quite dry when delivered to the child, and on the trial a police sergeant showed a similarly sealed bottle could be opened by wetting the label, removing it and taking off the screw top, and replacing all in six or seven minutes, it was held that the licensee delivering the bottle to the child was guilty of selling an unsealed package.⁹⁹ But in such an instance where it was not shown the bottle could be opened without destroying the label, the acquittal was held proper.¹ This statute also makes it an offense to knowingly send "any person under the age of fourteen years to any place where intoxicating liquors are sold and delivered or distributed, for the purpose of obtaining any description of intoxicating liquor," except "in corked and sealed vessels, in quantities not less than one reputed pint." In construing this statute one of the judges said: "There must be evidence that the sender intended that the vessel in which the liquor was to be delivered to the child should be corked and sealed before delivering." Another judge said that the sender "must send the child for a pint at least of some intoxicating liquors as are ordinarily sold in corked and sealed vessels, such as a pint of champagne or of bottled beer. He must not send for less than a reputed pint. And, further, he must not send the child with a bottle which has to be corked and sealed by the seller after being filled." "In my opinion," said another judge, "the statute meant that a child should not be sent for any liquor which is not sold in corked and sealed bottles."²

Sec. 735. Sales to students.

In three States at least statutes have been enacted forbidding sales or gifts to students of schools. One of these statutes forbade sales "to any student of the State University,

⁹⁹ Mitchell v. Crenshaw [1909], 631; 67 J. P. 251; 20 Cox, C. C. 1 K. B. 701; 72 L. J. K. B. 398; 449.

68 L. T. 463; 67 J. P. 179; 20 ² Farndale v. Dillon [1907], 2 Cox C. C., 395. K. B. 513; 71 J. P. 379; 76 L.

¹ Macey v. McKenzie, 88 L. T. J. K. B. 922.

or of any school, college or academy," and this was held to forbid sales to adult students of such institutions.³ But another statute forbidding sales "to any minor person, pupil or student while attending school," was held to apply only to minors in schools and not to adults.⁴ A statute prohibiting sales to minor students of any "college, school or academy" applies to students of a writing school.⁵

ARTICLE II.—TO SLAVES.

SECTION.

736. Sales or gifts to slaves.

Sec. 736. Sales or gifts to slaves.

The statutes prohibiting sales or gifts to slaves still have sufficient interest for us to warrant a short review of the cases. A sale or gift was permitted upon the order or direction or with the consent of the slave's owner; and an administrator who had possession of a slave was his owner.⁶ If the sale was made upon a forged order, the order was no protection to the vendor.⁷ Where the owner of a slave sent him after the liquor and it was put in a jug for him and the jug delivered to the slave, this was held to be neither a gift, sale nor delivery to the slave, but a sale and delivery to the owner.⁸ But *prima facie* the liquor furnished a slave was for his own use.⁹

³ State v. Cooper, 35 Mo. App. 532.

⁴ State v. Richter, 23 Minn. 81.

⁵ Farroll v. State, 32 Ala. 557.

A statute allowing it to be an offense that the liquor was sold to a minor in good faith, believing him to be of age, has no application to a sale to a student where a statute forbids such sale. Peacock v. Limburger, 95 Tex. 258; 46 S. W. 764.

Sale to a minor is one offense,

and sale to a student another. Daniels v. College (Tex. Civ. App.), 50 S. W. 205; State v. Hyde, 27 Minn. 153; 6 N. W. 555.

⁶ Boltze v. State, 24 Ala. 89.

⁷ Boltze v. State, 24 Ala. 89.

⁸ Powell v. State, 27 Ala. 151; State v. McNair, 46 N. C. (1 Jones) 180.

⁹ Hines v. State, 26 Ga. 614;

Parmell v. State, 29 Ga. 681;

Murphy v. State, 28 Miss. 637.

Directions of the master to the owner of liquor to let a slave have liquor in reasonable quantities whenever he wanted it did not justify sales to the slave at all times.¹⁰ Nor could the person hiring a slave give liquor to him; only the owner could do that, or one to whom he had given his consent to the gift.¹¹ In North Carolina a delivery could not be made to the slave except upon the written order of his master.¹² Usually statutes preventing sales to slaves covered both wholesale and retail sales.¹³ Pouring whisky into a jug owned by the slave who is waiting for it, in his presence, was sufficient to constitute a sale.¹⁴ But a contract to sell, not accompanied by a delivery, was not an indictable offense.¹⁵ Where a statute permitted a sale or gift in the presence of his master, it was held that the transaction must take place in such a presence of him as must imply a knowledge of and assent to the sale or gift; and if the master remained at a distance in order to watch and see if the law was violated there was not a sale or gift in his presence.¹⁶ But a statute forbidding a sale to a slave did not forbid a gift.¹⁷ A sale to a white man who immediately gave it to a slave was not an offense, although the sale was made in the presence of the slave and with a knowledge that the liquor was intended for him.¹⁸

¹⁰ Reinhart v. State, 29 Ga. 522.

¹¹ State v. Lyons, 3 La. Ann. 154.

¹² Page v. Luther, 51 N. C. (6 Jones) 413.

¹³ State v. Schroeder, 3 Hill (S. C.) 61; State v. Evans, 3 Hill (S. C.) 190. But see State v. Behrmans, Riley (S. C.) 82.

¹⁴ State v. Bierman, 1 Strobb. L. (S. C.) 256.

¹⁵ Pulse v. State, 5 Humph. 108.

¹⁶ Brown v. State, 2 Head 180.

This statute really forbade a sale or delivery to the slave, even in the master's presence, except for the use of the master. Jennings v. State, 3 Head 520.

¹⁷ Allen v. State, 14 Tex. 633.

¹⁸ Smith v. State, 24 Tex. 547.

A general written authority to sell to a slave was deemed sufficient, and a special order for such sale was not necessary. Johnson v. Commonwealth, 12 Gratt. 714.

For additional cases on sales to slaves, see Bond v. State, 13 Sm. & M. 265; Commonwealth v. Hatton, 15 B. Mon. 537; State v. Bradshaw, 2 Swan 627; Rawlins v. State, 2 Md. 201; Lindsay v. State, 19 Ala. 560; State v. Weak, 7 Humph. 522; Jolly v. State, 8 Sm. & M. 145; Shuttleworth v. State, 35 Ala. 415; State v. Harrington, 12 Rich. 293.

ARTICLE III.—TO DRUNKARDS.

SECTION.

737. Sales to intoxicated persons.

738. Who is an intoxicated person.

739. No knowledge purchaser is intoxicated.

740. Civil liability.

741. Sales or gifts to habitual drunkards or intemperate persons.

SECTION.

742. Who is an habitual drunkard or intemperate person.

743. Knowledge purchaser is an habitual drunkard or intemperate person.

744. Sale to drunkard after notice not to sell him.

745. Sales to idiots and insane persons.

746. Sale to convict.

Sec. 737. Sales to intoxicated persons.

A distinction must be observed in sales or gifts to an intoxicated person and in those to persons in the habit of becoming intoxicated or habitual drunkards, for a sale to an intoxicated person is not necessarily a sale to an habitual drunkard, and there may be a sale to an habitual drunkard when he is perfectly sober and yet an offense be committed. Slight variations exist in the several statutes of the States, but usually the thing that is forbidden is a sale, gift or bartering of liquor to a person in a state of intoxication, though occasionally the statute makes it an offense to "permit" such a person to obtain liquor, which means, of course, that the liquor is under the control and disposal of the accused at the time the intoxicated person obtains possession of it. So an occasional statute makes it an offense to dispose of liquor to such an individual. In the latter instance a sale to him is not necessary to make the transaction an offense, for if one buy the liquor and direct the seller to deliver it to the intoxicated person, the offense is committed.¹⁹ A sale to the drunkard's agent, so known to the seller, is, of course, a sale to the

¹⁹ State v. Hubbard, 60 Iowa 466; 15 N. W. 287; Fink v. Gorman, 40 Pa. 95; Vincent v. State (Tex. Cr. App., 55 S. W. 819;

Floyd v. Anderson, 12 N. Z. L. R. 567; Scatard v. Johnson, 57 L. J. M. C. 41; 51 J. P. 389; Evans v. Hemingway, 52 J. P. 134.

drunkard.²⁰ These statutes apply both to licensed and unlicensed persons,²¹ but not to a person who treats another in his own private residence as a guest.²² But where one C was on a drunken debauch at a certain house and he directed the defendant to send any liquors to the house that its mistress might order, and charge their cost to him, it was held that all liquors thus furnished to her for his use was a sale to him.²³ A statute making it an offense to sell liquors only when sold in less quantities than a quart, has no application to a sale to an intoxicated person, although the quantity exceeds that amount.²⁴ Of course, if another person in the defendant's saloon sell the liquor to a drunken man without authority, such defendant is not liable.²⁵ It is

²⁰ *Schulherr v. State*, 68 Miss. 227; 8 So. 328; *Scatchard v. Johnson*, 57 L. J. M. C. 41; 51 J. P. 389; *Evans v. Hemingway*, 52 J. P. 134.

²¹ *Altenburg v. Commonwealth*, 126 Pa. St. 602; 17 Atl. 799; 24 W. N. C. 145; 4 L. R. A. 543; *Fitzenrider v. State*, 30 Ind. 238. *Contra*, *State v. Nathken*, 60 W. Va. 673; 55 S. E. 742.

²² *Albrecht v. People*, 78 Ill. 510.

In this case, however, the court said the statute was aimed only at those who kept dramshops, but no court would convict a host for treating his drunken guest in his own home.

Under a New York statute it has been held that selling liquor to a drunken man was not indictable as a misdemeanor. *People v. Hislop*, 77 N. Y. 331, affirming 16 Hun 577.

A barkeeper selling liquor to an habitual drunkard is liable to be fined. *Walton v. State*, 62 Ala. 197.

²³ *Schullherr v. State*, 68 Miss. 227; 8 So. 328.

²⁴ *State v. Dolan*, 122 Ind. 141; 23 N. E. 761, overruling *Buell v. State*, 72 Ind. 523.

²⁵ *Hipp v. State*, 5 Blackf. 149; *Lathrope v. State*, 5 Ind. 192; *Wilson v. State*, 19 Ind. App. 389; 46 N. E. 1050.

If a sale be charged and the proof show a gift, there can be no conviction on the charge. *Harvey v. State*, 80 Ind. 142.

Unless some statute make it an offense to sell to an intoxicated person, a sale to such person is not an offense. *Maxwell v. State*, 27 Ala. 660.

Upon a charge of a sale to an intoxicated person there can be no conviction for a sale out of hours at a time when sales cannot be made. *Queen v. Harkins*, 7 Juta 69.

In Canada it was held that an ordinance prohibiting sales to a drunkard is valid; but one that no sale shall be made to an habitual drunkard after notice not

immateriai that the drunken purchaser does not himself drink the liquor, for if he pass it over to others who drink it there is still a liability, for the prohibition reaches the sale to the intoxicated person regardless of what he does with the liquor.²⁶ If the sale is to a sober person, and he passes it over to an intoxicated person, there must be evidence to show that the seller knew the liquor was for the person to whom it was given by the purchaser.²⁷ A statute forbidding a sale to a drunkard does not forbid a gift, though the gift is within the mischief of the statute.²⁸ And if a sale be made to an intoxicated person, and by his express orders it be not delivered to him but is delivered to sober persons who receive and drink the liquor, no offense is committed, for the object of the statute is to keep intoxicating liquors out of his actual possession and control, and by such a transaction he does not come in control of them.²⁹ R left a hotel drunk and met M and asked him to treat him. R and M went into the defendant's hotel and M ordered two drinks, one for himself and the other for R. M paid for them but not as the agent of R. It was held that the sale was to M and not to R.³⁰

Sec. 738. Who is an intoxicated person?

No peculiar significance attaches to the word "intoxicated" as used in the statutes, except that the intoxication must be produced by the kind of liquors forbidden to be sold to an intoxicated or drunken person, which are usually alcoholic, spirituous, vinous or malt.³¹ To be drunk the passions of the

to sell to him given by a relative or friend of the drunkard is void. *In re Barclay*, 12 Up. Can. 86; but a later case holds that a city cannot adopt an ordinance forbidding a sale to a drunkard. *Roberts v. Chinnie*, 46 Up. Can. 264.

²⁶ *Regina v. Mount*, 30 Ont. Rep. 303; 3 Can. Cr. Cas. 209.

²⁷ *Dwyer v. Hermann*, 19 N. Z. 209; distinguishing *Scathard v.*

Johnson, 57 L. J. M. C. 41; 51 J. P. 389.

²⁸ *Regina v. Mont*, 30 Ont. 303; 3 Can. Cr. Cas. 209.

²⁹ *Regina v. Mont. supra.*

³⁰ *Houldsworth v. Fairhall*, 25 N. Z. 1, distinguishing *Scathard v. Johnson*, 57 L. J. M. C. 41; 51 J. P. 389.

³¹ *State v. Kelly*, 47 Vt. 294. In this case it was said: "It needs no discussion or illustra-

individual must be so excited as to be visible to those about him, or his judgment must be impaired. In one sense of the word any amount of whisky of an appreciable quantity—as a small teaspoonful—will produce intoxication, by which is meant that it have some effect upon the human system, and yet in law it would not be intoxication because not noticeable to those coming in contact with the person taking the liquor, could not, in fact, be detected by a close examination. It is not such an intoxication as this that the statutes mean when they use the word “intoxicated” or “intoxication.”³² In one case it has been said: “Whenever a man is under the influence of liquor so as not to be entirely at himself, he is intoxicated, though he can walk straight, though he can attend to his business, and may not give any outward and visible signs to the casual observer that he is drunk.”³³

tion to show that when it is said that a man is intoxicated, the meaning is that his condition has been produced by the drinking of intoxicating spirituous liquors. No additional word or expression is used or needed to convey the full and unambiguous idea. Whenever any other idea is intended to be conveyed by the term intoxicated or its equivalent, drunk, other words are always used, and are necessary to be used. It is sometimes said that a person is intoxicated or drunk with opium or with ether, or with laughing gas. But it is always felt and understood that such is an unusual and forced use of the words intoxicated, drunk, and the addition to them is needful in order to prevent misapprehension of the sense in which those words are thus used. * * * There is, then, no need of any addition to the word when used in the complaint, in order, fully, exclusively

and explicitly to indicate the crime defined and meant by the statute, as the one made the subject of the prosecution instituted by the complaint.”

³² State v. Pierce, 65 Iowa 85; 21 N. W. 195; Brow v. State, 103 Ind. 127; 2 N. E. 321; Commonwealth v. Trimble, 150 Mass. 89; 22 N. E. 439; State v. Nethken, 60 W. Va. 673; 55 S. E. 742.

³³ Elkin v. Buschner (Pa.), 16 Atl. 102; Lafler v. Fisher, 121 Mich. 60; 79 N. W. 934.

It is held that the court may refuse to charge that the words “drunk” and “intoxicated” are synonymous. Simpson v. State, 93 Ga. 196; 18 S. E. 526.

It is not sufficient showing to obtain a new trial on the ground of newly discovered evidence, that the purchaser always drinks some, but no one who does not know him intimately can tell that he has been drinking, although he ‘feels his whisky.’ Simpson v.

Sec. 739. No knowledge purchaser is intoxicated.

Where a statute provided a penalty if any licensee sell "any intoxicating liquor to any drunken person," it was held, if the customer was really drunk, the licensee could not set up the defense that he and his partner considered the customer not to be drunk, for the risk of discovering the fact rested with the licensee.³⁴ Other cases hold to the same rule.³⁵ In an Indiana case, however, it was said that it was not necessary that the State show that the defendant knew that the purchaser of the liquor was intoxicated. "When the State proved the sale, and that the purchaser was at the time in a state of intoxication, the case was *prima facie* made out. When the fact of intoxication is shown, the law will presume the seller knew it. Whether an individual is in a state of intoxication or not is a fact ordinarily open to the perception of others,

State, 93 Ga. 196; 18 S. E. 526.

A witness may state that he could see that a certain person was drunk, or that he acted like he was drunk. Such testimony is not an opinion. *Kuhlman v. Weiben*, 129 Iowa 188; 105 N. W. 445.

A "state of intoxication" does not mean a state of complete intoxication involving almost entire suspension of the faculties of the body or of the mind; it is sufficient if either a person's mental or his bodily faculties are so disturbed by the influence of liquor that an average man who is neither a publican nor a prohibitionist would say it was improper for him to be supplied with more liquor. *Laffey v. Magarian*, 22 N. Z. 577.

"I do not think the words 'drunk and incapable' are an exact equivalent of 'in a state of intoxication.' It seems to me that these words signify some de-

gree less than absolute incapacity from drunkenness. It is, in fact, assumed, that this 'person already in a state of intoxication' is capable of asking for more drink, and, apparently, capable of paying for it; for it cannot be assumed that a man who is thoroughly drunk could either ask for a drink or pay for it. The state pointed out by the statute is therefore, in my opinion, a degree less than absolute drunkenness." *Brown v. Bowden*, 19 N. Z. 98.

³⁴ *Cundy v. Le Cocq*, 12 Q. B. Div. 207; 48 J. P. 599; 53 L. J. M. C. 125; 51 L. T. 265; 32 W. R. 769.

³⁵ *Church v. Higham*, 44 Iowa 482; *Commonwealth v. Julius*, 143 Mass. 132; 8 N. E. 898; *McVeigh v. Eccles*, 18 N. Z. 44; *Regina v. Gibson*, 11 Vict. L. R. 94; *Regina v. Bishop*, 5 Q. B. 259; *Regina v. Prince*, L. R. 2 C. C. R. 154.

and persons entrusted with the sale of intoxicating liquors must take notice of the condition of those who apply for it. If the degree of intoxication should be so slight as not to be noticeable to the seller, or if, on account of concealment, deception or any other peculiarity, in any case, it should escape detection, although reasonable care was exercised, it would be a legitimate defense to make such facts appear."³⁶

Sec. 740. Civil liability.

In this chapter no reference will be made to the civil liability of a person selling liquors to an intoxicated person or habitual drunkard. That subject is discussed in another chapter.

Sec. 741. Sales or gifts to habitual drunkards or intemperate persons.

Statutes not only prevent sales or gifts to intoxicated persons but also to habitual drunkards or persons of intemperate habits. It is said that not only such statutes but public policy forbid sales or gifts to such persons.³⁷ These statutes apply both to licensed and unlicensed persons,³⁸ and to a barkeeper of a licensed dealer,³⁹ and to sales and gifts of liquor.⁴⁰ And a sale to such a person upon a statement that his doctor had ordered him to get the liquor for sick members of his family is no excuse.⁴¹ So a sale to one who purchases it for a drunkard, to the seller's knowledge, and who is permitted by the seller to give it to such a person, is a violation of the statute.⁴² Notwithstanding this decision it

³⁶ *Brow v. State*, 103 Ind. 133; 2 N. E. 296; *Werneke v. State*, 50 Ind. 23; *Berry v. State*, 67 Ind. 222.

In *Whitton v. State*, 37 Miss. 379, it is said sufficient proof of knowledge of the intoxicated state of the purchaser if the seller had reason to know it.

³⁷ *Fink v. German*, 40 Pa. 95.

³⁸ *Fitzenrider v. State*, 30 Ind. 238; *Altenberg v. Commonwealth*,

126 Pa. St. 202; 17 Atl. 799; 24 W. N. C. 145; 4 L. R. A. 543.

Contra, *Albrecht v. People*, 78 Ill. 510.

³⁹ *Walton v. State*, 62 Ala. 197.

⁴⁰ *Church v. Higham*, 44 Iowa 482.

⁴¹ *McDonald v. Casey*, 84 Mich. 505; 47 N. W. 1104.

⁴² *Walton v. State*, 62 Ala. 197; *Scatchard v. Johnson*, 52 J. P. 389; 57 L. J. M. C. 41.

has been held that one who acts as the agent in the purchase of intoxicating liquor for an habitual drunkard does not violate the statute.⁴³ It is not necessary to the commission of the offense that the purchaser should be intoxicated at the time of the purchase,⁴⁴ nor that the vendor had no intent to violate the statute, for a voluntary delivery of the liquor is all that is necessary to constitute the offense.⁴⁵ Of course, a sale by agent is as much a crime as a sale in person when the agent is authorized generally to sell.⁴⁶ The amount of the sale is immaterial, as where a general statute forbids a sale of less than a quart, without a license to make a sale, and the amount sold to the drunkard is a quart or over.⁴⁷ However, under a statute prohibiting a sale to a drunkard a sale to him as agent of another is not an offense.⁴⁸ Of course, a license to sell liquor does not authorize a sale to an habitual drunkard.⁴⁹ It is immaterial for what purpose the liquor is sold.⁵⁰

Sec. 742. Who is an habitual drunkard or intemperate person.

An habitual drunkard is a person who is in the habit of getting drunk;⁵¹ but the court cannot say to the jury that it

⁴³ Young v. State, 58 Ala., 358.

⁴⁴ Fountain v. Draper, 49 Ind. 441; State v. Dolan, 122 Ind. 141; 23 N. E. 761.

⁴⁵ Hill v. State, 62 Ala. 168.

⁴⁶ Commissioners v. Cartman [1896], 1 Q. B. 655; 60 J. P. 357; 65 L. J. M. C. 113; 74 L. T. 726; 44 W. R. 637; 12 L. T. 334; Worth v. Brown, 40 Sol. J. 515; 62 J. P. 658.

⁴⁷ Brow v. State, 103 Ind. 133; 2 N. P. 296; Schmaedeke v. People, 63 Ill. App. 662; McCoy v. Clark (Iowa), 81 N. W. 159.

Contra, State v. Zeitler, 63 Ind. 441; Weireter v. State, 69 Ind. 269.

⁴⁸ Douthitt v. State (Tex. Civ. App.), 87 S. W. 190.

⁴⁹ State v. Donovan, 10 N. D. 203; 86 N. W. 709.

See also Barnes v. State, 19 Conn. 398; Mapes v. People, 69 Ill. 523; Humpeler v. People, 92 Ill. 400; Dudley v. Sautbine, 49 Iowa 650; 31 Am. Rep. 165; State v. Ward, 75 Iowa 637; 36 N. W. 765; State v. Heck, 23 Minn. 549; State v. Farr, 34 W. Va. 84; 11 S. E. 737.

Contra, see Farrell v. State, 45 Ind. 371; Deveny v. State, 47 Ind. 208; Williams v. State, 48 Ind. 306; Miller v. State, 5 Ohio St. 275.

⁵⁰ People v. Hamilton, 101 Mich. 87; 59 N. W. 107.

⁵¹ State v. Pratt, 34 Vt. 323; Commonwealth v. McNamee, 112

was not sufficient to prove that the person was an habitual drunkard to show that he had been frequently drunk, or that five or six instances of intoxication did not establish the charge that he was such an individual.⁵² So it is error to charge the jury that if a person gets drunk from three to five times a year he is an habitual drunkard.⁵³ A statute which defines an habitual drunkard or person of intemperate habits for the purpose of having a guardian appointed for him has no application to a statute forbidding a sale of liquor to him.⁵⁴ The term "intemperate habits" seems to be slightly different in meaning from that of "habitual drunkard." Thus, if a man living in the country usually gets drunk when visiting the saloon, he is a person of "intemperate habits," though when in the country he neither drinks nor even tastes intoxicating liquor.⁵⁵ And it is error to say to the jury that "a person who is in the habit of drinking intoxicating liquors intemperately is a person who is in the habit of getting intoxicated," for intemperance does not necessarily imply drunkenness.⁵⁶ Whether or not a person is an habitual drunkard or a person of intemperate habits is a question for the jury trying the case⁵⁷ and not one calling for the opinion of a witness. It must be directly proven.⁵⁸

Mass. 286; *Miller v. Gleason*, 18 Ohio Cir. Ct. Rep. 374; 10 Ohio C. D. 20; *State v. Nathan*, 60 W. Va. 673; 55 S. E. 742; *State v. Shinn*, 63 Kan. 638; 66 Pac. 650.

⁵² *Gallagher v. People*, 120 Ill. 179; 11 N. E. 335, affirming 29 Ill. App. 397; *Miller v. Gleason*, 18 Ohio Cir. Ct. Rep. 374; 10 Ohio C. D. 20.

⁵³ *Kamman v. People*, 124 Ill. 481; 16 N. E. 661, affirming 24 Ill. App. 388; *Birr v. People*, 24 Ill. App. 389.

See *Harlan v. Richmond*, 108 Iowa 161; 78 N. W. 809.

⁵⁴ *Campbell v. Jowe*, 2 Tex. Cir. App. 263; 21 S. W. 723.

⁵⁵ *Tatum v. State*, 63 Ala. 147.

⁵⁶ *Mullinix v. People*, 76 Ill. 211.

⁵⁷ *Harrison v. Ely*, 120 Ill. 83; 11 N. E. 334; *Murphy v. People*, 90 Ill. 59; *Kamman v. People*, 124 Ill. 481; 16 N. E. 661, affirming 24 Ill. App. 388; *Birr v. People*, 24 Ill. App. 389.

⁵⁸ *Gallagher v. People*, 120 Ill. 179; 11 N. E. 335, affirming 29 Ill. App. 399.

It is not necessary to constitute the offense that the purchaser should have a fixed habit of getting drunk. *Giroux v. People*, 132 Ill. App. 562.

Sec. 743. Knowledge purchaser is an habitual drunkard or intemperate person.

There are many cases that hold it is not essential to a conviction of having violated the statute for selling liquor to an habitual drunkard or one of intemperate habits that the seller should know, or by reasonable effort or precaution could have known, the purchaser was such an individual.⁵⁹ Of course, if the vendor knows the purchaser is in the habit of getting intoxicated, then he is guilty of a willful violation of the statute.⁶⁰ And even where the statute forbade sales to a "person of known intemperate habits," it was held that it was not necessary to show the seller knew the purchaser was "a person of known intemperate habits," for it was said that a mere sale to a person of known intemperate habits constituted the offense.⁶¹ But this is not always the rule. Thus, where a statute made it unlawful to sell, barter or give intoxicating liquor "to any person who is in the habit of getting intoxicated," it was held not necessary to show that the seller knew, at the time of the sale, that the purchaser was such a person. "Applying to the present case," said the court, "the same rule which has been uniformly applied in a case of a sale to a minor, we are of opinion that the offense is made out when it is proved that the person charged sold intoxicating liquor to a person who is proved to have been in the habit of getting intoxicated. The State is not required to prove that the defendant sold the liquor to such person knowing that he was in the habit of getting intoxicated. If the liquor was sold under the reasonable belief, entertained in good faith, that the person purchasing it was not in the habit of getting intoxicated, such fact may be proved by the defendant, upon

⁵⁹ Barnes v. State, 19 Conn 398; Smith v. State, 19 Conn. 493; Humpeler v. People, 92 Ill. 400; Church v. Higham, 44 Iowa 482; Dudley v. Sautbine, 49 Iowa 650; 31 Am. Rep. 165; Commonwealth v. Julius, 143 Mass. 132; 8 N. E. 898; State v. Heck, 23 Minn. 549; State v. Parr, 34 W.

Va. 81; 11 S. E. 737; Clifford v. Smith, 24 N. S. W. 192.

See Whitton v. State, 37 Miss. 379.

⁶⁰ Wolfe v. Johnson, 45 Ill. App. 122.

⁶¹ Commonwealth v. Zelt, 138 Pa. 615; 21 Atl. 7; 27 W. N. C. 131; 11 L. R. A. 602.

whom rests the burden of proof on this subject. Then the question is for the court or jury trying the case. The question of the good faith of the defendant being one of fact more than of law, no fixed or definite rules can be laid down in advance for the government of the court or jury in the trial of such cases. But we think it may be safely said that if it should be proved that the defendant had no personal acquaintance with or previous knowledge of the habits of the person who applies for the purchase of liquor, and who is at the time sober and exhibits on his person none of the usual indications resulting from habits of intoxication, he may sell to him without making any inquiry into his habits of sobriety or intoxication. If, on the other hand, the vendor from his personal acquaintance with, or knowledge of the habits of, or from the condition or appearance, of a person who applies to purchase liquor, has reason to believe that such person is in the habit of getting intoxicated, he would not be justified in selling to him until he had by reasonable inquiry ascertained that the person so applying was not in the habit of getting intoxicated. Whenever the vendor is put upon inquiry he should be held to pretty satisfactory proof of good faith."⁶² Where there can be no offense unless the seller knew the purchaser was an habitual drunkard or an intemperate person, the State must show beyond a reasonable doubt that the seller knew what kind of a person the purchaser was at the time the sale or gift was made.⁶³

Sec. 744. Sale to drunkard after notice not to sell him.

In Indiana a statute makes it an offense to sell, barter or give liquor "to any person who is in the habit of becoming intoxicated after notice shall have been given to him in

⁶² *Farrell v. State*, 45 Ind. 371; *Zeiger v. State*, 47 Ind. 129; *Deveney v. State*, 47 Ind. 208; *Fountain v. Draper*, 49 Ind. 441; *Williams v. State*, 48 Ind. 306; *Buell v. State*, 72 Ind. 523; *State v. Dolan*, 122 Ind. 141; 23 N. E. 761; *Haney v. Mann* (Tex. Civ.

App.), 81 S. W. 66; *Mitchell v. Gascoigne*, 23 N. S. W. 239; 6 S. R. (N. S. W.) 717.

⁶³ *State v. Alderton*, 50 W. Va. 101; 40 S. E. 350; *McCormack v. State*, 133 Ala. 202; 32 So. 268.

writing by any citizen of the township or ward wherein such person resides, that such person is in the habit of becoming intoxicated.”⁶⁴ Under this statute the giving of the notice is an essential element to constitute the sale, barter or gift an offense,⁶⁵ and it must be given by a person of the class designated in the statute to give it.⁶⁶ Inability on the part of the defendant to read will not excuse him from liability if a written notice has been duly given him.⁶⁷ In North Dakota it is held that a sale after notice is an offense regardless of the fact that the purchaser is not a person of intemperate habits.⁶⁸ A printed notice is sufficient, and it need not set forth all that is necessary to make out a case. Nor is knowledge of the seller that the person he is selling to is the same person whose name is inserted in the notice necessary to make him liable under the statute.⁶⁹ But if the statute requires the notice to be signed by the person giving it, then a copy of a notice, although his signature be copied, is not sufficient.⁷⁰

Sec. 745. Sales to idiots and insane persons.

In Canada a by-law forbidding sales and gifts to idiots and insane persons, unless made under the *written* permission of

⁶⁴ Burns Rev. S. 1908, § 2485. The act is constitutional. *Farrell v. State*, 45 Ind. 371.

⁶⁵ *Miller v. State*, 107 Ind. 152; 7 N. E. 898; *State v. Smith*, 122 Ind. 178; 23 N. E. 714; *Wilson v. State*, 19 Ind. App. 389; 46 N. E. 1050; *Dolan v. State*, 122 Ind. 141; 23 N. E. 761; *Garaghty v. State*, 110 Ind. 103; 11 N. E. 1.

⁶⁶ *Engle v. State*, 97 Ind. 122.

⁶⁷ *Cayionette v. Girard*, 28 L. C. J. 177; 1 Mon. Sup. Ct. 182; *State v. Gutekunst*, 24 Kan. 252.

⁶⁸ *State v. Donovan*, 10 N. D. 203; 86 N. W. 709. See as to what is sufficient evidence of a sale. *State v. Pritchard* (N. D.), 91 N. W. 583.

⁶⁹ *Queen v. Dias*, 1 Can. Cr. Cas. 534.

⁷⁰ *Gleason v. Williams*, 27 C. P. (Can.) 93.

A drunkard may be prohibited purchasing liquor on the ground that excessive drinking is injurious to his health. *Krummel v. Kidd* [1905], *Vict. L. R.* 193; 26 *Austr. L. T.* 131; 10 *Austr. L. R.* 264.

In New Zealand the justices issuing the license may issue an order forbidding sales to a particular individual, but an order issued in blank and filled out by a constable is void. *Cooper v. McMullen*, 16 N. Z. L. R. 560; *Rex v. Ward*, 21 N. Z. 506.

his guardian or master, was upheld where a statute empowered the adoption of a by-law requiring a consent of the guardian or master to be first given.⁷¹

Sec. 746. Sale to convict.

It is common legislation to forbid sales, gifts or furnishing liquor to convicts, or even to persons in jail. To constitute the offense the convict need not be at the time confined in the penitentiary.⁷²

ARTICLE IV.—TO INDIANS AND NATIVES.

SECTION.

747. Introducing liquor into the Indian country.

748. What is not an introduction of liquor into Indian country.

SECTION.

749. Sales to Indians.

750. State legislation.

751. Sale to natives under British Government.

Sec. 747. Introducing liquors into the Indian country.

In 1897 Congress enacted that it should be unlawful to sell intoxicating liquors to an Indian for whom the United States holds the title to land in trust, or who is a ward of the Government under an Indian superintendent or agent, or over whom the Government, through its departments, exercises guardianship.⁷³ Similar statutes had been in force previous to that time.⁷⁴ These statutes are held constitutional under the treaty making power of the United States and upon the power of Congress to regulate commerce with the Indians.⁷⁵ “Indian

⁷¹ *In re Ross*, 14 Can. Prac. 171; *In re Barclay*, 12 Up. Can. 86; *In re Arlell*, 38 Up. Can. 594.

⁷² *Askew v. State* (Ala.), 46 So. 751.

⁷³ Act Cong., January 30, 1897 (2 Supp. Rev. Stat. p. 544).

⁷⁴ Rev. Stat. U. S., § 2139, and

amendment of July 23, 1892, c. 234; 27 Stat. at Large 260; Act January 30, 1897, c. 109; 29 Stat. at L. 506.

⁷⁵ *Dick v. United States*, 208 U. S. 340; 28 Sup. Ct. 399; 52 L. Ed. —; *United States v. 43 Gallons of Whisky*, 3 Wall 407; 18 L. Ed.

country" as used in the United States statute does not embrace territory in which the Indian title has been extinguished and over which the jurisdiction of the State for all purposes of government is full and complete.⁷⁶ But the agreement between the United States and the Nez Perce Indians that the Federal laws forbidding the introduction of liquors into the Indian country should apply for twenty-five years to the lands by the treaty ceded to the United States as well as to those lands retained, as well as to those allotted to them in severalty, was not an invasion of the sovereignty of the State of Idaho in which these lands were situated, and therefore valid.⁷⁷ These various statutes of the United States, when the Indian country lies within a State, apply only because of the status of the Indian or because of the *locus* of the forbidden act being on a reservation.⁷⁸ The Red Lake and Pembina Indian reservation was held to be "Indian country," the court looking to the Act of 1834, referred to in

182; *Farrell v. United States*, 110 Fed. 942; 49 C. C. A. 183. See also *United States v. Shaw* — Mux 2 Sawy. 264; Fed. Cas. No. 16268; *American Fur Co. v. United States*, 2 Pet. 358; *United States v. Earl*, 17 Fed. 75; *Nelson v. United States*, 30 Fed. 112; *United States v. Buckles*, 6 Ind. T. 319; 97 S. W. 1022; *United States v. Forty-three Gallons of Whisky*, 93 U. S. 188; 23 L. Ed. 846.

⁷⁶ *Dick v. United States*, 208 U. S. 340; 28 Sup. Ct. 399; 52 L. Ed. —; *Bates v. Clark*, 95 U. S. 204; 24 L. Ed. 471.

⁷⁷ *Dick v. United States*, 208 U. S. 340; 28 Sup. Ct. 399; 52 L. Ed. —; *United States v. Boss*, 160 Fed. 132; *Ex parte Viles*, 139 Fed. 68.

⁷⁸ *United States v. Boss*, 160 Fed. 132; *Farrell v. United*

States, 110 Fed. 942; 49 C. C. A. 183; *United States v. Forty-three Gallons of Whisky*, 93 U. S. 188; 23 L. Ed. 846.

See act of February 8, 1887 (24 U. S. Stat. at Large 388).

By act of Congress, June 30, 1834 (4 U. S. Stat. at L. 729, § 1), the "Indian country" is defined as "all that part of the United States west of the Mississippi, and not within the States of Missouri and Louisiana or the Territory of Arkansas, and also that part of the United States east of the Mississippi River and not within any State to which the Indian title has not been extinguished." But this was repealed by § 5596, U. S. Rev. Stat., and the statute can no longer be appealed to for a definition of the "Indian country." *Palcher v. United States*, 11 Fed. 47.

a note, for a definition of the term.⁷⁹ It has been held that all Indians residing in Oregon are *prima facie* members of some Oregon tribe, and for that reason subject to the charge of the superintendent of Indian affairs in that State.⁸⁰ So in the Indian Territory,⁸¹ and the Territory of Alaska under Act of March 3, 1873,⁸² but not under the Act of March 15, 1864.⁸³ Only that portion of the United States that has been declared "Indian country" can be included therein.⁸⁴ But territory within a State which has been conveyed by the United States, ceded to it by an Indian tribe, which has passed into the ownership of individuals and a municipality of the State, is no longer "Indian country," and Congress has no power to legislate concerning the introduction of liquors therein.⁸⁵

Sec. 748. What is not an introduction of liquor into Indian country.

Liquor transported through an Indian reservation to a place where it may be lawfully sold is not introduced into the "Indian country," and is not subject to seizure, either while in transit or when it has reached its destination.⁸⁶ Nor

⁷⁹ *United States v. Le Bris*, 121 U. S. 278; 7 Sup. Ct. 894; 30 L. Ed. 946; *United States v. Forty-three Gallons of Whisky*, 108 U. S. 491; 2 Sup. Ct. 906; 27 L. Ed. 803. See *Three Cases of Cognac Brandy*, 14 Fed. 539.

⁸⁰ *United States v. Wirt*, 3 Sawy. 161; Fed. Cas. No. 16745; *United States v. Tom*, 1 Ore. 26.

⁸¹ *Burch v. United States*, 7 Ind. T. 294; 104 S. W. 619.

⁸² *In re Carr*, 3 Sawy. 316; Fed. Cas. No. 2432; *In re Sah Quah*, 31 Fed. 327; *United States v. Stephens*, 12 Fed. 52.

⁸³ *United States v. Seveloff*, 2 Sawy. 311; Fed. Cas. No. 16252.

⁸⁴ *United States v. Seveloff*, 2 Sawy. 311; Fed. Cas. No. 16252.

⁸⁵ *Ex parte Dick*, 141 Fed. 5; 72 C. C. A. 667; *In re Heff*, 197 U. S. 488; 25 Sup. Ct. 506; 49 L. Ed. 848.

So of the Cattaraugus and Allegheny Indian Reservations in New York. *Benson v. United States*, 44 Fed. 178.

The Yakima Reservation in Washington is part of the "Indian country." *United States v. Sutton* (U. S.), 30 Sup. Ct. 116; *United States v. Celestine* (U. S.), 308 Sup. Ct. 93.

⁸⁶ *United States v. Four Bottles of Sour Mash Whisky*, 90 Fed. 720; *United States v. 29 Gallons of Whisky*, 45 Fed. 847; *United States v. Carr*, 2 Mont. 234.

is whisky that has been ordered by a resident of the Indian country to be shipped to him from outside such country—as where the person ordering it lived in Alaska and ordered the liquor shipped from San Francisco—and the person so ordering it is not guilty of an attempt to introduce it into such country. To make the attempt to introduce liquor into the Indian country a criminal intent, the act done in pursuance of such intent must be performed after the liquor has been brought so near some point or place of “the main lands or waters” of such country as to render it convenient to bring it from there, or at least to make it manifest that such is the present purpose.⁸⁷

Sec. 749. Sales to Indians.

A sale to an Indian who is under the charge of an Indian agent or superintendent is an offense, although not made in the Indian country,⁸⁸ even if made to an Indian who has received allotted lands and is an elector of the State, if still under control of an Indian agent,⁸⁹ or even if he is a soldier in the United States army.⁹⁰ Any officer, soldier or employe of the United States furnishing an Indian liquor is liable.⁹¹ So an Indian selling liquor to an Indian may be punished.⁹² The statute applies to sales made to Indians of mixed bloods “over whom the Government, through its departments, exercises guardianship,” and includes Indian students at the

⁸⁷ United States, 12 Fed. 52.

⁸⁸ United States v. Burdick, 1 Dak. 142; 46 N. W. 571; Mulligan v. United States, 120 Fed. 98.

⁸⁹ United States v. Renfrow, 3 Okla. 161; 41 Pac. 88.

⁹⁰ United States v. Hurshman, 53 Fed. 543. See also United States v. Holliday, 3 Wall 407; 18 L. Ed. 182.

⁹¹ *In re McDonough*, 49 Fed. 360.

As to punishments under acts of June 30, 1834, and March 3,

1847, see *Fowler v. United States*, 1 Wash. T. 3.

⁹² United States, 2 Sawy. 364; Fed. Cas. No. 16268.

The California statute applies to any Indian regardless of their tribal relations or citizenship. *People v. Bray*, 105 Cal. 344; 38 Pac. 731; 27 L. R. A. 158.

Upon a charge of selling to an Indian a plea in abatement to the effect that the purchaser was not an Indian cannot be pleaded. *State v. Bailey*, 57 Neb. 204; 77 N. W. 654.

Carlisle Indian School in Pennsylvania.⁹³ A sale to a half breed is illegal.⁹⁴ A sale to an Indian outside an Indian reservation, who is "under the charge of any Indian superintendent or Indian agent appointed by the United States," is forbidden by the statute.⁹⁵ Actual control or immediate personal superintendence by the agent over the Indian to whom the liquor is sold is not essential to the commission of the offense if the tribe to whom the Indian belongs is under the control of the agent and the Indian still keeps up his tribal relations.⁹⁶ Even though the Indian owns a piece of land, on which he resides, and casts his vote under the State laws, he is still such a person, if he lives with his tribe and keeps up his tribal relations, to whom liquor cannot be sold.⁹⁷ The sale must take place in the Indian country to be an offense under the statute.⁹⁸ A Puyallup Indian, who inherited land from his parents in the Puyallup reservation, patented in 1886, pursuant to the treaty of December 26, 1854,⁹⁹ is not within the Act of 1897¹ prohibiting sales of intoxicating liquors to an Indian for whom the United States holds title to land in trust, or who is a ward of the Government under an Indian superintendent or agent, over whom the Government, through its departments, exercises guardianship, even though the Act of Congress of 1887² confers the

⁹³ *United State v. Belt*, 128 Fed. 168.

[Citing *United States v. Holliday*, 9 Wall. 407; 18 L. Ed. 182; *U. S. v. Osborn* (D. C.), 2 F. 58; *U. S. v. Earl* (C. C.), 17 F. 75; *U. S. v. Hurshman* (D. C.), 53 F. 543; *U. S. v. Flynn*, 1 Dill. 451; Fed. Cas. No. 15124; *U. S. v. Burdick*, 1 Dak. 142; 46 N. W. 571; *Renfrow v. U. S.*, 3 Okla. 170; 41 P. 88; *U. S. v. Clapox* (D. C.), 35 F. 575.]

⁹⁴ *Regina v. Mellon*, 4 Terr. L. R. 301. This is a Canadian decision.

⁹⁵ *United States v. Holliday*, 3 Wall. 407; 18 L. Ed. 182.

⁹⁶ *United States v. Flynn*, 1 Dill. 451; Fed. Cas. No. 15124.

⁹⁷ *United States v. Holliday*, 3 Wall. 407; 18 L. Ed. 182; *Farrell v. United States*, 110 Fed. 942; 49 C. C. A. 183.

⁹⁸ *United States v. Winslow*, 3 Sawy. 337; Fed. Cas. No. 16742; *United States v. Downing*, Fed. Cas. No. 14991.

⁹⁹ 10 Stat. at L. 1132, Art. 6.

¹ January 30, 1897 (2 Supp. Rev. St. p. 544).

² 1 Supp. Rev. St. (2 ed.), p. 536, § 6.

right of citizenship on Indians to whom allotments have been made.³ The statute does not apply to an Indian who has been emancipated from Government guardianship.⁴ It is no defense for the person disposing of the liquor that he did not know the purchaser was an Indian;⁵ nor is it upon a charge for illegally introducing liquors into the Indian country that the United States Government had issued a license for their sale in such country.⁶ The statute does not prohibit the introduction of malt liquors into the Indian country.⁷ An indictment charging a sale to divers Indians of a certain tribe to the grand jurors unknown, is sufficient as to whom the buyers were.⁸ So it is sufficient to allege that the Indian was a ward of the United States, and proof that he was a ward and also an Indian to whom an allotment of land had been made shows no variance.⁹ The military force of the United States may be empowered to arrest persons violating these statutes,¹⁰ and an Indian agent may seize the property of a third person used in carrying liquor into the Indian country.¹¹

³ United States v. Kopp, 110 Fed. 160.

Section 5 of the act providing that patents shall be issued to the Indians applies only to patents issued after its enactment.

⁴ *In re Heff*, 197 U. S. 488; 25 Sup. Ct. 506; 49 L. Ed. 848. The statute does not apply to the Pueblo Indians of New Mexico. *United States v. Mares* (N. M.), 88 Pac. 1128.

⁵ *United States v. Stofelo*, 76 Pac. 611. *Contra*, under the Canadian statute. *Regina v. Mellon*, 4 Terr. L. R. 301.

⁶ *United States v. Ellis*, 51 Fed. 608; *Endleman v. United States*, 86 Fed. 456.

⁷ *Satlls v. United States*, 152 U. S. 570; 14 Sup. Ct. 720; 38 L. Ed. 556, reversing 51 Fed. 808.

⁸ *Foerster v. United States*, 116 Fed. 860.

⁹ *Mulligan v. United States*, 120 Fed. 98.

¹⁰ *In re Carr*, 3 Sawy. 316; — Fed. Cas. No. 2432.

¹¹ *Webb v. Nickerson*, 11 Ore. 382; 4 Pac. 1126.

Formerly persons arrested could be confined in military prisons. *Waters v. Campbell*, 5 Sawy. 17; Fed. Cas. No. 17265.

For Canadian cases see *Regina v. McGauley*, 12 P. R. 259; *Regina v. Green*, 12 P. R. 373; *Regina v. McKenzie*, 6 Ont. 165; *Regina v. Young*, 7 Ont. 88; *Regina v. McGauley*, 14 Ont. 643.

The Canadian act applies to an island leased by a white man, but owned by Indians. No sale on such an island can be made. *Regina v. Duquette*, 9 Prec. Rep. (Ont.) 29.

Sec. 750. State legislation.

A statute of a State forbidding sales to Indians within its boundaries is constitutional, and does not trespass upon the power of Congress to regulate commerce with Indian tribes.¹² A person selling liquor to an Indian may be punished both under the act of Congress and under the State law.¹³

Sec. 751. Sale to natives under British Government.

In South Africa sales to natives are prohibited unless the natives have a permit to purchase, but the permit is purely personal to the one to whom it is issued, and a sale to any other native under its provisions is illegal;¹⁴ and if a sale be made to a native the burden is on the seller to show the native had a permit.¹⁵ Bastards of native mothers are natives,¹⁶ and a person whose general appearance presents the leading characteristics of an aboriginal native is taken to be such.¹⁷ To justify a sale to a native he must produce his permit or a certificate of registration as a voter.¹⁸ Of course, in making out its case the government must show that the purchaser was a native.¹⁹ A similar statute is in force in Australia, but

¹² *People v. Bray*, 105 Cal. 344; 38 Pac. 731; 27 L. R. A. 158; *Territory v. Guyott*, 9 Mont. 46; 22 Pac. 134; *Territory v. Coleman*, 1 Ore. 191; 75 Am. Dec. 554; *State v. Bailey*, 57 Neb. 204; 77 N. W. 654; *People v. Gebheard*, 151 Mich. 192; 115 N. W. 54; 14 Detroit Leg. N. 685.

¹³ *Territory v. Coleman*, 1 Ore. 191; 75 Am. Dec. 554.

¹⁴ *Rex v. Francis*, 18 Juta 57; *Rex v. Altenkirch*, 18 Juta 338.

¹⁵ *Rex v. Altenkirch*, 18 Juta 338; *Queen v. Bridges*, 17 Juta 385.

¹⁶ *Rex v. Stern*, 20 Juta 564; *Queen v. Parrott*, 16 Juta 452; *Queen v. Kirston*, 16 Juta 510.

As to sufficiency of proof, see

King v. Tomlinson, 18 East. Dist. Ct. Rep. 253.

¹⁷ *Rex v. Willett*, 19 Juta 168; *Rex v. Joplin*, 19 Juta 502.

¹⁸ *Queen v. Bridges*, 17 Juta 385.

¹⁹ *Queen v. Parrott*, 16 Juta 452; *Queen v. Kuston*, 16 Juta 510.

An order of a licensing court that no liquor should be sold a native, unless he produce an order of certain named persons is not a total prohibition within the meaning of a statute forbidding the board to adopt such measures as will amount to prohibition. *Beyers v. Willowmore Licensing Board*, 17 Juta 254; *Queen v. Parrott*, 16 Juta 452.

it is held that a sale to a person who is a son of a full-blooded aboriginal father and a half-caste mother is not "an aboriginal native of Australia," for both father and mother must be aboriginals for the offense to be committed by a sale to their son.²⁰ In New Zealand is a similar statute.²¹

The statute permits the licensing board to grant a license for sale to natives at the licensee's canteen, but not at his hotel bar. *Queen v. Roos*, 17 Juta 547.

As to who may authorize a sale to his servant (in this case a

checker on a railroad), see *Queen v. Rankin*, 17 Juta 528.

²⁰ *Branch v. Sceat*, 20 W. N. (N. S. W.) 41.

²¹ *Rhodes v. Bowden*, 26 N. Z. 1097.

CHAPTER XXIII.

SALES AT PROHIBITED PLACES.

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- 753. License for premises.
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SECTION.

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- 775. Sales at dwelling house.
- 776. Sales on boat.
- 777. Sales of native wine in bar-room.
- 778. Sales at public place.

Sec. 752. Sales out of territory for which license is issued.

It is a universal practice to issue a license for the sale of intoxicating liquors in certain described territory, as in a town, city, township or county. Thus, town authorities can only issue a license for a town, a city for a city, a county for a township of the county or for the county. In all such instances sales outside the district for which the license was

issued will subject the licensee to punishment the same as if he held no license. A person licensed in one county cannot sell in another county of the same State.¹

Sec. 753. License for premises.

Licenses for the retail of liquors almost invariably are restricted to certain definite premises described in the license and usually described in the application for the license. In all such instances the sales must be confined to the premises thus described, and all sales elsewhere are illegal.² If the grant of a license be for a particular place sales must be there made, although the license or permit do not restrict the sales to any particular place.³

Sec. 754. Sales off premises.

Where a statute requires the sales to be made on the specific premises licensed—and most of them do—then a sale off such premises is illegal. What is and what is not a sale off or on the licensed premises is often a matter of considerable difficulty to determine. Thus, where a distiller could sell his product “at the place of manufacture” without a license, a

¹ Commonwealth v. Holstine, 132 Pa. St. 357; 19 Atl. 273; United State v. Sheiver, 23 Fed. 134; United States v. Cline, 36 Fed. 515.

In the case of an island, the adjoining county usually issues the license for a sale upon it. Wright v. Harris, 49 J. P. 628.

A contract for a sale made in Georgia, but a delivery in Mississippi of the liquor sold is a sale in the latter State. Angelin v. State (Miss.), 50 So. 492.

² Goforth v. State, 60 Miss. 756; Commonwealth v. Merriam, 136 Mass. 433; Commonwealth v. Stratton, 150 Mass. 238; 22 N. E. 893; Commonwealth v. Mc-

911; State v. Prettyman, 3 Harr. (Del.), 570; State v. Walker, 16 Me. 241; State v. Hughes, 24 Mo. 147; Zinner v. Commonwealth (Pa. St.), 14 Atl. 431; Wasson v. Severance, 2 N. H. 501; State v. Moody, 95 N. C. 656; Common-Cormick, 150 Mass. 270; 22 N. E. wealth v. Esterbrook, 10 Pick. 293; Sanders v. Elberton, 50 Ga. 178; Hockstedler v. State, 73 Ala. 24; St. Louis v. Gerardi, 90 Mo. 640; 3 S. W. 408; State v. Fredericks, 16 Mo. 382; Barnes v. State, 49 Ala., 342; Currie v. Lamb, 17 Rev. Leg. 251.

³ State v. Hilliard, 10 N. D. 436; 87 N. W. 980.

sale of his products three or four hundred yards from the distillery was held to be illegal.⁴ So where a distilleryman could sell at his own residence if it was "located upon the distillery premises or premises adjacent," a sale on leased premises, at a nominal rent, consisting of two or three narrow strips of land connecting the distillery and residence, a mile or more distant, was held to be illegal.⁵ But where a licensee put up three bars, screened off by partitions, yet having direct connection by doors, all being situated on the ground floor of the same hotel, it was held that a sale in any of the three places was legal.⁶ So where liquor could not be kept or used "in any refreshment saloon or restaurant," a sale or keeping of liquor in a shop used for the manufacture of cigars and sale of tobacco was held to be no offense.⁷ Where the license is issued for a particular building, or room therein, a sale elsewhere is illegal.⁸ And where a person obtained a license for a room fronting on two streets, it was held that he could not divide the room by a permanent partition so as to make one room face on one street and the other room face on the other street, and then maintain a bar in each room.⁹ So where a license was for a certain room in a building and he enclosed the ground surrounding the building with a fence and set therein a hundred tables where, by waiters, he supplied guests with liquors, it was held that the sales were illegal, not having been made on the licensed premises.¹⁰ So where beer was carried out in the street and delivered a short distance from the licensed premises, it was held that the transaction was illegal.¹¹ And where the sale could be made at the

⁴ *State v. Hazel*, 100 N. C. 471;
⁶ *S. E.* 404; *Commonwealth v. Holland*, 104 Ky. 323; 47 S. W. 216; 20 Ky. L. Rep. 581.

⁵ *Creekmore v. Commonwealth* (Ky.), 12 S. W. 628.

⁶ *St. Louis v. Gerardi*, 90 Mo. 640; 3 S. W. 408.

⁷ *State v. Hogan*, 30 N. H. 268.

⁸ *United States v. Powers*, 1 Alaska 180.

⁹ *Thomas v. Aric*, 122 Iowa 538;
98 N. W. 380.

¹⁰ *Tron v. Lewis*, 31 Ind. App. 178; 66 N. E. 490. See also *Clement v. Marton*, 117 N. Y. App. Div. 5; 102 N. Y. Supp. 37.

¹¹ *State v. Young*, 70 Mo. App. 52; *Cross v. State* (Ark.), 87 S. W. 1026.

But not immediately in front of it in the street. *Douthitt v. State* (Tex. Civ. App.), 87 S. W. 190.

seller's place of residence, a sale at his warehouse seventy-five feet away was held unauthorized.¹² Where defendant was licensed to sell on "Erf, No. 106, Hopefield," and he sold a bottle of wine in the door of his general store about ten yards distant from his bottle store, but on Erf, No. 106, it was held that he had not violated the statute.¹³ Where the license granted the right to sell "on the premises," it was held that it would be presumed, until the contrary appeared, that the yard was a part of the premises.¹⁴ Where the license was to sell liquor "in the house known as Dind's Hotel," on one quarter of an acre, and the licensee built a new addition to the hotel, connected by a covered way, it was held that he could sell liquor in this new addition, for the reason that a license for a "house" covered all the outbuildings and grounds.¹⁵ The place licensed was the "front room, ground floor, side or end of building," which was a single dwelling house, with a small kitchen addition, consisting of only one room. It was held that sales could not take place in the kitchen addition on its removal to another part of the lot.¹⁶ Such a statute does not prohibit the maintenance of a refrigerator room, with a door between the two rooms, in which liquor is stored and then brought out for sale in the licensed room.¹⁷ Under a permit to sell liquors in a warehouse liquors

¹² Commonwealth v. Asbury, 104 Ky. 320; 47 S. W. 217. But see Cross v. Commonwealth (Ky.), 56 S. W. 981; Commonwealth v. Holland, 104 Ky. 323; 47 S. W. 216; 20 Ky. L. Rep. 581.

¹³ Queen v. Abel, 14 Juta 480.

¹⁴ Graves v. Roth, 29 Vict. L. R. 84; 26 Austr. L. T. 58; 10 Austr. L. R. 158, following Cairns v. Peterson, 2 Vict. L. R. 143.

By the same court it was held to be a question of fact whether a room separated from the principal business of an hotel was or was not a part of the licensed premises. *In re Rapken*, 14 Vict.

L. R. 317. See also Commonwealth v. Asbury, 104 Ky. 320; 47 S. W. 217; 20 Ky. L. Rep. 574.

¹⁵ *Ex parte McConnell*, 23 N. S. W. 9; 6 Sup. Rep. 88.

¹⁶ *In re Flanagan*, 49 N. Y. App. 99; 63 N. Y. Supp. 531; Carter v. Nicol, 116 Iowa 519; 90 N. W. 352 (on another lot).

Sales from wagon in Ohio; liability to tax at place of storage. *Jung Brewing Co. v. Talbot*, 59 Ohio St. 511; 53 N. E. 51.

¹⁷ *State v. Donahue*, 120 Iowa 154; 94 N. W. 503.

stored in the cellar of a brewery may there be sold.¹⁸ A statute imposing a tax upon liquor served in a bar and placed on a bar slide opening from the bar to a passage outside the bar and drank by persons in the passage, is liquor drank at the public bar.¹⁹ Where a statute required liquor to be sold in a single room having but one entrance, which must be on a public business street, and the defendant had a cellar below such a room, to which a stairway led down from the licensed room, and in this cellar he had liquors stored which he sold at wholesale, making deliveries through a side door in the cellar wall leading to the sidewalk, it was held that there was a violation of the statute forbidding sales at any other place than in the licensed room.²⁰ If orders for liquors be taken at a licensed saloon, but the liquors procured elsewhere, yet delivered in the saloon, the sale takes place at the saloon.²¹ A license authorized the licensee to sell liquors "inside" a certain baseball park, and instead of selling at the bar in the park when there were games played the licensee procured kegs of beer and located them at different places in the park from which he sold beer. It was held that he had not violated the statute, for the sales were all on the premises.²² A brewing company owned lots, three to ten, inclusive, its brewery building covering lots five to ten. On lots three and four was a house, the second story of which was occupied by the president of the company as a residence, and the first story of that part of the house on lot four was used as an office. The first

¹⁸ *Regina v. Halliday*, 21 App. (Ont.) 42; *Regina v. Young*, 8 Ont. 476.

As to tax on the place where liquor is trafficked in under the Dow Ohio law (83 Ohio Laws, p. 157), see *Reymann Brewing Co. v. Bristor*, 92 Fed. 28.

License to a brewer to sell at place not place of manufacture. *In re Brewing Co.*, 14 Pa. Super. Ct. 188.

¹⁹ *Sawtelle v. Jones*, 23 N. S. W. 165.

²⁰ *Powers v. Klett* (Iowa), 82 N. W. 752; *Carter v. Fred Miller Brewing Co.*, 111 Iowa 457; 82 N. W. 930.

²¹ *Carter v. Bartel*, 110 Iowa 211; '81 N. W. 462; *Cameron v. Fellows*, 109 Iowa 534; 80 N. W. 567; *Bartel v. Hobson*, 107 Iowa 644; 78 N. W. 689.

²² *Lyman v. Malcom*, 160 N. Y. 96; 54 N. E. 577; 55 N. E. 408, affirming 40 N. Y. App. Div. 46; 57 N. Y. Supp. 634.

story on lot three was used as a saloon to retail beer from the brewery. Between the saloon and office was a partition with a door in it. The public entrance to the saloon was on the corner of lot three. A statute forbade a brewery company to retail its product upon its premises. It was held that the company in retailing its product on lot three had violated this statute.²³

Sec. 755. Sales off premises—English cases.

The English statute of 1872²⁴ provides that “no person shall expose for sale at retail any intoxicating liquor” “at any place where he is not authorized by his license to sell the same.” The license is issued for a particular place or house. In that country two kinds of licenses prevail: one for sale of liquors for consumption on the premises and another for retail off the premises.²⁵ As construing these various provisions we take the following *résumé* of the decisions from a standard English work:²⁶ “In *Pletts v. Campbell*,²⁷ a brewer, having an off license for the sale of beer by retail, was in the habit of sending round his cart containing jars of beer to houses in the neighborhood; the jars of beer were delivered from the cart at the customer’s house in pursuance of orders given by the customers at their houses to the carter in the previous week, the price being paid by the customer at his house to the carter in the week succeeding delivery. There was no label or mark on the jars to show that any particular jar had been appropriated to any particular customer. It was held that the sale of the beer must be taken to have been at the house of the customer and not at the licensed premises. In *Cocker v. McMullen*,²⁸ the respondent, a brewer, had an off-license for his premises at L. His traveler called at the house

²³ *Oke v. McManus* (Iowa), 121 N. W. 177, reversing 115 N. W. 580.

²⁴ 35 and 36 Vict. c. 94, § 3.

²⁵ 4 and 5 Will., 4 c. 85

²⁶ *Patterson’s Licensing Acts* (19 ed.), p. 338.

²⁷ [1895] 2 Q. B. 229; 59 J. P. 502; 64 L. J. M. C. 225; 73 L. T. 344; 43 W. R. 634; 15 R. 493.

[*Platts v. White*, 25 J. P. 485 dissented from.]

²⁸ 64 J. P. 245; 81 L. T. 784.

of B., a customer, and obtained an order for six bottles of beer. He entered the order in his memorandum book which he had with him. Nothing more was done at this house by the traveler, and the goods were delivered by the respondent's carter a few days later. On delivering the bottles, which were not marked in any way indicating any appropriation, the carter took the bottles from a box which was constructed to contain twelve, but which contained only the six ordered by B. There was no address or label on the bottles, and the beer was paid for on delivery. The appellant contended that the sale took place at the customer's house. It was proved that it was the practice for each traveler to enter his order in an order book at the licensed premises. The respondent himself entered all the orders in a private general order book and contended that he accepted or rejected them as he considered fit. He then entered them in the general delivery book. It was held that the sale took place at the customer's house. Channell, J., observed: 'On the facts as here stated there was no complete sale at the licensed premises. The contract was not made there, neither were the goods appropriated. The only place of the transaction was at the customer's house.' In *Guild v. Freeman*,²⁹ a brewer who held a certificate and excise license for the sale of beer by retail in premises belonging to him at Inverness and also a license for the sale of beer wholesale in premises at Elgin, accepted a retail order in his Elgin premises. He transmitted the order to Inverness, where it was executed by sending the beer to the station at Elgin, whence it was delivered by his servant to the purchaser. It was held by the High Court of Justiciary in Scotland that the sale took place at Elgin.³⁰ In *Pletts v. Beattie*,³¹ a brewer having an off license for the sale of beer by retail, sent round his traveler to customers for orders, with postcards addressed to the licensed premises, to be signed by the customers, stating

²⁹ 36 Sc. L. R. 6.

³⁰ See also the Scotch case, *R. v. Gilroys*, 4 Sc. Sess. Cas. (3d serv.), 656.

³¹ [1896] 1 Q. B. 519; 60 J. P. 185; 65 L. J. M. C. 86; 74 L. T. 148; 12 T. L. R. 227. [See also the Canadian case of *Queen v. Hazel*, 2 Can. Cr. Cas. 516.]

the amount and kind of liquor to be ordered, and that the customer assented to the appropriation by the brewer to the order at the licensed premises of goods of the amount and kind described, and in a deliverable state. Such a postcard, ordering six pints of ale weekly until further notice, was signed by the customer at his own house, and posted from there by the traveler. After the receipt of the postcard at the licensed premises, the traveler, in execution of the order, placed six bottles of ale in a box in a lorry at the licensed premises, and labeled one bottle with the customer's name and address. He also placed six other bottles for another customer, only one bottle being similarly labeled, in the same box. Both sets were delivered by the traveler himself to the respective customers at their houses, where they were also paid for. It was held that the sale took place on the licensed premises, the goods having been appropriated there. In *Stephenson v. Rogers*,³² it was held that the taking of an order at an unlicensed office for the sale of beer by retail in a less quantity than four and a half gallons, or in a less quantity than two dozen reputed quart bottles at one time, such order to be forwarded to licensed premises belonging to the same persons, where the order might be accepted or not according to the discretion of the manager of the licensed premises, was not a sale by retail at the unlicensed office. In *Walker v. Walker*,³³ a traveler employed by the holder of a retail off license, took an order from a customer in the course of his rounds; he handed the order to his master, who placed in a box the twelve bottles required to fulfill the order, and also a slip of paper bearing the customer's name. The traveler delivered the goods in the course of his next round and received payment for them. It was held that the sale within the meaning of the licensing acts took place on the licensed premises. In *Hewitt v. Jervis*,³⁴ one R, a in the employment of G. W. & Company, a firm of brewers, was in the habit, in the course of such employment, of delivering to a Mrs. H, a quantity of beer

³² 63 J. P. 230; 80 L. T. 195;
15 T. L. R. 748.

³³ 67 J. P. 452; 90 L. T. 88; 20
Cox C. C., 594.

³⁴ 68 J. P. 54.

every fortnight in pursuance of a verbal standing order given at her house to R. Subsequently R left the employment of G. W. & Company, and Mrs. H verbally agreed with R to continue the standing order for beer to any person by whom R might be employed. R was employed by the appellant, and he took the standing order to the appellant at his licensed premises, who accepted the order and agreed with him to supply beer to Mrs. H. Afterwards R died, and one D, on behalf of the appellant, agreed with him to supply beer to Mrs. H in pursuance of the standing order. The beer was paid for on delivery. The justices found that the sale took place at the house of Mrs. H and convicted the appellant under s. 3.³⁵ The court held that the statement by Mrs. H that she would continue the standing order for beer to any person by whom R might be employed was equivalent to her assenting to the appropriation of the goods on the licensed premises, and that, therefore, the sale took place on the licensed premises and the conviction was wrong. In *Strickland v. Whitaker*,³⁶ a brewer held a license to sell by retail beer to be consumed off his premises at Pendle Street, Nelson. He employed a traveler to obtain orders for beer from persons residing at Rishton. The traveler was required to observe the following rules: (1) No person in the employ of the brewer was to deliver beer, either in bottles, casks, or otherwise, in any quantity to any person, unless the same has been previously ordered, and the name and postal address of the person by whom the goods are ordered are first handed into the office; (2) no money must be received by any person taking or receiving orders, unless the goods ordered have been delivered; (3) the full name and postal address of all persons ordering must be entered in the office the day before the orders are to be delivered. The traveler called on a customer at Rishton and obtained from him there an order. The traveler entered such order in his order book, and on the following day posted such order book to the appellant, with a summary of

³⁵ The statute cited at the beginning of this section.

³⁶ 68 J. P. 235; 52 W. R. 538; 90 L. T. 445; 20 T. L. R. 224; 20 Cox C. C., 610.

the orders obtained by him. It was held that the sale took place on the licensed premises. The appellant was convicted for selling wine without a license. He was the proprietor of a restaurant in Gerard Street, Soho, which was not licensed for the sale of intoxicating liquors, and he also carried on the business of a wine dealer in partnership with one Durand, at Dansey Yard, Soho, on premises for which Durand had a license. An officer of inland revenue entered the restaurant in Gerard Street and ordered wine. A waiter showed him a list of wines and prices and the officer selected a bottle of claret at 1s. 6d. The waiter asked him to pay for the wine and he did so. The waiter then proceeded to Dansey Yard, a short distance away, and purchased a bottle of claret, but there was no evidence as to price. He then returned with the bottle of claret, which he served to the officer, who consumed it. Upon these facts the magistrate held that there was a sale at the restaurant in Gerard Street and convicted the appellant, and the high court refused to disturb the conviction.³⁷ In a

³⁷ *Pasquier v. Neale* [1902], 2 K. B. 287; 67 J. P. 49; 71 L. J. K. B. 835; 51 W. R. 92; 87 L. T. 230; 18 T. L. R. 704.

See also *Stellard v. Marks*, 3 Q. B. Div. 412; 47 L. J. M. C. 91; 38 L. T. 566; 26 W. R. 694; *Stackberry v. Spencer*, 55 L. J. M. C. 141; 51 J. P. 181; *Elias v. Dunlop* [1906], 1 K. B. 266; 70 J. P. 183; 75 L. J. K. B. 168; 94 L. T. 164; 22 T. L. R. 162; *Killick v. Graham* [1896], 2 Q. B. 196; 60 J. P. 534; 65 L. J. M. C. 180; 75 L. T. 29; 44 W. R. 669; 12 T. L. R. 428; *McLaughlin v. McCloy*, 26 Ir. L. T. 131.

Where a wife held a license, and the husband carried liquor to a private house and sold it at a raffie there going on, and brought back the money and gave it to her, it was held that she could be convicted of selling off the

premises. *Seager v. White*, 48 J. P. 436; 51 L. T. 261.

A company had an office in C and there took orders and sent them to W, whence the goods were shipped to their customers. It was held that there was an unlicensed sale in C. *Stackberry v. Spencer*, 55 L. J. M. C. 399; 54 J. P. 181.

One J. B. gave defendant, a licensed dealer in beer only and having no spirit's license, took an order for two gallons of rum, which was delivered to the carman at the defendant's house and sent to J. B. by his, defendant's, potman. The spirits were not accompanied by any permit or certificate, as a statute required. It was held that the defendant was guilty of sending out, delivering and vending spirits in contravention of the statute.

case before Mr. Denman, at Marlborough Street Police Court, in April, 1906, the keeper of a restaurant in Soho, which had no license, and a wine merchant were summoned for selling at the restaurant wine without a license. It appeared that an excise officer visited the restaurant and ordered supper and wine. The waiter asked for the money, namely, 3s., for the wine, which was paid, and the wine was fetched from the wine merchant's stores in the neighborhood by the restaurant keeper's waiter, who at the time of his doing so handed the price and a green slip of paper to the wine merchant. The magistrate came to the conclusion that although the full price, namely, 3s., may have been paid by the waiter to the wine merchant, yet the restaurant keeper was entitled to a commission, drawback, or profit from the wine merchant. He thereupon held that there was a sale to the excise officer by the restaurant keeper at his unlicensed premises, and convicted him, and, further, that there was a sale to the restaurant keeper by the wine merchant at the latter's licensed premises, and dismissed the summons against him."

Sec. 756. Selling in premises which have been enlarged.

"The case also sometimes arises where during the licensing year the license holder has rebuilt his premises on a larger site or annexed adjoining premises. In such a case the high court seldom interferes with the discretion of justices and considers that it is for justices on the occasion of a renewal, or of a prosecution under this section, to determine whether the altered or enlarged premises are substantially the same as the original premises. The question generally is one of fact for the justices.³⁸ Whichever way the justices determine the high court generally declines to interfere, even though the premises have been doubled in size.³⁹ 'Whether the premises for which the license is granted and the premises used are the

³⁸ *Regina v. Sheffield* J. J., 63 J. P. 595.

³⁹ *Regina v. Smith*, 31 J. P. 259; 15 L. T. 178; *Regina v. Rafles*, 1 Q. B. D. 207; 40 J. P. 68;

45 L. J. M. C. 61; 34 L. T. 180; 24 W. R. 536; *Regina v. Hampshire*, Ballam v. Wiltshire, 44 J. P. 72.

same is a question of fact for the magistrate. I do not mean to say that if the magistrate has gone entirely wrong—that if, for instance, he had held an addition of a whole street of houses to be immaterial—it would not have been right that we should review his decision. But it would be necessary for us to see that the magistrate's decision was clearly wrong.’⁴⁰ A license holder, like other traders, may enlarge and improve his premises at his own discretion, subject to the risk of the justices treating the alterations as substantial when a renewal is applied for.⁴¹ And the high court has refused to interfere even where he was convicted of selling on part of the ground held along with the licensed premises, and which they might well have treated as being part of such premises.⁴² Though this is usually a question of fact, yet it may sometimes happen that there may be a question of law involved, and hence in case of conviction or refusal of license, the justices may be required to state a case for the opinion of the high court.”⁴³

Sec. 757. Sales near church or schoolhouse.

Elsewhere has been discussed sales near churches, school-houses and colleges, and what is there said need not be repeated here. Suffice it to say that no license can be issued within the territory thus prescribed, and the prohibited area may be embraced in two or more counties, though the building be situated in one county only. Thus, where liquor could not be sold within one mile of a college, and the college was situated within half a mile of the county line, a sale within the adjoining county but less than a mile from the college, was held to be prohibited and a violation of the

⁴⁰ Cockburn, C. J., in *Regina v. Raffles*, *supra*.

⁴¹ *Stringer v. Huddersfield J. J.*, 40 J. P. 22; 45 L. J. M. C. 39; 33 L. T. 568.

⁴² *Mahon v. Gaskell*, 42 J. P. 583.

⁴³ *Patterson's Licensing Acts* (19th Ed.), p. 344.

After a license had been granted, a licensee rebuilt his house, setting it five feet nearer the street, over which his new bar extended. It was held that a sale made in the new house was not a sale off the premises. *Deer v. Bell*, 58 J. P. 513.

statute.⁴⁴ Even though the property of the institution be sold under judicial process the prohibition remains in force.⁴⁵ Where a statute forbade sales within three miles of certain named "Methodist and Baptist churches," a sale within three miles of one but more than three miles from the other was held illegal.⁴⁶ And a statute forbidding the sale of liquor "within three miles of" a named town prohibits a sale within the town itself.⁴⁷ A statute forbidding sales "within three miles of" a certain named schoolhouse means within a circle having the schoolhouse for its center and a radius of three miles,⁴⁸ and although the schoolhouse burn down the prohibition still remains.⁴⁹ And if a sale be prohibited in a certain territory, by statute, and that territory be afterwards subdivided, and one part retains the original name, the prohibition still extends to both divisions.⁵⁰ But a statute prohibiting sales within three miles "of any academy" does not apply to a common State school taught in the buildings of an academy.⁵¹ A statute prohibiting a "furnishing" liquor within such territory prohibits the delivering of liquor therein though to be used by another person outside the district;⁵² and a statute forbidding sales within a city or within two miles of its corporate limits embraces all territory over which the city exercises its corporate rights.⁵³ A statute prohibiting sales within two miles of an agricultural fair, although passed to apply to temporary fairs, applies to permanent fairs.⁵⁴ Such a statute

⁴⁴ *State v. Knotts*, 131 N. C. 705; 42 S. E. 444.

⁴⁵ *Brinson v. State*, 89 Ala. 105; 8 So. 527.

⁴⁶ *Carlisle v. State*, 91 Ala. 1; 8 So. 386.

⁴⁷ *Jennings v. Russell*, 92 Ala. 603; 9 So. 421.

⁴⁸ *Love v. Porter*, 93 Ala. 384; 9 So. 585; *Butler v. State*, 89 Ga. 821; 15 S. E. 763; *State v. Greenway*, 92 Iowa, 472; 61 N. W. 239; *Commonwealth v. Wheeler*, 124 Mass. 206; *State v. Hampton*, 77 N. C. 526; *Commonwealth v. Jones*, 142 Mass. 573; 8 N. E. 603.

⁴⁹ *Love v. Porter*, 93 Ala. 384; 9 So. 585; *State v. Edwards*, 47 La. Ann. 688; 17 So. 246; *State v. Eaves*, 106 N. C. 752; 11 S. E. 370; 8 L. R. A. 259.

⁵⁰ *Long v. State*, 103 Ala. 55; 15 So. 565.

⁵¹ *Blackwell v. State*, 36 Ark. 178.

⁵² *Dukes v. State*, 77 Ga. 738.

⁵³ *Albia v. O'Hara*, 64 Iowa, 297; 20 N. W. 444.

⁵⁴ *Heck v. State*, 44 Ohio St. 536; 9 N. E. 305; *State v. Long*, 48 Ohio St. 509; 28 N. E. 1038 (agricultural fair defined).

applies not only to the time when such a fair is open, but to the evenings when it is closed.⁵⁵ Where a statute forbade a sale "near an election ground," a sale a mile and a quarter away was held to come within its prohibition.⁵⁶ If a statute prohibits sales within a certain distance of an incorporated school, then an incorporated school must be shown to secure a conviction, and one recognized by State officers as such is not necessarily such a school;⁵⁷ but if it is a duly incorporated school the statute applies to it in vacation.⁵⁸ Such a statute prohibits a sale to a club to be distributed among its members within the prohibited distance.⁵⁹

Sec. 758. Within prohibited distance of another saloon.

Statutes occasionally restrict the number of saloons in a district by providing that the number to be licensed shall be according to the population of the district. And they, occasionally, go farther and specify that one saloon shall not be located within a certain distance of another saloon. When that is the law, and a saloon is located within the prohibited distance of another saloon, a sale in the last located saloon is illegal, and even a license will not protect the licensee making the sale.⁶⁰

Sec. 759. Sale of liquors to be sent by common carrier.

A person licensed to sell liquor at a particular place may also solicit orders elsewhere throughout the city, town or county for which he is licensed, as well as throughout the entire State, and agree to forward it by express or any common carrier. In all such instances the sale is completed when the liquor is delivered to the carrier. But if he can only sell on particular premises, the agent of the carrier must

⁵⁵ *Theis v. State*, 54 Ohio St. 245; 43 N. E. 207.

⁵⁶ *Manis v. State*, 3 Heisk. 315.

⁵⁷ *Brewer v. State*, 7 Lea, 682.

⁵⁸ *Tilleny v. State*, 10 Lea, 35; *State v. Tarver*, 11 Lea, 758.

⁵⁹ *Harrison v. State*, 96 Tenn. 548; 35 S. W. 559.

As to the effect of the adoption of local option upon such statute as has been referred to, see *Bruison v. State*, 89 Ala. 105; 8 So. 527.

⁶⁰ *Outred v. Keddel*, 2 N. Z. 201; distinguishing *Birley v. McDonald*, 4 S. C. (N. Z.) 427.

come upon the premises and there take possession of the liquors, and the seller cannot carry it to the carrier's office or depot.⁶¹ This rule is not changed by the fact that the

⁶¹ *Pelgreen v. State*, 71 Ala. 368; *Smith v. State* (Ark.), 16 S. W. 2; *Dunn v. State*, 82 Ga. 27; 8 S. E. 806; 3 L. R. A. 199; *Bagby v. State*, 82 Ga. 786; 9 S. E. 721; *Frohlich v. Alexander*, 36 Ill. App. 428; *State v. Colby*, 92 Iowa, 463; 61 N. W. 187; *Finch v. Mansfield*, 97 Mass. 87; *Kline v. Baker*, 99 Mass. 253; *Frank v. Hoey*, 128 Mass. 263; *People v. Bouchard*, 82 Mich. 156; 46 N. W. 232; *Pearson v. State*, 66 Miss. 510; 6 So. 243; 4 L. R. A. 835; *West v. State*, 70 Miss. 598; 12 So. 903; *Harris v. State* (Miss.), 12 So. 904; *McClure v. State*, 148 Ala. 625 42 So. 813; *Bancher v. Warren*, 23 N. H. 183; *Gorbracht v. Commonwealth*, 96 Pa. 449; 42 Am. Rep. 550; *Commonwealth v. Fleming*, 130 Pa. 138; 18 Atl. 622; 25 W. N. C. 122; 5 L. R. A. 470; 17 Am. St. 763; *Commonwealth v. Smith*, 16 Pa. Co. Ct. Rep. 644; *State v. Hughes*, 22 W. Va. 743; *Sarbecker v. State*, 65 Wis. 171; 26 N. W. 541; 56 Am. Rep. 624; *Berchwald v. People*, 21 Ill. App. 213; *State v. Carl*, 43 Ark. 353; 51 Am. Rep. 565; *Hirsch v. State*, 50 Tex. Cr. App. 1; 96 S. W. 40; *McElroy v. State*, 49 Tex. Cr. App. 604; 95 S. W. 539; *Carthage v. Duvall*, 202 Ill. 234; 66 N. E. 1099; *Croak v. Cowan*, 64 N. C. 743; *Carthage v. Munsell*, 203 Ill. 474; 67 N. E. 831; affirming 105 Ill. App. 119; *Ex parte Hackney* (Tex. Cr. App.), 92 S. W. 1092; *Ex parte Massey* (Tex. Cr. App.),

92 S. W. 1086; *Carter v. State* (Tex. Cr. App.), 92 S. W. 1093; *State v. Rosenberg*, 212 Mo. 648; 111 S. W. 509; *Donley v. State*, 48 Tex. Cr. App. 567; 89 S. W. 553; *Coats v. State*, 48 Tex. Cr. App. 553; 89 S. W. 838; *Golightly v. State*, 49 Tex. Cr. App. 44; 90 S. W. 26; *Adams Exp. Co. v. Commonwealth* (Ky.), 96 S. W. 593; 29 Ky. L. Rep. 904; *F. W. Cook Brewing Co. v. Commonwealth* (Ky.), 99 S. W. 354, 355; 30 Ky. L. Rep. 598, 600; *Samuel Wertheimer & Son v. Habinck*, 131 Iowa, 643; 109 N. W. 189; *Wright v. State* (Tex. Cr. App.), 90 S. W. 24; *Sedgwick v. State*, 47 Tex. Cr. App. 627; 85 S. W. 813; *Taggart v. State* (Tex. Cr. App.), 85 S. W. 1155; *Hickox v. State* (Tex. Cr. App.), 85 S. W. 1198; *Parker v. State*, 48 Tex. Cr. App. 69; 85 S. W. 1155; *Coffeen v. Huber*, 78 Ill. App. 455; *James v. Commonwealth*, 102 Ky. 108; 42 S. W. 1107; 19 Ky. L. Rep. 1045; *Harper v. State* (Ark.), 121 S. W. 738; *Moore v. State*, 126 Ga. 414; 55 S. E. 327.

In some jurisdictions, whether there was a sale consummated at the place of destination or at the place of shipment, is a question for the jury, where the intent of the parties control; but in the absence of a finding of that intent, it is a question of law. *State v. Shields*, 110 La. 547; 34 So. 673.

Proof of shipment from Arkansas to Missouri has been held not

carrier is required to collect the price of the liquor before delivering it to the purchaser or consignee.⁶² The express agent delivering the liquor cannot be held to have made a sale.⁶³ And even though the vendor enter the other county and there collect the amount to be paid for the liquor he does not make a sale in such county.⁶⁴ B, a trader in Truro, Nova Scotia, ordered goods from a company in Glasgow, Scotland, through its agents in Halifax, of the former country, whose authority was limited to receiving and transmitting such orders to Glasgow for acceptance. B's order was sent to and accepted by the company and the goods delivered to a carrier in Glasgow to be forwarded to B in Nova Scotia. It was held that the contract of sale was made and completed in Scotland.⁶⁵ An owner of liquor in North Carolina resided within two miles of a church, and within that distance from the church liquors could not be sold. He received an order for whisky from South Carolina, which he filled and shipped by express. It was held that he had violated the statute.⁶⁶ The fact that the agent receives a commission on the sales made on orders he takes does not make the transactions sales

to be proof of sale in Arkansas. *Henry v. State*, 64 Ark. 496; 43 S. W. 498.

⁶² *State v. Carl*, 43 Ark. 353; 51 Am. Rep. 565; *Herron v. State*, 51 Ark. 133; 10 S. W. 25; *Bryant v. State*, 89 Tenn. 581; 15 S. W. 253; *Weldon v. State*, 36 Tex. Cr. Rep. 34; 35 S. W. 176; *State v. Flanagan*, 38 W. Va. 53; 17 S. E. 792; 22 L. R. A. 430; 45 Am. St. 832; *Lynch v. O'Donnell*, 127 Mass. 311.

⁶³ *Carthage v. Munsell*, 203 Ill. 474; 67 N. E. 831; affirming 105 Ill. App. 119.

Contra, where he knows the package contains liquors. *Crabb v. State*, 88 Ga. 584; 15 S. E. 455; *Knight v. State*, 88 Ga. 584; 15 S. E. 456; *State v. Goss*, 59 Vt. 266;

9 Atl. 829; 59 Am. Rep. 706. But there are cases which hold that the place of actual delivery to the purchaser is the place of the sale. See also *Southern Express Co. v. State*, 114 Ga. 226; 39 S. E. 899.

⁶⁴ *Sarbecker v. State*, 65 Wis. 171; 26 N. W. 541; 56 Am. Rep. 624; *State v. Hughes*, 22 W. Va. 753; *Fowler v. Morton* [1905], *Vict. L. R.* 76; 26 *Aust. L. T.* 143; 10 *Aust. L. Rep.* 267.

⁶⁵ *Bigelow v. Crerquellochias, etc., Co.*, 37 Can. S. C. 55; affirming 37 N. S. 482; *Fowler v. Morton* [1905], *Vict. L. R.* 76; 26 *Aust. L. T.* 143; 10 *Aust. L. Rep.* 267.

⁶⁶ *State v. Groves*, 121 N. C. 632; 28 S. E. 403.

at the place the orders are taken.⁶⁷ If the consignee of liquor, on its reaching its destination, gives an order on the carrier to deliver it to his purchaser, a sale is consummated as soon as the carrier delivers it to such consignee's purchaser.⁶⁸ If liquor be sold on approval at its destination, and it is also sent C. O. D. upon an order to be approved by the consignor, the shipment to be made at the risk of the consignee, the sale takes place at the point of shipment and not at the point of destination.⁶⁹ And this is true though such sale is made a criminal offense at such place of destination, and the seller is not guilty of selling liquor in a prohibitory locality.⁷⁰ Thus, where a minor in one State sent an order to a liquor dealer in another State to ship him liquor by common carrier, which the dealer did, it was held that he had committed an offense against the statute of the latter State forbidding sales to minors.⁷¹

Sec. 760. Place of order taken deemed place of sale.

But there are a number of cases which refuse to follow the rule that when the liquor is delivered to a common carrier to be carried into another county or State that the sale is then complete though sent C. O. D. It is considered that whether or not the sale is completed when delivered to the carrier is a question of intent, and the fact that the liquor was sent to be delivered on payment of its purchase price shows that the seller had no intention to part with his goods or the title to it until he actually received pay therefor—when the express or carrier's agent received the purchase price and turned over the liquor. Such being the case the sale is not completed until then, and whatever offense is committed is committed at the place the purchaser acquires actual physical possession of the property and pays the pur-

⁶⁷ *Donley v. State*, 48 Tex. Cr. App. 574; 89 S. W. 554.

⁶⁸ *Parks v. State* (Ky.), 96 S. W. 328.

⁶⁹ *Novich* (Tex. Cr. App.), 86 S. W. 332.

⁷⁰ *Otto v. State* (Tex. Cr. App.), 87 S. W. 698; *Sims v. State* (Tex. Cr. App.), 87 S. W. 689.

⁷¹ *Harper v. State* (Ark.), 121

chase price.⁷² In some of these transactions the case is made to hinge upon the fact that the order taken by the agent in a prohibition territory was not subject to acceptance or rejection by his principal.⁷³ Thus, in Iowa, where it had been held that the sale was consummated at the purchaser's residence, it was held the sale took place where the order was approved by the principal and the liquor shipped.⁷⁴ Of course, if there be no delivery there is no sale.⁷⁵

Sec. 761. Place order taken made place of sale.

Statutes not infrequently make the place where the order is taken or given the place of sale. Thus, where a statute imposed a fine upon "any person who, without a license therefor, shall, by sample, by soliciting or procuring orders, or otherwise, sell" intoxicating liquors, a traveling agent soliciting orders for a non-resident dealer, which orders he transmits to his principal, who fills them and ships the liquors to the purchaser, violates its provisions.⁷⁶ And statutes have been enacted which expressly make the place of actual delivery by

⁷² State v. O'Neil, 58 Vt. 140; 2 Atl. 586; 56 Am. Rep. 557; State v. Goss, 59 Vt. 206; 9 Atl. 829; 59 Am. Rep. 706; United States v. Cline, 26 Fed. 515; United States v. Shriver, 23 Fed. 134; 31 Alb. L. Jr. 163; Baker v. Boucicault, 1 Daly, 23; Crabb v. State, 88 Ga. 584; 15 S. E. 455; Knight v. State, 88 Ga. 590; 15 S. E. 457; Southern Exp. Co. v. State, 114 Ga. 226; 39 S. E. 899; Commonwealth v. Hess, 148 Pa. 98; 23 Atl. 977; Tigler v. Shipman, 33 Iowa, 194; State v. United States Exp. Co., 70 Iowa, 271; 30 N. W. 508; State v. Wingfield, 115 Mo. 428; 22 S. W. 363; 37 Am. St. 406; Commonwealth v. Guja, 28 Pa. Super. Ct. 58.

⁷³ Taylor v. Pichet, 52 Iowa, 467; 3 N. W. 514; Commonwealth v. Eggleston, 128 Mass. 408 (in this case the agent had complete control over the entire transaction, and sent his employer's wagon with the liquor from Rhode Island to Massachusetts, the State in which the unlawful sale was charged. Commonwealth v. Hess, 148 Pa. 98; 23 Atl. 977.

⁷⁴ Gross v. Scarr, 71 Iowa, 656; 33 N. W. 223.

⁷⁵ White v. State, 47 Tex. Cr. App. 551; 85 S. W. 9.

⁷⁶ State v. Ascher, 54 Conn. 299; 7 Atl. 822; Southern Exp. Co. v. State, 114 Ga. 226; 39 S. E. 899.

a common carrier to the purchaser the place of sale.⁷⁷ But a sale not followed by a delivery is no offense.⁷⁸

Sec. 762. Sale by agent subject to approval by principal.

If an agent take an order in prohibition territory and transmit it to his principal in a territory where sales may be made, and the order is subject to the principal's approval, then the sale is made, where shipped by carrier from the place of approval in the non-prohibition territory. This is even held in those States where it is held that the place of actual delivery is the place of sale.⁷⁹ But if the sale is absolute, the principal having resigned his power to reject the order, and the liquor is delivered pursuant to the order, then in these States the sale is considered to have been consummated in the place where the agent took the order.⁸⁰ But if the principal may reject the order of his agent, then the agent cannot be convicted, under these cases, upon unlawful sale, although the order be filled.⁸¹

Sec. 763. Seller taking orders without but delivering liquors within prohibited district.

Since the place of delivery is the place where the sale is completed, therefore, if the seller take an order for liquor in a county where its sale is not forbidden, or he has a license to there sell, and even there receive pay for it, and then in person or by agent (who is not a common carrier) delivers it in a county where its sale is forbidden, or in which he has no

⁷⁷ *Sinclair v. State*, 45 Tex. Cr. App. 487; 77 S. W. 621; *Williams v. State* (Tex. Cr. App.), 77 S. W. 215; *McGovern v. State*, 49 Tex. Cr. App. 35; 90 S. W. 502.

Telephoning orders is not soliciting. *Moore v. State*, 126 Ga. 414; 55 S. E. 327; *People v. Young*, 237 Ill. 196; 86 N. E. 589.

⁷⁸ *White v. State*, 47 Tex. Cr. App. 551; 85 S. W. 9.

⁷⁹ *Gross v. Scarr*, 71 Iowa, 656; 33 N. W. 223; *Frank v. Hoey*, 129 Mass. 263; *Bigelow v. Crerquellochie, etc., Co.*, 37 Can. S. C. 55; affirming 37 N. S. 482.

⁸⁰ *Commonwealth v. Eggleston*, 128 Mass. 408.

⁸¹ *Garbrecht v. Commonwealth*, 96 Pa. 449; 42 Am. Rep. 550; *Newman v. State*, 88 Ala. 115; 11 So. 762; *Pearson v. State*, 66 Miss. 510; 6 So. 243.

license, the sale is in the latter county, and he is liable to the penalty of a statute forbidding sale there or forbidding a sale without a license.⁸² Thus, A owned a store in B county, and there took an order for liquor to be filled at a store in which he had a joint interest in C county. He went to the store in C county, there obtained it and brought it to B county and delivered it to the purchaser. It was held that the sale had taken place in B county, and a sale there being prohibited, A was convicted of having violated the statute forbidding sales there.⁸³ And so where a defendant in a prohibition county sent an order to a county where liquor could be sold, and the liquor ordered was there put in a bottle labeled with the purchaser's name and sent to the defendant, who delivered it to the purchaser, it was held that he had violated the statute.⁸⁴ So where defendant received an order for whisky in A county, and this order he sent to his saloon in B county, where the amount of whisky ordered was put in a jug and labeled with the purchaser's name, and a clerk of the defendant then took it by public conveyance to A county and there delivered it to the purchaser, it was held that the

⁸² Brooks v. State, 105 Ala. 133; 16 So. 698; Yowell v. State, 41 Ark. 355; Blackwell v. State, 42 Ark. 275; Davidson v. State (Tex. Cr. App.), 73 S. W. 808; Berger v. State, 50 Ark. 20; 6 S. W. 15; Bagby v. State, 82 Ga. 786; 9 S. E. 721; Doster v. State, 93 Ga. 43; 18 S. E. 997; Spring Valley v. Henning, 42 Ill. App. 159; State v. Houts, 36 Mo. App. 265; People v. Copen, 26 Hun, 377; State v. Sykes, 104 N. C. 694; 10 S. E. 191; Commonwealth v. Holstine, 132 Pa. 357; 19 Atl. 273; 25 W. N. C. 423; Commonwealth v. Greenfield, 121 Mass. 40; Curtiss v. State, 52 Tex. Cr. App. 606; 108 S. W. 380; Bryant v. State, 89 Tenn. 581; 15 S. W. 353; King v. Bigelow, 9 Can. Cr. Cas. 322;

Cocher v. McMullen, 81 L. T. 784; 64 J. P. 245; Guild v. Freeman, 35 Se. L. R. 6; Montclair v. State (N. J. L.), 69 Atl. 451; Shuster v. State, 62 N. J. L. 521; 41 Atl. 701 (driver of wagon indicted); State v. Johnston, 139 N. C. 640; 52 S. E. 273; George H. Goodman Co. v. Commonwealth (Ky.), 99 S. W. 252; 30 Ky. L. Rep. 519; McIlveney v. Whittingham, 25 N. Z. 29; Mackenzie v. Whittingham, 23 N. Z. 857; Teal v. Commonwealth (Ky.), 57 S. W. 464; 22 Ky. L. Rep. 350.

⁸³ Brooks v. State, 105 Ala. 133; 16 So. 698.

⁸⁴ Berger v. State, 50 Ark. 20; 6 S. W. 15; Commonwealth v. Greenfield, 121 Mass. 40; State v. Houts, 36 Mo. App. 265.

sale took place in A county.⁸⁵ If an agent take orders for liquors which are shipped to him to deliver, the place of the delivery is the place of sale.⁸⁶ So if liquor be sent C. O. D. to A county and the person to whom sent gave an order in B county on the express company to deliver the liquor to C, C having purchased it, which was done, a sale was consummated in B county to C.⁸⁷ The fact that the seller maintains a telephone in the prohibition county so his customers can telephone him orders for liquors, does not make an order a sale there which he fills and ships by carrier into such county.⁸⁸ But where a statute provided that no trick, device, subterfuge or pretense should be allowed to evade or defeat the local option law in force in a county, and a brewing company's agent resided in a local option county where he took an order for beer and forwarded it to a non-local option county to the brewing company's place of business, and the beer was shipped to the purchaser by common carrier and he paid the agent for it, the company having the right to reject orders he sent in, but never did if the person ordering was financially responsible, and the company mailed the agent a copy of the bill of lading for the beer shipped, and he gathered up the empty beer bottles and returned them to the company, it was held that the transaction was within the prohibition of the statute, being a mere device to evade the local option statute.⁸⁹ Where a servant of a licensee in A county carried liquors into B county, delivering them pursuant to orders and making sales from the wagons as to others, it was held that he had committed an offense in B county.⁹⁰ In Australia a brewer

⁸⁵ Bryant v. State, 89 Tenn. 581; 15 S. W. 253; Lafferty v. State (Tex. Cr. App.), 35 S. W. 374.

⁸⁶ People v. DeGroot, 111 Mich. 245; 69 N. W. 248.

⁸⁷ McElroy v. State, 49 Tex. Cr. App. 604; 95 S. W. 539; Caton v. State (Tex. Cr. App.), 95 S. W. 540; White v. State, 47 Tex. Cr. App. 551; 85 S. W. 9.

⁸⁸ Moore v. State, 126 Ga. 414; 55 S. E. 327; McDermott v. Com-

monwealth (Ky.), 96 S. W. 474; 29 Ky. L. Rep. 750. *Contra*, Swift v. State, 108 Tenn. 610; 69 S. W. 326.

⁸⁹ George Wiedemann Brewing Co. v. Commonwealth (Ky.), 96 S. W. 834; 29 Ky. L. Rep. 1026.

⁹⁰ State v. Shuster, 63 N. J. L. 355; 46 Atl. 1101; Shuster v. State, 62 N. J. L. 521; 41 Atl. 701.

carried on his business in a no-license district. On a sale of liquor of his own manufacture, at the request of the purchaser made at the time of the sale, he undertook to hand the liquor to a person who agreed to deliver it outside the no-license district. It was held that the brewer sold liquor to be delivered "beyond the limits of such district" in violation of a statute forbidding such a sale.⁹¹

Sec. 764. Seller retaining title until purchaser actually receives the liquors.

If by agreement the seller is to retain the title until the liquor actually reaches the purchaser, then the sale is not completed until that event takes place. Thus, where the seller agreed that if the beer sold should be lost or sour he would furnish beer to take its place, and the beer was to remain his until it should be received by the purchaser, it was held that the sale was not consummated until the purchaser actually received the beer at the end of its destination.⁹² A very similar instance was where the seller living in New Hampshire sent a barrel of brandy to Vermont, and while it lay at the railroad station he permitted a person in Vermont to take it from the station house, take out such as he wanted and return the cask to the seller's store in the former State; it was held that the seller had violated the Vermont statute.⁹³

Sec. 765. Seller taking order in but delivering liquors without prohibited territory.

If a person within a prohibited territory take an order for liquor, or enter into a contract for its sale, but he deliver it

⁹¹ Mackenzie v. Whittingham, 24 N. Z. 620; McIlveney v. Whittingham, 25 N. Z. 29.

In Arkansas a minor gave the defendant money to buy liquor for him in Texas, which the defendant did and delivered the liquor to the minor on his return to Arkansas. The statute of Arkansas forbade any one selling, giving away or being interested in the sale or giving of liquor in that State;

but it was held that the transaction was not a violation of its terms; for if any offense had been committed, it had been committed in Texas. Anderson v. State, 82 Ark. 405; 101 S. W. 1152; Ford v. State, 82 Ark. 603; 102 S. W. 1196.

⁹² Bruce v. State (Tex. Cr. App.), 35 S. W. 383.

⁹³ State v. Commonwealth, 28 Vt. 508.

without such territory, where liquor may be sold, he commits no offense.⁹⁴

Sec. 766. Soliciting or taking orders by agent.

But although a licensee's license requires him to sell in a particular city, town or county, or even at a particular place or on particular premises in such city, town or county, that does not prevent his sending out agents through the State to solicit and take orders, and he is not required to have a license in each city, town or county in which he thus solicits and takes orders. Merely soliciting orders, and even receiving pay for the liquor to be furnished is not a sale, delivery being essential to complete the transaction.⁹⁵ And it is not an offense to accept an order over a telephone maintained by the seller in a prohibition county so as to receive thereby orders in a non-prohibition county.⁹⁶

Sec. 767. Liquors shipped into prohibition territory without order taken.

To escape liability by reason of the fact that the liquor is delivered to a common carrier outside of prohibition territory, there must be an order given and accepted before the liquor is shipped, for if the liquor is shipped to a prospective purchaser without such an order, and on its arrival at its destination the consignee takes the liquor out of the possession of the carrier and pays for it (and possibly it is not necessary to pay for it), the sale takes place where the liquor is so received by the purchaser or consignee.⁹⁷ A statute which

⁹⁴ *United States v. Lackey*, 120 Fed. 577.

⁹⁵ *Newman v. State*, 88 Ala. 115; 6 So. 762; *Heron v. State*, 51 Ark. 133; 10 S. W. 25; *Smith v. State* (Ark.), 16 S. W. 2; *Boothby v. Plaisted*, 51 N. H. 436; *Gill v. Kaufman*, 16 Kan. 571; *Haug v. Gillett*, 14 Kan. 140; *Williams v. Feriman*, 14 Kan. 248; *Gillen v. Riley*, 27 Neb. 148; 42 N. W. 1054;

Commonwealth v. McDermott (Ky.), 96 S. W. 475; 29 Ky. L. Rep. 752.

⁹⁶ *Moore v. State*, 126 Ga. 414; 55 S. E. 327.

⁹⁷ *American Express Co. v. Commonwealth* (Ky.), 97 S. W. 807; 30 Ky. L. Rep. 207; *Weil v. State*, 48 Tex. Cr. App. 603; 90 S. W. 644; *Ingram v. State*, 49 Tex. Cr. App. 117; 90 S. W. 1098; *Otto v.*

attempts to hold a carrier or its agent liable for carrying liquor from one State to another and there delivering it to the consignee who has not in good faith ordered the liquor for his own use, is unconstitutional.⁹⁸

Sec. 768. Sale of liquors to be drunk on premises—American decisions.

Statutes are common which forbid a sale of liquor to be drunk or consumed on the premises. These statutes, of course, relate to the retailing of liquors. The essence of the offense is the sale for that purpose, and whether actually drunk upon the premises is immaterial. Of course, there must be a sale with the intention that it be consumed on the premises where sold.⁹⁹ If the sale is not made for the purpose of being consumed on the premises no offense is committed, although the purchaser has a secret purpose to there drink the liquor, and

State (Tex. Cr. App.), 87 S. W. 698.

In this Kentucky case the court of appeals went upon the assumption that there was no previous order. On appeal to the Supreme Court of the United States the attorney general admitted that the record showed a previous order; and the case was thereupon reversed, because the shipment being from another State the statute making the place of actual delivery to the purchaser the place of sale was void, and holding the express company liable, on the ground that it was an interference with interstate commerce, *American Express Co. v. Kentucky*, 206 U. S. 139; 27 Sup. Ct. 609; 51 L. Ed. 993.

The United States Supreme Court said in a similar case that if a carrier knowingly carried liquor consigned to a person who had

not ordered it; and then delivered it to the consignee, collected the amount due and remitted it to the seller, this would be evidence to show that the carrier was engaged in the liquor traffic. *Adams Express Co. v. Kentucky*, 206 U. S. 129; 27 Sup. Ct. 606; 51 L. Ed. —; reversing (Ky.); 96 S. W. 1104; 29 Ky. L. Rep. 947; see *Cincinnati, etc., R. Co. v. Commonwealth*, 126 Ky. 563; 104 S. W. 394; 31 Ky. L. Rep. 954.

On the question of interstate commerce see also *Vance v. Vandercook*, 179 U. S. 438; 18 Sup. Ct. 674.

⁹⁸ *Crescent Liquor Co. v. Platt*, 148 Fed. 894.

⁹⁹ *Commonwealth v. Ludy*, 143 Mass. 563; 10 N. E. 448; *Wrocklege v. State*, 1 Clarke (Ia.), 167; *State v. McAnally* (Mo. App.), 79 S. W. 990.

does so drink it.¹ Of course, a statute of this kind does not prohibit a sale where the liquor is to be taken away from the premises and drunk.² But a person selling liquor cannot passively remain quiet when the purchaser proceeds to drink it on the premises, else the presumption will be raised that the sale was with the intent that it was to be there consumed,³ and he must take active, though not violent, steps to prevent it.⁴ Of course, the liquor must be shown to be intoxicating,⁵ and it has been held that it was a good defense to show the liquor was sold under an honest belief that it was not intoxicating,⁶ though in some jurisdictions it would probably be held that the seller is charged with a knowledge that the liquor was intoxicating. By the word "premises" is meant a place over which the seller has legal control.⁷ Thus, a sale in a house and the taking of the liquor fifteen or twenty steps therefrom to a bench in a mill yard owned by the seller was held to be a sale of liquor to be consumed on the premises, the liquor having been consumed at the bench.⁸ So where the liquor was passed through the window of the house to be consumed on the back steps, it was held that a statute forbidding a sale without a license "to be drunk or suffered to be drunk in his house, outhouse, yard, garden, or the appurtenances thereunto belonging," had been violated.⁹ So proof that the liquor was drunk on the lot on which defendant's shop was situated, out of a glass furnished by him, and that the place was used for drinking by the defendant's customers, with his knowledge and consent, shows a sale of liquor to be consumed

¹ Taylor v. Pickett, 52 Iowa, 467; 3 N. W. 514; People v. Van Aylstane (Mich.), 122 N. W. 193; 16 Det. L. N. 392.

² State v. Pratt, 52 N. J. L. 306; 19 Atl. 607.

³ Cochran v. State, 26 Tex. 678.

⁴ Christian v. State, 40 Ala. 376.

⁵ State v. Chambers, 2 Ohio Dec. 647.

⁶ Farrell v. State, 32 Ohio St. 456; 30 Am. Rep. 614.

⁷ Swan v. State, 11 Ala. 594; Downman v. State, 14 Ala. 242;

Daly v. State, 33 Ala. 431.

⁸ Swan v. State, 11 Ala. 594;

Varble v. Commonwealth, 3 Ky. L. Rep. (abstract) 694; People v. Van Aylstane (Mich.) 122 N. W. 193; 16 Det. L. N. 392.

⁹ Stockwell v. State, 85 Ind. 522.

upon the premises, and is a violation of the statute quoted.¹⁰ It is, of course, a question of fact what constitutes the premises and whether or not the place at which the liquor was consumed constituted a part of such premises. Thus, where the defendant furnished the glasses for the purchaser and his companion to drink the beer, and they drank it a few feet from the back door of the saloon, and then returned to the saloon the empty bottle and glasses, it was held that there was evidence from which it might be found there had been a sale of liquor to be consumed on the premises.¹¹ But where the evidence showed the accused sold a bottle of beer, which was taken by the purchaser to a shed from fifteen to twenty feet distant from the seller's premises, and there drunk, and there was no understanding or agreement between the buyer and seller as to where the liquor was to be drunk, it was held that the statute had not been violated. "The shed where the liquor was drunk," said the court, "was not adjoining to or connected with the place where the liquor was sold. The appellant had no control over the shed. It was out in a public street, fifteen or twenty feet from the place where the liquor was sold, and was used by another person."¹² In another case under this same statute the court made these observations: "It does not sufficiently appear that the appellant sold the bottle of beer with the purpose, expectation or understanding, express or implied, that the purchaser was to drink it while sitting in his wagon close to the door of the saloon. If the appellant sold the bottle of beer with the understanding that it was to be taken away and drunk elsewhere he was guilty of no offense. The offense consists in selling liquor to be drunk in, upon or about the house or premises where sold. A court or jury may infer from all the facts or circumstances surrounding a transaction that the liquor was sold to be drunk in, upon or about the house or premises, or in a room, building or premises, adjoining to or connected with the place where it was sold, although there was no express understand-

¹⁰ *Shields v. State*, 95 Ind. 299;
State v. Morgan (Mo.), 115 S.
W. 491.

¹¹ *Stout v. State*, 93 Ind. 150.
¹² *O'Connor v. State*, 45 Ind.
347.

ing in reference thereto between the vendor or purchaser. If a person goes into a saloon and calls for a glass of beer, or drink of liquor, and the beer is drawn and handed in a tumbler, or a bottle of liquor and tumblers are placed upon the counter, the presumption might be indulged that it was intended that the beer or liquor was sold to be drunk in the saloon. If to this was added proof that the proprietor or bartender stood by and permitted, without objection, the beer or liquor to be drunk, the presumption would be greatly strengthened, if not rendered conclusive. If the appellant had handed Mr. Burger and Mr. Lalley beer in tumblers, while sitting in the wagon, close to the door, the presumption might be indulged in that it was sold with the understanding that it was to be drunk there. If, in addition to this, it was shown that the appellant stood by and permitted them to drink the beer, without objection, and then received the pay and tumblers, a pretty strong presumption would arise that the liquor was sold to be drunk in the place where such persons then were. But such are not the facts or circumstances of the present case. For aught that appears in the evidence, the appellant sold the bottles of beer with the expectation or understanding that it was to be taken away and drunk elsewhere. It is not shown that the appellant was present when the beer was drunk, or that he even knew it was drunk in the wagon, close to his door; nor is it shown what was done with the bottle after the beer was drunk, or whether it was paid for before or after it was drunk. In our opinion the verdict is not supported by sufficient evidence.”¹³ The fact that the seller positively ordered the purchaser not to drink the liquor on the premises will not avail him if it appears from all the evidence that the seller expected or intended the liquor to be drunk upon the premises.¹⁴ If the house where the liquor was sold was under the immediate possession and exclusive control of a third person there can be no conviction.¹⁵ A sale from a

¹³ O'Connor v. State, 45 Ind. 347; Eisenman v. State, 49 Ind. 507.

¹⁴ Wood v. State, 9 Ind. App. 42; 36 N. E. 158; Eisenman v. State, 49 Ind. 507.

¹⁵ Plunket v. State, 69 Ind. 68.

wagon in a public highway or at a picnic, though sold to be immediately consumed, is not a sale of liquor to be drunk upon the premises.¹⁶ But where the statute forbids a sale of liquor to be drunk "on or about the premises," a sale of liquor to be drunk in the highway a few feet away from the store where sold is a violation of its provisions,¹⁷ and the court may so instruct the jury that the facts proven show a violation of such statute.¹⁸ Under a statute of this kind where the sale was to ditchers working a mile away from the house but on the plantation on which the work was being done, and the sale was intended for the purchasers to drink where they were ditching, it was held that the statute was violated.¹⁹ So it was held under the same statute that a sale from a buggy at a public vendue of property, to be there drunk, was a violation of its provisions.²⁰ Where a license forbade the sale of liquor to be drunk "on the premises * * * or in any out-building, yard, or booth or garden appertaining thereto, or connected" with the licensed premises, a sale of liquors to be drunk on the piazza of the house, the premises consisting of a two-story building, the piazza being set back into the lower story and the upper story serving as a roof, the place of business being immediately back of the piazza, it was held that the terms of the license had been violated.²¹ Proof of what was said or done before or at the time of the sale is admissible to show whether the liquor was sold to be drunk upon the premises.²²

¹⁶ Schilling v. State, 116 Ind. 200; 18 N. E. 682; O'Connell v. Larkins, 5 N. S. W. L. R. 8.

¹⁷ Whaley v. State, 87 Ala. 83; 6 So. 380; Easterling v. State, 30 Ala. 46; Patterson v. State, 36 Ala. 297.

¹⁸ Brown v. State, 31 Ala. 353.

¹⁹ Powell v. State, 63 Ala. 177.

²⁰ Pearce v. State, 40 Ala. 720.

²¹ *In re* Lyman, 25 N. Y. Misc. Rep. 638; 56 N. Y. Supp. 359.

²² People v. Shuler, 136 Mich. 161; 98 N. W. 986; 10 Detroit Leg. N. 1004.

In Hawaii it was said: "Any room under the same roof with the saloon and used in carrying on the saloon business is to be considered as a part of the saloon premises." Territory v. Wong Feast, 17 Hawaii, 353.

It is not enough the jury believes that the defendant had knowledge of the drinking on his premises; but they must find he consented thereto; but this consent may be shown by evidence that knowing that others proposed to drink beer at his place

Sec. 769. Sale of liquor to be consumed on premises—English decisions.

A statute of England provides that "if any purchaser of any intoxicating liquor from a person who is not licensed to sell the same to be drunk on the premises drinks such liquor on the premises where the same is sold, or on any highway adjoining or near such premises, the seller of such liquor shall, if it shall appear that such drinking was with his privity or consent," be subject to certain penalties, and the phrase "premises where the same is sold" includes "any premises adjoining or near the premises where the liquor is sold, if belonging to the seller of the liquor or under his control, or used by his permission."²³ A local work of authority construes this statute as follows:²⁴ "The present section is confined entirely to the circumstances described in the first four lines [that part above quoted], which collectively constitute a condition precedent to the offense: (1) The premises on which the liquor is drunk must be premises on which the person selling has no license to sell the same in order to be drunk on such premises; (2) the sale must be on such premises; and (3) the liquor must also be drunk on the premises, or on a highway near such premises or in a third

he failed to object. *State v. Morgan* (Mo.), 115 S. W. 491.

An ordinance regulating the sale of "near-beer," forbidding its sale on the premises, is valid. *Campbell v. Thomasville* (Ga.), 64 S. E. 815.

²³ 35 and 36 Vict. 94, § 5. Earlier Statutes were 4 and 5, Will 4 c. 85, § 4; 32 and 33 Vict. c. 27, § 14; 33 and 34 Vict. c. 29, § 6. Construction of earlier statutes can be found in *Cross v. Watts*, 13 C. B. (N. S.) 239; 27 J. P. 7; 32 L. J. M. C. 73; 7 L. T. 463; 11 W. R. 210; and in *Deal v. Schofield*, L. R. 3 Q. B. 8; 32 J. P. 181; 27 L. J. M. C. 15; 17

L. T. 143; 16 W. R. 77; 8 B. & S. 760.

"The word 'not' was probably intended to be put before the phrase 'to be drunk.' A person 'not licensed to sell liquor to be drunk on the premises' may mean either a person who has no license at all of any kind, or who has a license to sell liquor, but only 'liquor not to be drunk on the premises.' The enactment seems to have been intended to meet this latter case only, and hence the word 'not' is misplaced." *Patterson's Licensing Acts* (19th ed.) 350.

²⁴ *Patterson's Licensing Acts* (19th ed.) 351.

party's premises adjoining or near, if under the seller's control. These conditions existing, the seller of such liquor is to be liable to penalties, but only if he is privy or consenting to such drinking. If the liquor is taken to neighboring premises (not being the seller's), a few yards distant and drunk on such premises and partly on the highway, this cannot be treated as an offense with the seller's privity. 'The word "knowledge" is not used in the act. * * * If the evidence had clearly shown that the appellant was conniving at the drinking on the highway near her premises, the conviction might have been sustained. But I am by no means satisfied that it does so. There is nothing to show that she knew what was to be done with the beer. If it could have been shown that she knew it was to be drunk on the highway "near to or adjoining her premises," and willfully shut her eyes to the fact, then it might be said to have been done with her "privity or consent," and a conviction might have been sustained.' ²⁵

The consent or privity must refer to some premises as to which the seller's consent would be matter of legal right, for he could not be said to consent to something he cannot prevent or control. Hence, if, for example, the field of a third person adjoins the house, and if the seller has no interest in it, and the purchaser gets into the field and there drinks the liquor, it will be difficult to hold that he did so with the privity or consent or permission of the seller since the seller will not be able to give or take away the permission to go into another's field. * * *

Another difficulty may arise when the man who purchases the liquor does not drink it himself but hands it over to a third person, who drinks it on the premises or near them; the penalty seems not to apply in such case. The justices may, however, in such a case, hold the real purchaser was the one who drank the liquors, and the other, or nominal purchaser, was his agent, if the facts warrant the inference, for, under Section 62 [a subsequent section] the consumer is *prima facie* a purchaser.' ²⁶

²⁵ Justice Lindley in *Bath v. White*, 3 C. P. Div. 175; 42 J. P. 375; 26 W. R. 617.

²⁶ Citing *Scatchard v. Johnson*, 52 J. P. 389; 57 L. J. M. C. 41; *Evans v. Hemingway*, 52 J. P. 134.

Sec. 770. Sale of liquor to be drunk "about" the premises.

Where a statute forbids the sale of liquor "to be drunk about the premises" of the seller, it is usually a question of fact whether proof of the place where they were drunk bears out the charge. But where the evidence showed the liquor was drunk in the public road, in front of the store wherein it was sold, in full view thereof from the front entrance, about fifteen or twenty steps away, it was held that the court could say to the jury that the liquor was drunk "about the premises."²⁷ Yet where the liquor was drunk in an alley, five or six feet wide, between the seller's house and the next adjoining one, over which the seller had no control, and he could not see the place where it was drunk from his front door, no window of his store opening into the alley, and the alley did not lead into his back yard, it was held that the court could not say to the jury that the liquor was drunk "about the premises," that being a question for them to determine.²⁸

Sec. 771. Refreshment saloon or restaurant.

A statute permitting sales to be made in a refreshment saloon or restaurant does not apply to a shop used for the manufacture and sale of cigars, tobacco or snuff.²⁹ As to the question what is a "refreshment house," it "must always be one of more or less difficulty, and the facts of each particular case must be looked to as they arise."³⁰ Thus, where a shop consisting of one room provided lemonade and ginger beer, having no accommodations for visitors to sit down, and nothing but a table or counter at which they stood only for a few minutes, this was held to be a refreshment house.³¹ And the same was held where only coffee and cigars were provided,³² and like-

²⁷ Brown v. State, 31 Ala. 353.

²⁸ Daly v. State, 33 Ark. 431.

²⁹ State v. Hogan, 30 N. H. 268.

In this case the prohibition was against the manufacture and sale of "intoxicating" liquor; but the liquor sold was "strong beer;" and it was held no offense had been committed.

³⁰ Justice Blackburn in Muir v.

Keay, L. R. 10 Q. B. 599; 40 J. P. 694; 44 L. J. M. C. 143; 23 W. R. 700; 41 J. P. 423.

³¹ Howes v. Inland Revenue, 1 Exch. Div. 385; 41 J. P. 423; 46 L. J. M. C. 15; 35 L. T. 584; 24 W. R. 897.

³² Muir v. Keay L. R. 10 Q. B. 599; 40 J. P. 694; 46 L. J. M. C. 143; 23 W. R. 700; 41 J. P. 423.

wise where tripe was supplied on plates in a shop having neither seats, knives nor forks.³³ If the refreshments are not kept in the house to be supplied to visitors, but are merely sent for at the request of and for behoof of visitors as required, it would seem that such a place is not a refreshment house.³⁴ In England what are known as temperance hotels, not selling intoxicating liquors, but supplying ordinary refreshments, are nevertheless refreshment houses.³⁵

Sec. 772. Sale at hotel.

In a few States sales may be made at hotels, and usually what constitutes a hotel is statutorily defined. When the statute defines what shall be necessary to make a hotel, then a sale in a building not coming up to the requirements of the statute is not protected.³⁶ Thus, where the building called a hotel was required to contain not less than ten bedrooms, a dining-room with at least three hundred square feet of floor area, and a kitchen of sufficient size and capacity to provide *bona fide* meals for twenty guests at once, it was held that a house having twenty-four bedrooms, the requisite dining-room, and with adequate kitchen facilities, and which harbored at least thirty people, came within the statutory requirements.³⁷ A "summer" hotel may come within the statutory requirements, although only used a part of the year.³⁸ A hotel must be furnished to accommodate the public who may desire to use it, and not merely for drinking purposes. A kitchen is not a room for public accommodation. The hotel must be accessible to the general public and not merely to inmates of the house.³⁹ Thus, where a hotel was required to have "at

³³ *Cooper v. Dickinson*, an unreported English case, January, 1877.

³⁴ *Baron Bromwell in Taylor v. Oran*, 1 H. & C. 370; 27 J. P. S.; 31 L. J. M. C. 252; 7 L. T. 58; 10 W. R. 800.

³⁵ *Kelleway v. Macdougall*, 45 J. P. 207.

³⁶ *In re Schuyler*, 63 N. Y. App. Div. 206; 71 N. Y. Supp. 437.

³⁷ *In re Cullinan*, 93 App. Div. 427; 87 N. Y. Supp. 660; affirming 41 N. Y. Misc. Rep. 3; 83 N. Y. Supp. 581.

³⁸ *Appeal of Burns*, 76 Conn. 395; 56 Atl. 611.

³⁹ *Penney v. Warren*, 22 N. Z. 602.

least two moderate sized sitting rooms and four sleeping rooms constantly ready and fit for public accommodation," and one T, having a terrace of five houses, made a door between each house and then obtained a license for the premises (which in all had thirty-two rooms), and he closed the accommodations between the houses and sublet the rooms to various tenants, and in some cases the rooms were unfurnished, and in others the tenants cooked their own food and supplied their own fuel, it was held that his place was not a hotel and his license was declared forfeited.⁴⁰

Sec. 773. Sale at military canteen.

A military officer cannot establish a canteen at a military camp and authorize sales of liquors at it, unless some statute expressly authorizes him to do so. Such a place must have a license under the State law.⁴¹

Sec. 774. Sales at theaters.

Where a statute prohibited a sale at a "theater" or "place of amusement," it was held that whether or not a place was a theater was a question of fact and not of law.⁴² But in this same case it was held that a hall which had a stage, on which a nightly programme of music and dancing was rendered, was a "place of amusement," though no fee for admission was charged. Where a statute forbade the furnishing of liquor inside any place of amusement or "any apartment opening into the same," and a proprietor gave persons tickets to an adjoining wine room in adjoining building, which could be reached by a stairway from the barroom, whence drinks were

⁴⁰ *Bremmer v. Thompson*, 15 N. S. W. L. R. 345.

In England it is held that a confectioner who has held a wine license for consumption of wine on the premises, and who supplies luncheons, is an inn-keeper within the meaning of the statute allowing an inn-keeper to take out a

license. *Regina v. Surry*, 52 J. P. 423.

⁴¹ *Commonwealth v. Joyce*, 22 Pa. Co. Ct. Rep. 397; 30 Pittsb. Leg. J. (N. S.) 28.

⁴² *In re Gartenstein & Sindel's License*, 15 Pa. Co. Ct. Rep. 612; 4 Pa. Dist. Rep. 37.

sent, it was held that the statute applied to such wine room and prevented its maintenance.⁴³ A statute prohibited an "internal communication" between a theater and a saloon. A hotel and a theater adjoined each other, but were under different roofs. The dress circle of the theater was approached along a passage covered by the main roof of the building, and a flight of stairs led from this passage to the dress circle of the theater. A door from a landing on the stairs led up two other flights of stairs to a room in the hotel in which liquor was sold. It was held that there was an "internal communication" between the theater and the hotel, such as the statute forbade.⁴⁴

Sec. 775. Sales at dwelling house.

A statute permitting the giving away of liquor at private dwellings, which have not become places of public resort, a gift of liquor in a room wherein no business is transacted, but not in a dwelling house, does not come within the permission of such statute.⁴⁵ And a gift within a barn or granary near the house is not permitted.⁴⁶

Sec. 776. Sales on boat.

In Louisiana it is held that the owner of a saloon on a river steamboat running between two towns can only be required to take out a license for his saloon at the home port, and if he does that sales are legal at the other port.⁴⁷ In Kentucky a sale at any place on the Ohio River opposite that State, without a license, is a sale in the county opposite to which the sale

⁴³ State v. White, 7 Baxt. 158; see Smith v. McCormick, 2 Vict. L. R. 93.

⁴⁴ *Ex parte* Dickson, 3 N. S. W. L. R. 358.

A statute authorizing the granting of a license to a "theater" will not authorize the granting of one to a "music hall." Regina v. Commissioners, 57 L. J. M. C.

92; 21 Q. B. Div. 569; 59 L. T. 378; 36 W. R. 692; 52 J. P. 390.

⁴⁵ State v. Danforth, 62 Vt. 188; 19 Atl. 229.

⁴⁶ State v. Camp, 64 Vt. 295; 24 Atl. 1114.

⁴⁷ State v. Dennie, 51 La. Ann. 608; 25 So. 394; State v. Frapport, 31 La. Ann. 340.

took place,⁴⁸ and the same rule applies to sales in Canada on Lake Huron.⁴⁹ A vessel on this lake plying between Canada and the United States must have a Canadian license to sell liquor in Canada until it has passed the international boundary line.⁵⁰ In New Zealand a license authorizing sales to passengers on the boat during its passage from one point to another does not authorize a sale at the end of the journey, although the passenger remain aboard intending to return on the same steamer on the same day, to his starting point.⁵¹ A license issued for the home port will not authorize sales at the point of destination.⁵² Where sales of liquor within a certain distance of a school is prohibited, a sale upon a boat within that distance, running on a river, is a violation of its provisions.⁵³

Sec. 777. Sales of native wine in barroom.

In Georgia a statute permitted the manufacture and sale of domestic wines or cider or the sale of wines for sacramental purposes, but provided that "such wines or cider should not be sold in barrooms by retail." In the construction of the word "barroom" it was held to mean a place where intoxicating liquors were sold at retail for consumption upon the premises.⁵⁴

Sec. 778. Sales at public place.

A law in Georgia⁵⁵ forbade the keeping or furnishing intoxicating liquors at any public place. The term "public place" was said to have a relative meaning, for at one time a

⁴⁸ Commonwealth v. Louisville, etc., Co., 117 Ky. 936; 80 S. W. 154; 25 Ky. L. Rep: 2098.

⁴⁹ Rex v. Meikleham [1906], 11 Ont. App. L. R. 366; 10 Can. Cr. Cas. 382; *Ex parte* McWilliams, 1 Leg. News (Can.) 66; see also Wright v. Harris, 49 J. P. 628.

⁵⁰ Rex v. Meikleham, *supra*.

⁵¹ Norwood v. Stuart, 23 N. Z. 473, 1108.

⁵² State v. Bland, 101 Mo. App. 618; 74 S. W. 3.

Evidence of reputation of ferry boat was held admissible. Cook v. State, 81 Miss. 146; 32 So. 312.

⁵³ Boyd v. State, 12 Lea, 687.

⁵⁴ Beiser v. State, 79 Ga. 326; 4 S. E. 257.

⁵⁵ Laws 1907, p. 81.

place may be a "public place" and at another time be not a "public place." A town guardhouse having only two prisoners in it was not considered to be a public place where liquor was furnished one of the prisoners. It was held that a "public place" was a place where the general public frequented, or where they might be expected to gather as a matter of common right. Even though privately owned or controlled, a place might be a "public place" if a number of persons there assembled by common usage or by general or indiscriminate invitation, and this invitation might be either express or implied. Public places devoted to private use and not open to the public were not embraced within the term, nor were places privately owned from which the indiscriminate public is generally excluded, although at a certain time a number of persons may there have assembled upon a special invitation for the occasion alone.⁵⁶ A place of public resort may be any ordinary shop; it may be an auction room, or a private house where a sale by auction is for the time being held;⁵⁷ or a cricket ground or recreation ground;⁵⁸ or a railway platform.⁵⁹

⁵⁶ *Tooe v. State*, 4 Ga. App. 495; 61 S. E. 917.

⁵⁷ *Sewell v. Taylor*, 7 C. B. (N. S.) 160; 23 J. P. 792; 29 L. J. M. C. 50; 1 L. T. 37.

⁵⁸ *Turnbull v. Appleton*, 45 J. P. 469.

⁵⁹ *Ex parte Davis*, 2 H. & N. 149; 26 L. J. M. C. 178; 5 W. R. 522; 21 J. P. 280.

CHAPTER XXIV.

SALES AND GIFTS AT PROHIBITED TIMES.

SECTION.

- 779. Public policy.
- 780. Sunday, election and holiday violations.
- 781. Sales or gifts on Sundays.
- 782. Facts sufficient to show a sale on Sunday.
- 783. Sunday sales or gifts—
Guests.
- 784. Sales at hotels and restaurants.

SECTION.

- 785. Trafficking in liquors on Sunday.
- 786. Sales on prohibited hours.
- 787. Supplying liquors to private friends and lodges after closing hours.
- 788. Sales on holidays.
- 789. Election days.
- 790. Under what statute prosecutions for sales at prohibited times brought.

Sec. 779. Public policy.

Experience has demonstrated the necessity of limiting the liquor traffic with respect to the times when sales may be made. It has been found necessary, more or less, to prohibit sales of intoxicating liquors during certain hours of the nighttime, in order to suppress and keep down crime and as a restraint upon immorality, when dissolute and criminal characters are wont to assemble in drinking places and plot crimes and the like, and when detection is rendered more difficult by reason of the darkness. These statutes in their provisions are half compromises, by allowing sales during practically the first half of the night and prohibiting them during the last half. So it has been found, as a matter of policy, that sales should be prohibited on Sundays, or on Sabbaths, for on these days men are at leisure and their tendencies are to gather in drinking places and indulge their appetites. Drinking to excess then are their natural tendencies, resulting in detriment to their health and tending to bring about quarrels and breaches of the peace. There is

also in these statutes a concession made to the religious elements of the country, who demand that these days shall be held sacred, shall be observed, the quiet of the day not disturbed by boisterous conduct, and religious assemblies not disturbed in their worship. So on occasion of holidays the same tendencies to assemble and carouse exists, and like reasons exist for the prohibition of sales and gifts. So in the instances of election days, which are often half holidays, when the passions of men run high over political discussions and struggles, it has been deemed best that the further excitement of intoxicating liquors should not be added to their often already overwrought imaginations and feelings. These and perhaps other reasons exist for the enactment of statutes of this kind, and experience has shown that they are beneficial, and while in a measure they are not a fulfillment of the expectations of the Legislatures or those urging their enactment, yet in a very large measure they prevent crime and acts of immorality that would otherwise take place. It will be found convenient in this connection to also extend the discussion to other instances connected with the liquor traffic upon these days, such as keeping drinking places closed and the like. Such laws are valid.¹ And it has even been held that a city might adopt an ordinance prohibiting the proprietor of a saloon from being in it during the time it is by law required to be closed.²

Sec. 780. Sunday, election and holiday violations.

It is competent for a legislature to prohibit, as a police regulation, under penalties, the sale of intoxicating liquors on Sunday,³

¹ Thomasson v. State, 15 Ind. 449; Heddrick v. State, 101 Ind. 564; 1 N. E. 47; 51 Am. Rep. 768; Bertholf v. O'Reilly, 74 N. Y. 509; 30 Am. Rep. 323; State v. Calloway, 11 Idaho, 719; 84 Pac. 27.

² State v. Calloway, 11 Idaho, 719; 84 Pac. 27.

³ State v. McMahon, 53 Conn. 407; Hall v. State, 4 Harr. (Del.) 132; Sanders v. State, 74 Ga. 82;

Liebold v. People, 86 Ill. 33; Thomasson v. State, 15 Ind. 449; Heddrick v. State, 101 Ind. 564; State v. Fearson, 2 Md. 310; Commonwealth v. Moore, 145 Mass. 244; 13 N. E. 893; People v. Cummerford, 58 Mich. 328; 25 N. W. 203; State v. Burnett, 77 Mo. 570; State v. Sinnott, 15 Neb. 472; Houtsch v. Jersey City, 29 N. J. L. 316; Pulling v. People, 8 Barb.

as well as upon election⁴ and other public days⁵ on which increased danger of drunkenness and rioting and public disturbance exists, and a person who is prosecuted for the violation of a law enacted for such purpose cannot successfully defend himself by showing that he is a licensed vendor of such liquor.⁶ A license or permit to sell intoxicating liquors is a permit to establish and maintain a tippling or public drinking house. It does not authorize the holder of it to violate the law; the privilege conferred by it must be exercised in conformity with the laws of the State. If, however, the statute does not provide a penalty for sales of liquor made on Sunday, or other public days, by a person having a license to sell, and hence, though the license does not extend to sales made on such days, no prosecution will lie for such sales.⁷ But if there be two statutes upon the subject, the one making it a misdemeanor to sell intoxicating liquors without a license, and the other a misdemeanor to sell on Sunday or other public days with or without a license, a general indictment under the first will be supported by proof under the second, of a sale, made on Sunday or other public day.⁸ And if a statute prohibits the sale of such liquor on Sunday or other public days by "any druggist or druggist's clerk," except on the written prescription of a regular practicing physician, a druggist who

N. Y. 384; *State v. Wool*, 86 N. C. 708; *Commonwealth v. Naylor*, 34 Pa. St. 86; *State v. Sharrer*, 2 Coldw. (Tenn.) 323; *Keller v. State*, 23 Tex. App. 259; *Thon v. Commonwealth*, 31 Gratt. (Va.) 887; *State v. Wacker*, 71 Wis. 672; 38 N. W. 189; *Ex parte Wright* (Tex.), 120 S. W. 868; *State v. Wahl* (Mo.), 119 S. W. 453; *Francis v. State* (Tex.), 119 S. W. 97.

⁴ *State v. Cady*, 47 Conn. 44; *State v. Kidd*, 74 Ind. 554; *State v. Hirsch*, 125 Ind. 207; 24 N. E. 1062; *Cearfoss v. State*, 42 Md. 403; *State v. Sinnott*, 15 Neb. 472; *People v. Murphy*, 5 Park. Cr. Co.

(N. Y.) 130; *Wooster v. State*, 6 Bact. (Tenn.) 533; *Smith v. State*, 18 Tex. App. 454.

⁵ *Ruge v. State*, 62 Ind. 388; *State v. Atkinson*, 139 Ind. 426; 39 N. E. 51; *Reithmiller v. People*, 44 Mich. 280; 6 N. W. 667; *People v. Minter*, 59 Mich. 557; 26 N. W. 701.

⁶ *Thomasson v. State*, 15 Ind. 449; *State v. Ambs*, 20 Mo. 214; *Commonwealth v. Gedkoh*, 101 Pa. St. 354; *Sifred v. Commonwealth*, 104 Pa. St. 179.

⁷ *Hingle v. State*, 24 Ind. 154; *Parker v. State*, 27 Ind. 393.

⁸ *People v. Krank*, 110 N. Y. 488; 18 N. E. 242.

sells on Sunday or other public day without such a prescription, even though a physician himself, is liable to prosecution.⁹ In so deciding the court said: "The intention is to prohibit the sale on such days except in case of sickness. And in order that this intention shall not be thwarted by feigned sickness the prescription is required, and that there may be no imposition the physician must be a regular practicing physician; and, still further, to guard against imposition the physician must be of the county where the liquor is to be sold, so that the druggist and the authorities may the more likely have a personal acquaintance with him. The condition is the barrier erected about the sale by druggists on those days."¹⁰ And when such prescription is required to justify the sale a licensed dealer is indictable for making a Sunday sale without it although the liquor was bought for the use of a sick person, and the vendor was so informed at the time of the sale.¹¹

Sec. 781. Sales or gifts on Sundays.

It is no offense to sell or give away liquors on Sunday unless some statute specifically prohibits it.¹² But it has been held that a seller of liquor on Sunday may be prosecuted for having violated the statute forbidding labor on that day or under

⁹ *Tilford v. State*, 109 Ind. 359; 10 N. E. 170; *Shepler v. State*, 114 Ind. 194; 16 N. E. 521; *Edwards v. State*, 121 Ind. 450; 23 N. E. 277.

¹⁰ *Barton v. State*, 99 Ind. 89.

¹¹ *Barton v. State*, 99 Ind. 89; *State v. Wool*, 86 N. Car. 708.

Under an indictment for selling liquor by the glass, to be drank on the premises, without a license, a conviction can not be had for selling on Sunday. *People v. Brown*, 6 Parker Cr. Rep. 666; *Baer v. Commonwealth*, 13 Ky. L. Rep. (abstract) 396.

Persons who confederate to-

gether to get a saloon keeper to give them liquor on Sunday, in order that they may prosecute him and get the penalty allowed by statute, are not guilty of a conspiracy. *Hazen v. Commonwealth*, 23 Pa. St. 355.

¹² *State v. Crabtree*, 27 Mo. 232; *Rosenbaum v. State*, 4 Ind. 599; *State v. Huffschmidt*, 47 Mo. 73; *State v. Burnett*, 77 Mo. 520 (a statute rendered the license of the offender subject to revocation). See early practice in New York. *People v. Osmer*, 24 How. Prac. 451.

the liquor statute forbidding sales on that day.¹³ Upon a charge of a sale or gift on Sunday the amount sold or given away is immaterial, even though a general statute requires a license only for those selling at retail not to exceed a certain amount.¹⁴ The lack of an intention to violate the Sunday law is immaterial, for it is the making of the sale or gift that was intentionally made that the law punishes.¹⁵ If the statute requires a prescription for the sale of liquors on that day, then a sale without one is illegal,¹⁶ although made for medical purposes in good faith.¹⁷ It has been held that the giving of liquor in one's own dwelling house on an election day was an offense,¹⁸ and the same rule would apply to a gift on a Sunday. But we apprehend a gift to one who was at the time a *bona fide* guest of the giver would not be construed an illegal act. If the sale be made by the bartender of the defendant against his express orders not to sell on that day, then he is not liable.¹⁹ A Jew cannot insist that he should not be required to obey or observe the statute forbidding sales on Sunday because he conscientiously observes the seventh day of the week as the Sabbath.²⁰ Where a statute forbade sales on Sunday and a town ordinance forbade sales on certain hours of a Sunday, it was held that there might be a conviction

¹³ Commonwealth v. Harrison, 11 Gray, 310; Commonwealth v. Trickey, 13 Allen, 559.

A statute against peddling and one against selling liquors are both violated by a sale of liquor by a peddler. Commonwealth v. McConnell, 11 Gray, 204. See United States v. Morin, 4 Biss. 93.

¹⁴ Schliet v. State, 31 Ind. 246; State v. Eskridge, 1 Swan, 413; State v. Barker, 4 Sneed, 554.

Contra, only sale at retail forbidden. State v. Thomasson, 19 Ind. 99; Wood v. State, 21 Ind. 276.

¹⁵ Marimont v. State, 48 Ind. 21.

¹⁶ Barton v. State, 99 Ind. 89; Tilford v. State, 109 Ind. 359; 10 N. E. 107.

¹⁷ Edwards v. State, 121 Ind. 450; 23 N. E. 277; State v. Wool, 86 N. C. 708.

¹⁸ Cearfoss v. State, 42 Md. 403.

¹⁹ Minder v. Silverstein, 36 La. Ann. 912. But this question falls more properly under the subject of sales by agents; and the chapter on that subject should be consulted.

²⁰ Commonwealth v. Hyneman, 101 Mass. 30.

under the statute for a sale at any hour of that day.²¹ But where a general statute required barrooms to be closed on Sundays, and a city charter authorized the city to close them on those days, and the ordinance prohibited barter and traffic of liquors between 9 A. M. and 4 P. M. on Sundays, it was held that a sale on Sunday in the city at any other hour of that day was valid.²² There is no conflict between a statute prohibiting sales on Sunday and an ordinance requiring barrooms to be closed on that day, and although the statute provides that its provisions shall not apply to any city having police regulations on the subject of sales on Sunday, yet it is not affected by such an ordinance, and a prosecution may be sustained for sales on that day.²³ Where a statute prohibited the furnishing by sale, gift "or otherwise" of liquor on Sunday, it was held that a person riding around in a township on Sunday with a flask of whisky in his pocket, out of which he gave drinks to persons on whom he called, making no charge therefor, solely to engender a good feeling, had not violated its terms.²⁴ If a sale may be made without a license for medical purposes, it may be made on Sunday also.²⁵ Where a section of a statute imposes a penalty for sales without a license, and another section for sales on Sunday, for a sale on Sunday there can be no prosecution under the first section.²⁶ Of course, a license to sell intoxicating liquors is no

²¹ *Angenhoffer v. State*, 15 Tex. App. 613.

²² *Craddock v. State*, 18 Tex. App. 567.

²³ *Thon v. Commonwealth*, 31 Gratt. 887.

²⁴ *Commonwealth v. Heckler*, 168 Pa. St. 575; 32 Atl. 52; 36 W. N. C. 363; reversing 14 Pa. Co. Ct. Rep. 465.

A number of early Indiana cases held that sales by a licensed person on Sunday was not illegal, although it was for an unlicensed person. The statute was defective. *Hingle v. State*, 22 Ind. 462 (overruling *Thomasson v. State*, 15 Ind.

449; *Sohn v. State*, 18 Ind. 389; and *State v. Thomasson*, 19 Ind. 99); *Hingle v. State*, 24 Ind. 35; *State v. Drischel*, 26 Ind. 154, 180; *Parker v. State*, 27 Ind. 393.

²⁵ *Morris v. State*, 47 Ind. 503; *Beardsley v. State*, 49 Ind. 240.

²⁶ *People v. Krank*, 110 N. Y. 488; 18 N. E. 242; reversing 46 Hun, 632.

As to repeal of certain Pennsylvania statutes permitting the sale of liquors on Sunday, see *Commonwealth v. Gedikoh*, 101 Pa. 354; *Sifred v. Commonwealth*, 104 Pa. 179; and *Commonwealth v. Sassaman*, 2 Del. Co. Rep. 333.

permit to sell at times forbidden by a statute,²⁷ but a sale on Sunday by an unlicensed salesman renders him subject to indictment for having made a sale without a license.²⁸ A license by a city is no defense when the charge is a sale on Sunday brought under the State statute.²⁹ A statute providing that "no housekeeper" shall sell liquor on Sunday applies to sales by a tavern keeper.³⁰ The words "other person" in a phrase "any tavern keeper or other person" in a statute forbidding sales by them on Sunday means a person engaged in the liquor business.³¹

Sec. 782. Facts sufficient to show a sale on Sunday.

What facts show a sale on Sunday and what do not is always a separate question in each case. No rule can here be laid down beyond the general rules on sales. But we add a few illustrations. Thus, a person was seen to go into a saloon on Sunday and in a quarter of an hour come out with a bottle of whisky in his possession, concealed in his pocket. Two hours later the defendant was found in his barroom. On the trial the alleged purchaser could not be found, and it was shown that the defendant had said he would spend his last one hundred dollars to keep him away. This was held sufficient to show a sale.³² And where the officers on entering a

²⁷ *State v. Ambs*, 20 Mo. 214; *Sifred v. Commonwealth*, 104 Pa. St. 179; *Commonwealth v. Gedikoh*, 101 Pa. St. 354; *Morris v. State*, 47 Ind. 503; *Parker v. State*, 27 Ind. 393; *State v. Drischel*, 26 Ind. 154; *Hingle v. State*, 24 Ind. 35.

²⁸ *People v. Krank*, 110 N. Y. 488; 18 N. E. 242.

²⁹ *Heinesen v. State*, 14 Colo. 228; 23 Pac. 995.

³⁰ *State v. Fearson*, 2 Md. 110.

³¹ *Jensen v. State*, 60 Wis. 577; 19 N. W. 374.

As to early statute in Missouri, see *State v. Crabtree*, 27 Mo. 232.

Usually statutes specifically designate what liquors shall not be sold on Sunday. No special rules are here applicable; but only general rules. *State v. Baden*, 37 Minn. 212; 34 N. W. 24.

In Massachusetts while an inn-keeper may supply his guests with liquor, he can not do so between 11 P. M. and 6 A. M. *Commonwealth v. Kelly*, 177 Mass. 221; 58 N. E. 691.

³² *Commonwealth v. Stevens*, 153 Mass. 4; 26 N. E. 96. It is safe to say that in many States this would not be considered sufficient evidence of a sale. The transac-

saloon found buckets of freshly drawn beer on the bar, as well as a bottle of whisky and a glass, and there were also two barkeepers in their shirt sleeves and several persons, it was held that the defendant was rightly convicted of keeping liquor for sale on Sunday.³³ So where the evidence showed that the front door of the saloon was closed, the back door open, several persons in the saloon, and a sale was made by the barkeeper to two persons who went in the back door and purchased two glasses of beer, the conviction was sustained, although both the defendant and barkeeper testified he had orders to keep the saloon closed on Sunday and not sell on that day and that he went there merely to clean up the bar.³⁴ But evidence that defendant was behind his bar with his sleeves rolled up and an apron on, the doors being fastened, that back of the bar were all the usual equipment of a saloon, that on the bar stood two glasses filled with some kind of liquor, which were taken away before the witness could reach them, and that three strangers were in the barroom, was held not sufficient to show a sale or gift or even an exposure of liquor for sale on Sunday.³⁵

Sec. 783. Sunday sales or gifts—Guests.

It is not an offense against the laws requiring an observance of the Sabbath or Sunday for an innkeeper to sell to his guests intoxicating liquors, for by law he is required to keep his inn open at all times, regardless of the days,³⁶ and this has also

tion might have been a gift; or the alleged purchaser might have taken the liquors into the defendant's bar-room, although a remote possibility.

³³ Commonwealth v. McNeese, 156 Mass. 231; 30 S. E. 1021.

³⁴ State v. Meagher, 49 Mo. App. 571.

³⁵ People v. Owens, 148 N. Y. 648; 43 N. E. 71; affirming 91 Hun, 344; 36 N. Y. Supp. 755.

See also a very similar case. City Council v. Talck, 3 Rich. L. (S. C.) 299.

³⁶ Hall v. State 4 Harr. (Del.) 132; Commonwealth v. Naylor, 34 Pa. 86; *In re Breslin*, 45 Hun, 210 (sales "as a beverage" prohibited only). But see *In re Breslin*, 7 N. Y. St. Rep. 764; see *Savage v. State* (Tex. Cr. App.), 88 S. W. 351.

been held with reference to sales on the premises to be there consumed to persons not lodgers or travelers.³⁷ But, of course, these statutes turn upon the phraseology of each one of them, and general rules cannot be deduced from the decisions with any degree of accuracy for the interpretation of other statutes. Even in the same State from which the last citation was made it has been held an offense for an innkeeper to sell or give away liquor on Sunday,³⁸ and it has been also held that such an act was a violation of the general law requiring an observation of Sunday and forbidding labor and traffic thereon.³⁹ Under a statute permitting an innkeeper to sell to "guests who have resorted to his house for food or lodging," the defendant has the burden to show the persons he sold liquor to on Sunday were in fact his guests.⁴⁰ If the persons resorted to his inn simply for the purpose of securing intoxicating liquors they are not guests,⁴¹ and the fact that the keeper requires them to eat a cold lunch before receiving the liquor they order does not make them guests.⁴² Sales by a club on Sunday are prohibited by a general statute forbidding the retail of intoxicating liquors on that day.⁴³ A barkeeper who sells liquor on Sunday, or assists his principal in making a sale, violates the statute.⁴⁴ If the sale be on a week day, but the delivery is on Sunday, there is an offense committed, though the saloon

³⁷ *Van Zant v. People*, 2 Parker Cr. Rep. (N. Y.) 168.

³⁸ *People v. Murphy*, 5 Parker Cr. Rep. (N. Y.) 130.

³⁹ *Omit v. Commonwealth*, 9 Harris (Pa.) 426; *Commonwealth v. Naylor*, 34 Pa. 86; *State v. Crabtree*, 27 Mo. 232.

⁴⁰ *Commonwealth v. Molter*, 142 Mass. 533; 8 N. E. 428; *Commonwealth v. Francis*, 152 Ind. 508; 25 N. E. 836; *Commonwealth v. Shaw*, 152 Mass. 510; 25 N. E. 837; *Ryland v. Foley*, 16 N. Z. L. R. 670.

⁴¹ *Commonwealth v. Moore*, 145 Mass. 244; 13 N. E. 893.

⁴² *Commonwealth v. Hagan*, 140 Mass. 289; 3 N. E. 207; *In re Lyman*, 28 Misc. Rep. 408; 59 N. Y. Supp. 968; *Queen v. Sutton*, 10 Juta, 273; *In re Cullinan*, 93 N. Y. App. Div. 427; 87 N. Y. Supp. 660; 41 N. Y. Misc. Rep. 3; 83 N. Y. Supp. 581.

⁴³ *State v. Maryland Club*, 105 Md. 585; 66 Atl. 607.

Contra, *Cullinan v. Trolley Club*, 65 N. Y. App. Div. 202; 72 N. Y. Supp. 629.

⁴⁴ *Burnett v. State*, 42 Tex. Cr. App.), 89 S. W. 1079.

keeper kept it under an arrangement with the purchaser in his ice chest so it would be in a suitable condition for drinking.⁴⁵ If a person casually find liquor on Sunday and on that day give some of it to a friend he violates the statute.⁴⁶ If one voluntarily, at the request of a saloon keeper, serve liquor in the latter's saloon on Sunday he may be convicted of making sales on that day.⁴⁷ If a sale may be made to a guest on Sunday, at a hotel, such person must be a *bona fide* guest, and the court may so charge the jury.⁴⁸ A sale to a police officer, with his consent, is a violation of the statute, though purchased for the purpose of prosecuting the seller.⁴⁹ A sale to his barkeeper cannot be made by a saloon keeper on Sunday.⁵⁰ To treat one on Sunday in the giver's own private room has been held a violation of a statute prohibiting a sale or "other disposal" of liquors, but it may well be doubted if this case rests upon a solid basis.⁵¹ Where a statute made the presence of two or more persons on the licensed premises on Sunday *prima facie* evidence that a sale of liquor had taken place, and sales were permitted to *bona fide* lodgers, boarders and travelers, it was held that it must be proven that the persons on the premises were not lodgers, boarders or travelers, and, in addition thereto, that they were not servants or inmates of the premises.⁵² Where two special agents of the excise department of the State in disguise visited a hotel and ordered the drinks, but were told they could not have any unless they ordered something to eat, and they said they did not want anything, but ordered two sandwiches, saying they

⁴⁵ Wallis v. State (Tex. Cr. App.), 78 S. W. 231; but see Crawford v. State (Tex. Cr. App.), 89 S. W. 1079.

⁴⁶ State v. Gibson, 121 N. C. 680; 28 S. E. 487; Brownlow v. State, 112 Ga. 405; 37 S. E. 733; Regina v. Walsh, 29 Ont. Rep. 36.

⁴⁷ Pigford v. State (Tex. Cr. App.), 74 S. W. 323.

⁴⁸ Lehman v. District of Columbia, 19 App. D. C. 217; District

of Columbia v. Reuter, 15 App. D. C. 237.

⁴⁹ Borch v. State (Ala.), 39 So. 580; Hazen v. Commonwealth, 23 Pa. 355.

⁵⁰ Regina v. Southwick, 21 Ont. Rep. 670.

⁵¹ Regina v. Walsh, 29 Ont. Rep. 36.

⁵² Cahill v. Millett [1907], Vict. L. R. 605; 29 Austr. L. T. 16; Biggs v. Cunningham [1907], Vict. L. R. 344; 29 Austr. L. T. 14.

were not obliged to eat them, the sale was held to be illegal, not having been made in good faith.⁵³

Sec. 784. Sales at hotels and restaurants.

Where statutes prohibited sales to guests at restaurants and hotels, the restaurants and hotels must be restaurants and hotels in fact and not mere shams, and the guests must also be guests in fact. Anything short of these qualifications will not protect the person making the sales. The application for a license will control if there be a variance between it and the license, especially if the latter be broader than the former.⁵⁴ So far as the guest is concerned he must be an actual *bona fide* guest.⁵⁵ If a statute provides that a hotel keeper may supply liquor to "guests who have resorted to his house for food or lodging," the persons supplied must be actual guests, and his belief that the customers are guests is not sufficient to exempt him from the penalty of selling to persons not guests.⁵⁶ Where a statute defined a guest to be "a person who during the hours when meals are regularly served therein resorts to the hotel for the purpose of obtaining, and actually orders and obtains, at such time and in good faith, a meal therein," it was held that a sale of liquor to a person who did not desire a meal but desired to procure liquor was not a sale to a guest, although he purchased some trifling refreshments which were carried away by the waiters untasted.⁵⁷ Where a customer asked for beer but was refused and told he could not have it

⁵³ *In re Cullinan*, 93 N. Y. App. Div. 427; 87 N. Y. Supp. 660; affirming 41 N. Y. Misc. 3; 83 N. Y. Supp. 581.

⁵⁴ *In re Smith*, 48 N. Y. App. Div. 423; 63 N. Y. Supp. 255.

⁵⁵ *Lehman v. District of Columbia*, 19 App. D. C. 217.

⁵⁶ *Commonwealth v. Regan*, 182 Mass. 22; 64 N. E. 407.

⁵⁷ *Cullinan v. O'Connor*, 100 N. Y. App. Div. 142; 91 N. Y. Supp. 628; *Clement v. Martin*, 117 N. Y. App. Div. 5; 102 N. Y. Supp.

37; *In re Schuyler*, 63 App. Div. 206; 71 N. Y. Supp. 437; *In re Cullinan*, 41 N. Y. Misc. Rep. 3; 83 N. Y. Supp. 581; *Clement v. Beers*, 110 N. Y. Supp. 99; *In re Cullinan*, 45 N. Y. Misc. Rep. 497; 92 N. Y. Supp. 802. The above were cases where a sandwich was served with the liquors; and this was held not a serving of liquors with a meal.

See also *Queen v. Sauer*, 3 B. C. Rep. 308; 1 Can. Cr. Cas. 317.

unless he ordered a meal, and he then ordered crackers and cheese for which no extra charge was made, it was held that he had not ordered a "meal," for that word applies to food eaten to satisfy the requirements of hunger, and the cracker and cheese were a mere excuse to enable the defendant to sell liquor.⁵⁸ Where sales could be made to a "lodger," it was held that in ordinary cases a man who hires a bedroom in a hotel is not, unless he sleeps there, a lodger within the meaning of the statute.⁵⁹ A servant cannot be regarded as a lodger.⁶⁰ Where sales could be made to a lodger a sale to such an one who calls for the drinks for himself and others, and pays for them, is a sale of the entire number of drinks to the lodger, and the sale is not a violation of the statute.⁶¹ When charged with and proven to have made a sale the burden is on the defendant to show that the sale was made under proper circumstances to a proper person, to an actual guest or lodger.⁶² Under an act of Congress requiring "anyone engaged in the sale of intoxicating liquors" to have a license, a boarding house keeper cannot furnish his boarders liquors with their meals without it being specifically called or contracted for. The transaction in so furnishing liquors is a sale.⁶³ A licensee may entertain his "private friends," but a strict interpretation is usually put upon this term sufficient to prevent an easy evasion of the law.⁶⁴

Sec. 785. Trafficking in liquors on Sunday.

Where a statute makes it unlawful to "traffic" in liquors on Sunday, a sale or barter is not necessary to commit the

⁵⁸ *Regina v. Sauer*, 3 B. C. Rep. 308.

⁵⁹ *Knott v. Miller*, 12 N. Z. L. R. 397; *Leslie v. Clarke*, 22 N. Z. 967.

⁶⁰ *Rodericks v. Jones*, 3 W. N. C. (N. S. W.) 116.

⁶¹ *White v. Nestor*, 13 N. Z. L. R. 751 (*Pine v. Barnes*, 20 Q. B. Div. 221; 57 L. J. M. C. 28; followed and *Scatchard v. Johnson*,

57 L. J. M. C. 41 distinguished); *Brewer v. Stagpoole*, 13 N. Z. L. R. 134.

⁶² *Cullinan v. O'Connor*, 100 N. Y. App. Div. 142; 91 N. Y. Supp. 628.

⁶³ *Lauer v. District of Columbia*, 11 App. D. C. 453.

⁶⁴ *Corbett v. Haigh*, 5 C. P. Div. 50.

offense.⁶⁵ Two men called on Sunday at a hotel and each asked for a glass of beer, and one of the men said something about waiting for dinner, but before they had finished drinking the beer the police arrived and the men then left without paying for the drinks. It was held that these facts showed a "trafficking" on Sunday.⁶⁶ The evidence in a case showed that a man entered a hotel on Sunday with something that looked like a bottle under his coat, and shortly afterwards came out with a bottle of beer which appeared to have been freshly drawn. He denied having purchased the beer on Sunday, stating that he had bought it on the premises the night before, had left it under a seat, and had called on Sunday to get it. It was held that what had taken place on Sunday amounted to "traffic," but whether it was a sale or barter was left undecided.⁶⁷ It is said that this same statute relates to "traffic" in liquor in general, and the information or indictment should not allege a traffic with a particular person.⁶⁸ Under such a statute a prosecution for a sale on Sunday is no bar to a subsequent prosecution for a sale of the same liquor without a license, as the prosecution, in order to convict, must make proof of a different state of facts under the first statute from that under the second.⁶⁹ Opening a saloon on Sunday is not a trafficking in liquors on that day within the meaning of a statute forbidding trafficking on Sunday.⁷⁰

Sec. 786. Sales on prohibited hours.

A statute prohibiting sales or gifts of liquors on certain hours of the day—as from 11 P. M. to 5 A. M.—is valid,⁷¹

⁶⁵ *Irwin v. Panytz*, 20 Viet. L. R. 282; 16 Austr. L. T. 18.

⁶⁶ *Regina v. Spiers*, 4 Austr. L. R. (C. N.) 93.

⁶⁷ *Devine v. Fallon*, 3 Austr. L. R. (C. N.) 42.

⁶⁸ *Molyneux v. McPherson*, 23 Austr. L. R. 228; 8 Austr. L. R. 120. It was made a *quaere* whether a single sale of a glass of beer

was sufficient to constitute trafficking.

⁶⁹ *Arrington v. Commonwealth*, 87 Va. 96; 12 S. E. 224; 10 L. R. A. 242.

⁷⁰ *People v. Chase*, 41 N. Y. App. Div. 12; 58 N. Y. Supp. 292.

⁷¹ *Hedderick v. State*, 101 Ind. 564; 1 N. E. 47; 51 Am. Rep. 768.

and so is one requiring the saloon to be closed on those hours.⁷² And so is an ordinance forbidding sales on certain hours.⁷³ If there be a conflict between a statute and an ordinance as to when liquors may be sold the former controls.⁷⁴ But where an ordinance forbade the keeping open of a saloon after 10:30 P. M., and a subsequently enacted statute providing for the licensing of persons to sell liquors forbade sales between midnight and 5 A. M., repealing all inconsistent statutes, it was held that the ordinance still applied to unlicensed persons, though not to licensed persons.⁷⁵ Where a statute provided that no sale of liquor should be made between 11 P. M. and 5 A. M., except that "the towns or the municipal authorities of any city, borough, or town" might fix the closing hour at 12 o'clock at night, and the selectman of a town which embraced an incorporated city, where no action on the subject had been taken, extended the time of closing saloons until 12 o'clock at night, it was held that saloons within such city could lawfully keep open until midnight.⁷⁶ A city ordinance provided that "all sales of every description" and "all places where intoxicating liquors are sold" should be kept closed after 11 P. M. Subsequently a statute was adopted prohibiting throughout the State the sale of intoxicating liquors. It was held that so far as the ordinance regulated sales it was void, but under a general welfare clause in a statute empowering a city to enact ordinances for the safety and morals of its inhabitants, it was still valid as to a place "commonly known as a saloon, where intoxicating liquors were sold," and a saloon keeper who kept open after 11 P. M. could be convicted of a violation of the ordinance.⁷⁷ Where a statute prohibits sales or gifts "between the hours of 11 o'clock P. M. and 5 o'clock A. M.," the time is reckoned by following the hours forward, and is so reckoned as to make the period a consecutive one, so that the phrase quoted means the period

⁷² State v. Gerhardt, 145 Ind. 439; 44 N. E. 469; 33 L. R. A. 313.

⁷³ Decker v. Sargeant, 125 Ind. 404; 25 N. E. 458; Davis v. Fasig, 128 Ind. 271; 27 N. E. 726.

⁷⁴ State v. Brady, 41 Conn. 588.

⁷⁵ State v. Brady, 41 Conn. 588.

⁷⁶ State v. Hellman, 56 Conn. 190; 14 Atl. 806.

⁷⁷ Clinton v. Gruesendorf, 80 Iowa, 117; 45 N. W. 407.

between 11 o'clock night and 5 o'clock in the morning of the succeeding day.⁷⁸ An ordinance requiring all saloons to close at dark and not open until daylight is a reasonable one and valid, though immediately adjacent to the town in which it is adopted, across the State line, is another town upon which no restriction is placed on the sale of liquors and which will have the effect to ruin the liquor business in the former town.⁷⁹ If a statute prohibits sales during certain hours, it does not prohibit the drinking of liquors during those hours, so that if liquor be sold during hours it may be sold, and the sales be in all things completed, then no offense is committed by the purchaser consuming it on the premises during closing hours.⁸⁰ But a statute may even prevent liquor being consumed on the premises during the closing period, though it had been previously bought.⁸¹ The prosecution has the burden to show that the sale was made out of hours, and this it must prove by some watch or clock whose time is to be depended upon, and not by the evidence of clocks or watches shown to be very irregular and erratic.⁸²

Sec. 787. Supplying liquors to private friends and lodgers after closing hours.

By express terms of a statute the keeper of a licensed public house in England may supply "intoxicating liquors, after the hours of closing, to private friends *bona fide* enter-

⁷⁸ Hedderick v. State, 101 Ind. 564; 1 N. E. 47; 51 Am. Rep. 768.

⁷⁹ Bradford v. Jellico, 1 Tenn. Ch. App. 700.

In Manitoba only licensed dealers can be prosecuted for sales out of hours. Regina v. Williams, 3 Manitoba, 342; Regina v. Adams, 5 Manitoba, 153.

⁸⁰ Pine v. Barnes, 20 Q. B. Div. 221; 37 L. J. M. C. 28; Cope v. Landles, 13 T. L. R. 18; White v. Nestor, 13 N. Z. L. R. 751; Queen v. Pilkington, 10 Juta, 132.

⁸¹ Batt v. Cullen, 16 N. Z. L. R. 17.

⁸² Regina v. Pearson, 9 Juta, 261.

Proof that people are seen going in and out of a hotel full of residential guests is not a reasonable ground for suspecting a breach of the law by selling liquors after the hours of closing. Hendrey v. Rolleston, 22 N. Z. 321. Nor is the fact that a boy was seen leaving with a bottle of beer after midnight. McDonough v. Cavanagh, 22 W. N. C. (N. S. W.) 151.

tained by him at his own expense.”⁸³ In construing this section an English writer of authority⁸⁴ has said: “This section recognizes as law that which was already in effect declared by the courts to be the law under the previous acts. The words ‘private friends’ seem to include those who are not in the relative situation of customers. The justices have nothing to do with the occasion of the entertainment, except as throwing light on the fact whether the friends were pretended friends only and really paid for their entertainment in some substantial way, by exchange or otherwise, in the nature of a sale, as defined by the licensing act.”⁸⁵ The license holder, it is true, cannot obtain the benefit of this enactment by saying to the ordinary customers when the hour of closing arrives that if they stay he will treat them as private friends, as this may be an evasion of the act.⁸⁶ And where a lodger of the house has invited friends and entertains them at his own expense, the license holder is not liable⁸⁷ merely because liquor is supplied to and consumed by the friends after closing hours.⁸⁸ ‘I agree that justices should closely scrutinize the cases before them, because, unless they do so the act might be evaded. But if, on scrutinizing the evidence, as they seem to have done in the present case, they come to the conclusion that the case is *bona fide*, and the publican honestly sells and the lodger honestly buys liquors after closing hours, and it is consumed by the *bona fide* guests of the lodger, I see no reason why the justices should not find those facts and refuse to convict.’⁸⁹ The entertainment must be in the licensed premises. Though the private friends may be lawfully on the premises during closing hours, yet the license holder will

⁸³ 37 and 38 Vict. c. 49, § 30.

⁸⁴ Patterson’s Licensing Acts (19th ed.), p. 535.

⁸⁵ 35 and 36 Vict. c. 94, § 62.

⁸⁶ Citing Corbett v. Haigh, 5 C. P. Div. 50; 44 J. P. 39; 42 L. T. 185; 28 W. R. 430.

⁸⁷ Under the act forbidding sales or keeping open during closing hours.

⁸⁸ Citing Pine v. Barnes, 20 Q. B. Div. 221; 52 J. P. 199; 57 L. J. M. C. 28; 58 L. T. 520; 36 W. R. 473.

⁸⁹ Hawkins, J., in Pine v. Barnes, *supra*. See also Cope v. Landles, 13 T. L. R. 18; Oliver v. London, 60 J. P. 248.

commit an offense if he allow them to carry on gaming, and it has been doubted whether the friends themselves can be convicted of aiding in the offense.⁹⁰ And for a like reason he will be liable if he allows his friends to play billiards."⁹¹

Sec. 788. Sales on holidays.

Statutes often make it an offense to sell liquors on holidays. Sometimes the term "legal holiday" is used, but more frequently the holidays are specifically named, as Christmas, New Year's Day, Decoration Day, Thanksgiving Day, or Fourth of July. Where a statute declared that it should be unlawful to give or sell liquor upon "any legal holiday," an indictment charging a sale upon the Fourth of July, it was held insufficient, for no statute made it a "legal holiday," and a statute providing that "for all purposes of presenting for payment or acceptance upon the maturity and protest, and giving notice for the dishonor of bills of exchange * * * falling due or maturing on" a legal holiday should not be due until the day thereafter, and the Fourth of July was enumerated as a holiday, had no application.⁹² The same ruling was made with reference to Memorial Day.⁹³ It was considered that the statute only related to the maturity of commercial paper. But where a statute defined what should be "legal holidays," it was construed in *pari materia* with a liquor statute making it an offense to sell liquors on "legal holidays," passed at the same session of the Legislature; and as that statute declared that "Labor Day" should be a "legal holiday," a sale on that day was prohibited.⁹⁴ Where a statute

⁹⁰ Citing *Hare v. Osborne*, 34 L. T. 294; 40 J. P. 759; *Cooper v. Osborne*, 35 L. T. 347; 40 J. P. 759.

⁹¹ Citing *Ovenden v. Raymond*, 40 J. P. 727; 34 L. T. 698.

As to what is a sale by a restaurant keeper, see *Pasquier v. Neale*, 71 L. J. K. B. 835 [1902]; 2 K. B. 287; 87 L. T. 230; 51 W. R. 92; 67 J. P. 49; 20 Cox C. C. 350.

⁹² *Ruge v. State*, 62 Ind. 388; see also *Brennan v. Roberts*, 125 Iowa, 615; 101 S. W. 460; *Johnson v. State (Iowa)*, 10 N. W. 1131.

⁹³ *State v. Atkinson*, 139 Ind. 426; 39 N. E. 51; *Hadley v. Muselman*, 104 Ind. 459; 3 N. E. 122.

⁹⁴ *State v. Shelton*, 38 Ind. App. 80; 77 S. E. 1052; *Commonwealth v. Francis*, 152 Mass. 508; 25 N. E. 836; *Commonwealth v. Shaw*, 152 Mass. 510; 25 N. E. 837;

required saloons to be closed on all "legal holidays," and another statute provided that New Year's Day "and any day appointed or recommended by the governor * * * or President * * * as a day of fasting and prayer or thanksgiving," should be holidays, it was held that a sale on a day especially set apart and recommended by the governor of the State as a day of general "thanksgiving and praise to Almighty God" was illegal because the day was a legal holiday.⁹⁵ Where a statute provides that if the Fourth of July falls on Sunday, then the following Monday shall be a holiday, a statute requiring saloons to be closed on legal holidays requires them in such an instance to be closed on such Monday.⁹⁶

Sec. 789. Election days.

Under these statutes it is immaterial that the liquor sold or given away had no reference to the election, when the statutes make no exception in that connection.⁹⁷ A statute prohibiting sales "during the entire day of any election" means from midnight to midnight, and not merely while the polls are open.⁹⁸ A statute prohibiting sales on "municipal

Rathmiller v. People, 44 Mich. 280; 6 N. W. 667. This was also held true where Labor Day was declared to be a holiday after the Sunday closing act had been adopted. People v. Kriesel, 136 Mich. 80; 98 N. W. 850; 10 Detroit Leg. N. 972.

⁹⁵ People v. Ackerman, 80 Mich. 588; 45 N. W. 367.

A statute closing "saloons" on "legal holidays" relates to the sale of liquors on holidays in places of resort for refreshments. People v. Hobson, 48 Mich. 27; 11 N. W. 771.

As to the requirements of a statute requiring an exposure to view of the bar-room on Fourth of

July when sales can not be made, see Nelson v. State, 17 Ind. App. 403; 46 N. E. 941.

⁹⁶ People v. Thielman, 115 Mich. 66; 72 N. W. 1102; 39 L. R. A. 218.

⁹⁷ Wolf v. State, 59 Ark. 297; 27 S. W. 77; 43 Am. St. 34.

⁹⁸ Kane v. Commonwealth, 89 Pa. 522; 33 Am. Rep. 787; Haines v. State, 7 Tex. App. 30; Lawrence v. State, 7 Tex. App. 192; Commonwealth v. Murphy, 95 Ky. 38; 23 S. W. 655; State v. Meagher, 124 Mo. App. 333; 101 S. W. 634; Shuch v. State, 50 Ohio, 493; 34 N. E. 663; Commonwealth v. Rogers, 1 Del. C. Rep. (Pa.) 517; Janks v. State, 29 Tex. App. 233;

election" days applies to an election held to determine whether the city would construct waterworks under a statute authorizing the holding of an election on that subject,⁹⁹ and so a statute prohibiting the sale "upon the day of any election in" a city "where the same may be held" forbids the sale upon an election in only one ward of a city, called to elect a councilman therein, in any part of the city.¹ Under a statute providing that no liquors should be sold on the "day of any election," it was held that a sale on a day of a "primary election," held by a political party to select candidates, was an offense.² A saloon keeper cannot justify the sale of liquor after the polls have closed on the ground that a police officer told him such a sale was not forbidden by the statute.³ In prosecutions for a violation of the statute the validity of the

15 S. W. 815; *Aimo v. People*, 122 Ill. App. 398; *Jones v. State*, 32 Tex. Cr. Rep. 533; 25 S. W. 124; *State v. Cady*, 47 Conn. 44; *Keith v. State*, 37 Tex. Cr. Rep. 678; *Rose v. State*, 107 Ga. 697; 33 S. E. 439. *Contra*, where statute defined "election day from sunrise to sunset." *Wooster v. State*, 6 Baxt. 633.

⁹⁹ *State v. Kidd*, 74 Ind. 554.

Contra, *Smith v. State*, 18 Tex. App. 454; *In re Liquor Dealers*, 19 Pa. Co. Ct. Rep. 329.

¹ *Quolter v. State*, 120 Ind. 92; 22 N. E. 100.

Contra, *In re Tenth Ward Election*, 5 Pa. Dist. Rep. 237. See *Reuter v. State*, 43 Tex. Cr. App. 572; 67 S. W. 505; *Thweat v. State* (Tex. Cr. App.), 95 S. W. 517; *In re Liquor Dealers*, 6 Pa. Dist. Rep. 723; 28 Pittsb. L. J. (N. S.) 16; *Miller v. State*, 44 Tex. Cr. App. 99; 69 S. W. 522.

² In this case the court resorted to another section of the same act for a construction of the words "any election" wherein druggists

were prohibited from selling liquor on the "day of any State, county, township, primary or municipal election." *State v. Hirsch*, 125 Ind. 207; 24 N. E. 1062; 9 L. R. A. 170. Inasmuch as at that time no statute provided for a "primary election," and all such elections were purely voluntary, the construction given to the words "any election" was certainly a very strained one.

In Arkansas it was held that the statute did not apply to the election of school directors. *Stout v. State*, 43 Ark. 413; but in Iowa it is held it does under a statute using the words "any election day." *Hammond v. King*, 137 Iowa, 548; 114 N. W. 1062. So held in Kentucky. *Ford v. Moss*, 124 Ky. 288; 98 S. W. 1015; 30 Ky. L. Rep. 428. An election held to elect constables requires saloons to be closed. *Rose v. State*, 107 Ga. 697; 33 S. E. 439; *Long v. State*, 127 Ga. 285; 56 S. E. 424.

³ *Jones v. State*, 32 Tex. Cr. App. 533; 25 S. W. 124.

election cannot be collaterally attacked, even though the election was held on a wrong day.⁴ It is immaterial that the sale or gift of liquor has no reference to the election, where the statute says nothing on that question.⁵ The giving of liquor in a private house on election day as an act of hospitality has been held to be a violation of a statute forbidding a gift of liquor on election days.⁶ If one casually find liquor on an election day and give it to a friend he violates the statute;⁷ and the same is true if one sell or give away another's intoxicating liquor, even without being his agent.⁸ Where a statute provided that "if any person shall find and take possession of any intoxicating liquors at or near a polling place, or inform another of the whereabouts of the said intoxicating liquors, he shall be fined," and a person went into a saloon on an election day and picked up one of two bottles in the rear, and as he was starting to drink from it the defendant said, "That bottle is negro whisky; drink out of the other one," whereupon such person set down the bottle and drank from the other, it was held that the evidence did not show a violation of the statute.⁹ A sale to a person not living in the territory where the election is held is a violation of the statute.¹⁰ The offense is committed by giving another liquor, though the giver did not own it, and it is no defense that it was not given with an intent to influence the election.¹¹

⁴ *Wear v. State* (Tex. Cr. App.), 29 S. W. 1082. But it may be shown that no election could then be legally held, because the order for it was void. *Neimann v. State* (Tex. Cr. App.), 74 S. W. 558; or that no statute authorized the election. *Reuter v. State*, 43 Tex. Cr. App. 572; 67 S. W. 505.

But mere irregularities in the election notice can not be taken advantage of. *Sadler v. State*, 48 Tex. Cr. App. 507; 89 S. W. 974.

⁵ *Wolf v. State*, 59 Ark. 297; 27 S. W. 77; 43 Am. St. 34.

⁶ *Cearfoss v. State*, 42 Md. 203.

⁷ *Brownlow v. State*, 112 Ga.

405; 37 S. E. 733; *State v. Gibson* (Ga.), 28 S. E. 487; *Keith v. State*, 38 Tex. Cr. App. 678; 44 S. W. 847.

⁸ *Brownlow v. State*, *supra*.

⁹ *Anthony v. State*, 41 Tex. Cr. App. 393; 55 S. W. 61.

¹⁰ *Farwell v. Brown*, 12 Can. L. Jr. 216; *Widdlesfield v. Metcalfe*, 12 Up. Can. 247; affirmed 8 Can. L. Jr. 74; *In re Metcalfe*, 12 C. P. (Can.) 411.

¹¹ *Keith v. State*, 38 Tex. Cr. App. 678; 44 S. W. 847. In this case it was held that the donee was not an accomplice with the giver in a violation of the statute.

Sec. 790. Under what statute prosecutions for sales at prohibited times brought.

Under a statute forbidding sales of liquors on Sunday it was held that a conviction for that offense was no bar to an action brought for sale without a license which covered the same transaction, because, in order to convict under the first statute the prosecution must make proof of a different state of facts from that under the second.¹² So it has been held that prosecuting one's regular business on a Sunday, where a statute forbids it, is a distinct offense from a sale on Sunday where another statute forbids such a sale.¹³ In some jurisdictions it must be averred that the defendant had a license at the time of the sale.¹⁴ Under a statute forbidding a sale of liquors and keeping open on Sunday it has been held that there can be only one prosecution, not two.¹⁵ Where a statute provided that a seller of liquor must have a license in order to sell, and if he sold on Sunday he should be deemed guilty of selling without a license, the penalty was held not for selling on Sunday but for selling in violation of his license.¹⁶ So a sale on Sunday violates a statute forbidding the keeping open of a tippling house on that day, the act being a commission of two offenses.¹⁷ And where the evidence showed defendant furnished beer from his bar to customers on Sunday,

¹² *Arrington v. Commonwealth*, 87 Va. 96; 12 S. E. 224; 10 L. R. A. 242; *Weaver v. Mt. Vernon*, 6 Ohio Dec. 436.

¹³ *State v. Bearden*, 94 Mo. App. 134; 67 S. W. 973; *State v. Lucas*, 94 Mo. App. 117; 67 S. W. 971; *Weaver v. Mt. Vernon*, 6 Ohio Dec. 436.

¹⁴ *Regina v. French*, 34 U. C. 403; *Regina v. Radwell*, 50 Ont. 186; *Regina v. Duquette*, 9 U. C. C. P. (Can.) 28; *Regina v. Williams*, 8 Man. Rep. 342; 12 Can. L. T. 282.

In these cases in Canada a defendant can not be compelled to

testify against himself. *Regina v. Roddy*, 41 U. C. 291; *In re Askwith*, 31 Ont. 150; *Regina v. Nurse*, 2 Can. Cr. Cas. 57. And it must be shown that the liquor sold was not for medicinal purposes. *Regina v. White*, 21 Can. Pr. 354.

¹⁵ *Dorrian v. McHugh* [1907], 2 Irish Rep. 564.

¹⁶ *Schiller v. State*, 49 Fla. 25; 38 So. 706; *Williams v. Augusta*, 111 Ga. 849; 36 S. E. 607; *Crabb v. State*, 47 Fla. 24; 36 So. 169.

¹⁷ *Shuler v. State*, 125 Ga. 778; 54 S. E. 689.

it was held that he might be convicted of the offense of selling merchandise on Sunday as a dealer.¹⁸ Where a statute made it an offense to expose for sale any goods, wares, or merchandise, or to keep open any ale or porter house, tippling shop, grocery, or to sell or retail liquor, on Sunday, it was held that a person who sold liquor on that day violated the statute, although the sale was not made in continuation of his regular business during the other week days, and it was not necessary to prove that the sale was made in the pursuance of such business.¹⁹ Of course, a license to sell liquor does not suspend the Sunday law forbidding sales on that day,²⁰ and each sale is a separate violation.²¹ It has also been held that in a prosecution for a sale on Sunday the defense cannot insist that the sale was a violation of the law preventing a desecration of the Sabbath, and thereby escape punishment under the statute of limitations which had run against a prosecution for such desecration but not against the liquor statute making the sale unlawful against which the statute of limitations had not run.²² It has been held that a sale of liquor on Sunday may be prosecuted under a statute forbidding labor on that day.²³

¹⁸ *Savage v. State* (Tex. Cr. App.), 88 S. W. 351; 93 S. W. 114.

¹⁹ *State v. Lucas*, 94 Mo. App. 117; 67 S. W. 971; *State v. Bearden*, 94 Mo. App. 134; 67 S. W. 973.

²⁰ *Bennett v. State*, 49 Tex. Cr. App. 294; 92 S. W. 415; *McHugh v. Pollard*, 28 Vict. L. R. 581; 24 Austr. L. T. 149; 9 Austr. L. R. 50.

²¹ *State v. Heard*, 107 La. 60; 31 So. 384.

²² *Shepler v. State*, 114 Ind. 194; 16 N. E. 521; *State v. Popp*, 45 Md. 432.

²³ *Commonwealth v. Harrison*, 13 Allen, 559.

A statute against peddling and one against selling liquors are both violated by a sale by a peddler. *Commonwealth v. McConnell*, 11 Gray, 204. See *United States v. Morin*, 4 Biss. 93.

CHAPTER XXV.

CLUB SALES.

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Sec. 791. Incorporated clubs—Cases holding must have license.

A distinction should be borne in mind in the examination of a liability to the statutes requiring licenses for "sales" of intoxicating liquors between sales by an incorporated and an unincorporated club. When the sale is made by an incorporated club to one of its members or stockholders it is as much a sale as if made to a stranger. The corporation owns the liquor—the title thereto is vested in it—and not the member or stockholder, and although no intention exists to make a profit out of the transaction, the sale being at actual cost, that fact does not change the character of the transaction. So that it would seem to be a reasonable proposition that all incorporated clubs must have licenses in order to sell intoxicating liquors to their members, unless some statute especially

exempt them from the requirements of the general licensing acts.¹

Sec. 792. Incorporated clubs—Cases holding need not have license—Transactions not sales.

Notwithstanding what has been said in the previous section, the greater number of cases hold that certain social incorporated clubs are not required to have a license in order to sell to their members. Such is the holding in New York, although at one time, and a number of cases so held,² it was understood that such incorporated clubs must have a license to sell to their members. The statute in that State provided that, "Any person who, without having a license granted to him in pursuance of a law of this State permitting him to sell either strong or spirituous liquors, wines, ale, or beer, shall sell strong or spirituous liquors, wines, ale or beer in quantities less than five gallons at a time, or shall sell any strong or spirituous liquor, wine, ale or beer in quantities of five gallons or more at a time to be drunk or used on the premises where the same shall be sold, or in any garden or enclosure communicating with such premises, or in any public street or place contiguous thereto, shall be guilty of a misdemeanor." A

¹ Chesapeake Club v. State, 63 Md. 446; State v. Easton Social Club, 73 Md. 97; 20 Atl. 783; 10 L. R. A. 64; State v. Essex Club, 53 N. J. L. 99; 20 Atl. 769; South Shore Country Club v. People, 228 Ill. 74; 81 N. E. 805; 12 L. R. A. (N. S.) 519; People v. Law and Order Club, 203 Ill. 127; 67 N. E. 855; 62 L. R. A. 884; State v. Mudie (S. D.), 115 N. W. 107; State v. Minnesota Club (Minn.), 119 N. W. 494; Spokane v. Baughman (Wash.), 103 Pac. 14; Lloyd v. Canon City (Colo.), 103 Pac. 288 (Elks' Club); Army & Navy Club v. District of Columbia, 8 App. D. S. 544.

A member of such an organiza-

tion is not liable for liquors purchased by the proprietor and secretary of the club who took all the profits. Chisholm v. Strickland, 9 N. S. W. L. R. 391. But the directors and managers, as well as the bartenders actually making the sale are liable. Lloyd v. Canon City (Colo.), 103 Pac. 288.

² People v. Andrews, 115 N. Y. 427; 22 N. E. 358; 6 L. R. A. 128; reversing 50 Hun, 591; 3 N. Y. Supp. 508; People v. Sinell, 12 N. Y. Supp. 40; 34 N. Y. Ct. R. 898; People v. Bradley, 33 N. Y. St. R. 562; 11 N. Y. Supp. 594; Donald v. Scott, 76 Fed. 554; People v. Luhrs, 7 N. Y. Misc. Rep. 503; 28 N. Y. Supp. 498.

social club in Albany was indicted for having sold intoxicating liquor to one of its members without a license. This member made a written order upon a piece of paper for five glasses of liquor, and delivered it to the steward, who filled it from the stock of liquors belonging to the club. This liquor was served to this member and his associates, who drank it upon the premises. They were all members of the club. The next evening this member paid the steward for the liquor, and the money went into the club's treasury. The club was incorporated as a social club, to establish and maintain a library, reading and assembly rooms, and to promote social intercourse among its members. It was managed by a board of trustees with a membership limited to one hundred and fifty persons of full age and residents of the city of Albany. A person could be admitted as a member only when proposed by some member to whom he was personally known, and upon the recommendation of the board of trustees, and by an election by the members at a regular meeting of the club by a two-thirds vote. There were initiation fees and annual dues of more than a nominal amount. The club maintained a club house in Albany, in which were parlors, a ballroom, dining-room, kitchen, library, card rooms, billiard, pool and store rooms, with apartments for the janitor. Meals, cigars and liquors were served to members of the club upon their written orders at a price fixed therefor by the house committee which was charged to the member, who paid therefor monthly. The money so paid in by the members, together with the annual dues, was used in defraying the general expenses of the club, its library, reading rooms, servants, lights and fuel, and in keeping up its stock of provisions, cigars and liquors. Its business was conducted solely for the entertainment and recreation of its members, and not for the purpose of deriving a profit beyond the defraying of its expenses. Residents of Albany might be introduced to the club by any of its members once a year. Non-residents might in like manner be introduced, not to exceed ten times a year. A member introducing a visitor was required to register his name in a book kept for that purpose, and to be responsible for his conduct while

in the club house. From ten to twelve entertainments—social, literary, musical and dramatic—were given annually, to which the female friends of its members were invited. Upon these facts the court held that the club was not liable for having sold the liquor illegally, and that it did not require a license. The statute did not authorize the issuance of a license to such a club. “As we have seen,” said the Court of Appeals, “the defendant is a social club organized under the statute for a legitimate purpose, to which the furnishing of liquors to its members is merely incidental and is not unlike the supplying of dinners or articles which the members may desire for his own comfort and entertainment. The defendant has a limited and selected membership. And while the property and supplies are technically owned by the club, each member is, in equity, an equal owner in common. It was not organized for the purpose of engaging in a business for profit, or for the traffic in liquors. It engages in no business other than that which pertains to the maintenance of its library, reading rooms, and the social intercourse and comfort of its members. Liquors, as well as other supplies, are distributed to its members upon the written order of the member at a price fixed by the officers of the club designed to cover the purchase price and disbursements in serving. These orders pass to the steward or treasurer of the club and are charged against the member, who settles therefor monthly. We think that the transaction with Stark did not amount to a sale within the meaning of the statute. It was but a distribution among the members of the club of the property that belonged to them. The fact that a payment was made does not change the character of the act, for it was but the means adopted by which each member could recover his own and not that belonging to his fellow member. The payment went into the treasury to ultimately restore that which he had taken.”³ In passing upon the case the court quoted from an English case, as do nearly all the cases holding similar views. “The Legislature have come to the conclusion that it is inadvisable that in-

³ *People v. Adolphi Club*, 149 A. 510; 52 Am. St. 700; affirming N. Y. 5; 43 N. E. 410; 31 L. R. 79 Hun, 415; 29 N. Y. Supp. 789.

toxicating liquors should be sold anywhere without a license. The enactment is limited to 'sales' of intoxicating liquors, and only seemed aimed at sales by retail traders because the wholesale trade is not touched. The question here is, Did Graff, the manager, who supplied the liquors to Foster, effect a 'sale' by retail? I think not. I think Foster was an owner of the property, together with all other members of the club. Any member was entitled to obtain the goods on payment of the price. A sale involves the element of a bargain. There was no bargain here nor any contract with Graff with respect to the goods. Foster was acting upon his rights as a member of the club, not by reason of any new contract, but under his old contract of association, by which he subscribed a sum to the funds of the club and became entitled to have ale and whisky supplied to him as a member at a certain price. I cannot conceive it possible that Graff could have sued him for the price as the price of goods sold and delivered. There was no contract between two persons, because Foster was vendor as well as buyer. Taking the transaction to be a purchase by Foster of all the other members' shares in the goods, Foster was as much a co-owner as the vendor. I think it was a transfer of a special property in the goods to Foster, which was not a sale within the meaning of the section."⁴ So where a limited company kept a club for the use of the shareholders of the company and the directors purchased liquor and directed the manager or servant to distribute it among the shareholders according to a fixed tariff, the court held that what he did was not a sale within the meaning of the statute.⁵ In Missouri the question under consideration was discussed at

⁴ Graff v. Evans, 8 Q. B. Div. 373; 46 J. P. 202; 51 L. J. M. C. 25; 46 L. T. 347; 30 W. R. 380.

⁵ Newell v. Hemingway, 53 J. P. 324; 58 L. J. M. C. 46; 60 L. T. 544.

"Where intoxicating liquor, which is *bona fide* the property of a club, is supplied to a member of the club who pays for it, the trans-

action, though resembling a sale, is not a sale within the meaning of the licensing acts. In substance the member is consuming his own property, and the mode of payment is a matter of internal arraignment regulated by the rules of the club." Chalmers' Sale of Goods (6th ed.), p. 10.

length, and the following conclusion reached: "We think that where a social club, as in this case, is clearly a *bona fide* organization with a limited membership, and admission into it cannot be obtained by any person at his pleasure, and its property is actually owned in common by its members, a distribution of wine or other liquors belonging to such a club among its several members is not a sale by retail or in original packages within the meaning and purview of our dramshop act, although technically the act does amount to a sale for some purposes. The *bona fides* of the organization are in each case a question for the court or jury under proper instructions of the court."⁶ There are many other cases holding to the same rule. Thus, an unincorporated club was organized with a select, limited number of members, duly elected officers, the purpose being to furnish refreshments to those who belonged to it. A salaried steward was employed. One dollar was charged for admission and checks were sold at five cents apiece. It was held that buying the liquor and distributing it among the members was no violation of the statute.⁷ In a Maryland case the Supreme Court of that State said: "After careful consideration of the facts set out in the general statement, we are of the opinion that the transaction was not a 'sale' of beer within the intent and meaning of the Act of 1866. It will be observed that the license laws which forbid the sale or barter of spirituous liquors have never been construed as applicable to social clubs, where liquors are procured for the use of the members and are furnished to them in the manner described in the present case, and we think it very clear that no license is required for the reason that such a transaction is not a 'sale' within the meaning of

⁶ State v. St. Louis Club, 125 Mo. 308; 28 S. W. 604; 26 L. R. A. 573. In this case the attempt was to forfeit the charter of the club, because of its violation of the liquor statute.

⁷ Commonwealth v. Pomphret, 137 Mass. 564; 50 Am. Rep. 340. "One inquiry," says the court, "al-

ways is whether the organization is *bona fide* a club, with limited membership, into which admission can not be obtained by any person at his pleasure, and in which the property is actually owned in common with the other members." The court followed Commonwealth v. Smith, 102 Mass. 144.

the license acts; and, by parity of reasoning, we conclude that the members of such associations, who obtain refreshments and liquors at the club by paying into the common fund the price fixed by the regulation of the society, cannot be said in any sense to buy from the corporation, nor can the corporation be said to sell to the members within the meaning of the Act of 1866. The society is not an ordinary corporation, but a voluntary association or club, united for voluntary purposes. Each member must be elected, and each is joint owner of the property and assets and entitled to the privileges of the society so long as he remains a member. Among these privileges is the partaking of the provisions and refreshments provided for the use of the members. These are not sold to him by the corporation, but furnished to him by the steward upon his paying into the common fund what is equivalent to the cost of the article furnished, and what is so paid is expended in keeping up the supply for the use of the members. Such a transaction is not a barter or sale in the way of trade, and, therefore, not within the purview or meaning of the Act of 1866.”⁸

⁸ Seim v. State, 55 Md. 566; 39 Am. Rep. 419.

To the same effect are Tennessee Club v. Dwyer, 11 Lea, 452; 47 Am. Rep. 298; Piedmont Club v. Commonwealth, 87 Va. 541; 12 S. E. 963; State v. McMaster, 35 S. C. 1; 28 Am. St. 826; 14 S. E. 290; Borden v. Montana Club, 10 Mont. 330; 25 Pac. 1042; 11 L. R. A. 593; 24 Am. St. 27; Koenig v. State, 33 Tex. Cr. Rep. 367; 26 S. W. 835; 47 Am. St. 35; Klein v. Livingston Club, 177 Pa. St. 224; 35 Atl. 606; 34 L. R. A. 94; 55 Am. St. 717; State v. Austin Club, 89 Tex. 20; 30 L. R. A. 500; 33 S. W. 113; Commonwealth v. Smith, 2 Pa. Super. Ct. 474 (*contra*, Commonwealth v. Steffner, 2 Pa. Dist. Rep. 152); Commonwealth

v. Pefferman, 12 Pa. Super. Ct. 202; Winter v. State, 33 Tex. Cr. Rep. 395; 26 S. W. 839; Ward v. State (Tex.), 116 S. W. 1154; Commonwealth v. Smith, 2 Pa. Super. Ct. 474; 39 W. N. C. 181; Newell v. Hemingway, 53 J. P. 324; 58 L. J. M. C. 46; 60 L. T. 544; 16 Cox C. C. 604.

“The condition of the bond, requiring the obligee to keep an open, quiet, and orderly house or place for the sale of spirituous, vinous or malt liquors, together with the provisions of the statute defining what are open and quiet houses, and the further provision requiring the posting of the license in a public place, indicate that the Legislature intended that the business of selling spirituous, vin-

Sec. 793. Club in existence when licensing act adopted.

In two cases at least weight was given to the fact that the clubs in controversy had been in existence before the licensing

ous, or malt liquors should be conducted in a public place, open to all persons to enter therein, to the observation of those passing by such place, and guarding against all of those things which would be calculated to lure the unsuspecting into such places, or to offend or corrupt those who might visit them. These provisions are inconsistent with the idea that the Legislature was attempting to regulate the dispensing of liquors in the private manner shown by the facts of this case, but shows that the business, as expressed in the article quoted [‘any person who shall pursue or follow any occupation, calling or profession, or do any act taxed by law, without first obtaining a license therefor, shall be fined,’ etc.], was intended to be a business conducted in a public manner, and in a place to which the public would have free access as stated above. We think this tends very strongly to support the position taken by the appellee in this case, that the language of the statute does not embrace the business as transacted by this club. Under the conditions of the bond required of persons engaged in the business of selling liquors and the provisions of the statute regulating the manner of conducting it, no license could be obtained to sell spirituous liquors in the private manner that it was done by this club and has been done by many

other clubs in the State for many years. The conclusion must be drawn that the Legislature either did not intend that such business as that conducted by the Austin Club should be embraced in the terms of the statute, or it did intend that all sales of a private character should be absolutely prohibited. We do not think that the latter conclusion can be drawn from this and other provisions of the Penal Code upon the subject of selling spirituous liquors. The Penal Code prohibits the sale of liquors under various other circumstances, as for instance, all sales to Indians, to minors, and in local option districts, without regard to whether the person selling has a license therefor or not; and if the Legislature intended to prohibit this class of business, if it be termed a business, it might easily have done so in plain and unambiguous language, as it has done with reference to the prohibited sales above stated.” *State v. Austin Club*, 89 Tex. 20; 33 S. W. 113; 30 L. R. A. 500.

A sale to a person not a member of the club, however, is illegal. *Stevens v. Wood*, 54 J. P. 742; *Queen v. Langford*, 55 J. P. 484; *Pendennis Club v. Louisville*, 7 Ky. L. Rep. (abstract) 831; *Regina v. Austin*, 17 Ont. Rep. 743; *King v. Lightburne*, 4 Can. Cr. Cas. 358.

As to validity of sales to members when valid, see *Queen v.*

statute had been adopted. "But it seems to us that inasmuch as this club has been organized as such since 1878," said the Supreme Court of Missouri in 1894, "it is not created for profit, and that the Legislature must have been cognizant that many similar organizations had been created under the same statute; and, if it had been the intention to require them to take out a liquor license, it would have made some provision for it, or provided a license tax suitable to the case, as they cannot under the dramshop act exercise their other corporate rights. The club has pursued this method of providing refreshments for some fifteen years. Its right seems never to have been challenged before, although the dramshop act has remained substantially the same all these years. Where the meaning of the law is thus seriously doubted, a proceeding in the nature of a criminal prosecution, which proposes to forfeit defendant's charter, ought to be strictly construed."⁹

Sec. 794. Statute expressly applying to clubs.

All cases of this character must be carefully distinguished from those cases where the statute is made in terms directly applicable to clubs or associations and prohibiting their making sales or furnishing liquors. In such instances there is no room for construction.¹⁰ Such was the case where a statute pro-

Walsh, 29 Nov. Sco. 521; reversing 19 Nov. Sco. 336; *Regina v. Slaterry*, 26 Ont. Rep. 148; *Regina v. Charles*, 24 Ont. 432; *Regina v. Hodgis*, 24 Ont. 433; *Regina v. Hughes*, 2 Can. Cr. Cas. 5; *Queen v. Harrell*, 1 Can. Cr. Cas. 510; *Victoria v. Union Club*, 3 B. C. 363; *Davies v. Burnett*, 71 L. J. K. B. 355 [1902]; 1 K. B. 666; 86 L. T. 565; 50 W. R. 391; 66 J. P. 406; *Eureka Club v. Commonwealth*, 105 Va. 564; 54 S. E. 470; *Canon City v. Manning*, 43 Colo. 144; 95 Pac. 537; *Regina v. Austin*, 17 Ont. Rep. 743.

A city may be enjoined for attempting to close a social club whose operations do not violate an ordinance of the city. *Canon City v. Manning*, 43 Colo. 144; 95 Pac. 537.

⁹ *State v. St. Louis Club*, 125 Mo. 308; 28 S. W. 604; 26 L. R. A. 573; *Klein v. Livingston Club*, 177 Pa. 224; 35 Atl. 606; 34 L. R. A. 94; 55 Am. St. Rep. 717; *State v. Austin Club*, 89 Tex. 20; 33 S. W. 113; 30 L. R. A. 500.

¹⁰ *State v. Maryland Club*, 105 Md. 585; 66 Atl. 667; *State v. Shumate*, 48 W. Va. 490; 29 S. E. 1001.

vided that "every place where intoxicating liquors are sold to be drunk on the premises shall, for the purposes of this act, be regarded and considered a barroom, and the possession of liquors and the selling or disposing of the same to be drunk on the premises shall constitute and make the place a barroom," and also provided that the "excise board may, in its discretion, issue a license to any duly incorporated club on the petition of the officers of the club."¹¹ So where a statute forbade the retailing of liquor in the way of business as well as retailing not in the way of business, it was held that the furnishing of liquor by a club to its members was a violation of its provisions.¹² Where an ordinance provided that "every club house and club room and other places of resort generally known as such, wherein spirituous liquors are sold at retail, shall pay a license," it was held that social clubs must have licenses.¹³

Sec. 795. Club required to have a license—Dramshop defined.

Not by any means are the decisions uniform with respect to the question under consideration. This statement is well exemplified by the cases in Illinois. In one case the State brought suit to forfeit the charter of a social club and the facts involved were presented by a plea in defense. The court in its opinion holding the plea insufficient sets out the facts as follows: "Appellant is a corporation not for pecuniary profit, and its objects, as stated in its charter, are pleasure, social

¹¹ *Army and Navy Club v. District of Columbia*, 8 App. D. C. 544.

¹² *Martin v. State*, 59 Ala. 34.

¹³ *Kentucky, etc., Club*, 92 Ky. 309. See also *State v. Boston Club*, 45 La. Ann. 585; 12 So. 895; 20 L. R. A. 185.

A statute which exempts a particular club by name from the provisions of the general licensing statutes is unconstitutional, because it is special legislation.

Beauvoir Club v. State, 148 Ala. 643; 42 So. 1040.

See generally *Wright v. Macon (Ga.)*, 64 S. E. 807; *University Club v. Louisville*, 11 Ky. L. Rep. 902.

A club may be declared by statute to be a nuisance. *State v. Kapresky (Me.)*, 73 Atl. 830; *State v. Johns (Iowa)*, 118 N. W. 295.

recreation, and the promotion of outdoor sports. The number of resident members is limited to two thousand and non-resident members to two hundred and fifty. An applicant for membership must be recommended in writing by at least two resident members, and applications are referred to and acted upon by a board of governors. The vote upon admission is by secret ballot, two negative votes excluding, and the entrance fee is \$200 and annual dues \$50, payable semi-annually. Membership is terminated by resignation, failure to pay dues, or conduct at variance with the purpose of the corporation or the house rules. Each member is given a certificate evidencing his respective share in the club and his right to its privileges. Appellant owns a club house and property in Chicago in that portion of the city which was formerly the village of Hyde Park, wherein no license can be issued to anyone to keep a dramshop, and the club property represents an expenditure of \$250,000. In addition to the club house, appellant has tennis courts, polo grounds, golf courses, stables and other buildings, and the club house is an elaborate one, including a library, reading rooms, card and billiard rooms, a dining-room, restaurant, and other facilities. It maintains a riding school, with horses and equipment, and employs a riding master and teachers. It holds regular receptions, lectures, musical and literary entertainments, and the library and reading room is well stocked, and it serves lunches and dinners. The purpose of the club is the physical and mental improvement of its members, and, to that end, physical and athletic exercises are provided for the improvement of the bodily and mental health of the members and their families. All the members share equally in the use of the house, grounds, library, literature and entertainments, but members are charged and pay for meals and liquors, and for the services of caddies, boatmen and teachers, and for horses, golf supplies, and special services. There are about fifty servants, including cooks, stewards, porters, waiters, hostlers, and other help, and the membership includes many of the best known and most respectable men in the social and professional world in the city of Chicago. Appellant keeps a stock of intoxicating

liquors in its club house which it furnishes only to its members and their guests accompanying them, upon a member's written order therefor. It maintains a steward's room, used exclusively by the club steward for preparing and dispensing liquors. The member ordering liquor is charged with it, and the charges are paid upon bills rendered semi-monthly. The charge is no more than the amount paid by the appellant for the liquor and the service, but the charge is greater than the charge for similar supplies in places patronized by the public. The club has obtained a United States retail liquor dealer's license, but the plea avers that it was done unadvisedly and was not necessary." This plea was held insufficient as a defense by the lower court and that decision was affirmed on appeal. The statute of Illinois provided that whoever, not having a license to keep a dramshop, shall sell any intoxicating liquor in less quantity than one gallon, or in any quantity, to be drunk upon the premises, should be punished by fine or imprisonment, or both. "Counsel for appellant," said the court, "admits that the letter of the statute requires any and every one, without exception, who sells intoxicating liquors in less quantity than one gallon, or in any quantity, to be drunk upon the premises, to take out a license to do so, and he fully appreciates that the definition of a dramshop adopted by the Legislature is broad enough to include any place where intoxicating liquors are retailed in less quantity than one gallon; but he says that appellant contests the right to demand a license because it refuses to have its club house considered a dramshop, or to be regarded as a dramshop keeper. The argument is that the court should not take the language of the statute literally, and that the general intent and spirit of the act do not require that it should be so taken. A dramshop, as defined by the statute, is a place where spirituous, or vinous, or malt liquors are retailed by less quantity than one gallon, and it is true that the term has, in popular acceptance, a more restricted meaning. It is commonly used to designate a place where intoxicating liquor is sold at a public bar frequented by the public without restriction, and, if the Legislature had failed to define what was intended by the term

'dramshop,' it would be reasonable to presume that it was used in the ordinary and popular sense; but, of course, the Legislature had a right to define what was meant by the term as used in the act, and the courts are bound by the definition. The argument is the same as that of the druggist, Wright, who felt himself aggrieved that his drug store should be brought within the definition of a dramshop by the sale in good faith of liquor for purely medical purposes. His chief business was the sale of drugs and medicines, and he did not even sell intoxicating liquors as a beverage, as the appellant does. The court put in the background the popular idea of the dramshop, saying that undue importance was given to that term, and enforced the law according to its literal meaning. The court said: 'The only safe course is to enforce the law as the Legislature has made it, and not defeat its execution upon some hypothetical theory of public policy that finds no place or recognition in the act itself.'¹⁴ Appellant's club house would be no more nor less a dramshop with the license than without it, and, if the facts bring it within the definition adopted by the Legislature, it must be held to be a dramshop, whether the definition accords with the popular understanding or not." "It is undoubtedly equitable," continued the court, "as said in the Pennsylvania case,¹⁵ that members of a club who drink the liquor should pay for it, and that those who do not touch it should not pay anything; but we do not see how it can be said that the transaction is merely an equitable distribution between the members of property belonging to them in equal shares. The liquor belongs to the corporation as a legal entity, and no member owns any share of the liquor, as a tenant in common with the other members or otherwise. An association organized merely for social, literary, scientific, or political purposes, although not incorporated, is not a partnership. A member of such association has no individual right or interest in the property and owns no share of it, but only has a right to the joint use so long as he continues to be

¹⁴ Wright v. People, 101 Ill. 126. ston Club, 177 Pa. 224; 35 Atl. 606; 34 R. A. 94; 55 Am. St.

¹⁵ Referring to Klein v. Living- 717.

a member. Even if they were tenants in common, a transfer of a specific part of the property to one for a stipulated price would be a sale.¹⁶ Appellant, however, is incorporated, and its stockholders are not tenants in common of its property, but the title is in the corporation. The right of a stockholder is to participate, according to the amount of his stock, in the profits, and, upon the dissolution of the corporation, to share in the assets remaining after the payment of debts. If a member should clandestinely enter the club house and withdraw from what is called the 'common property' as much liquor as would be represented by his interest as a member, it would hardly be contended that the act would not be larceny. The argument presented to show that the dispensing of liquors for fixed prices paid by the members is not a sale, if applied to the case supposed or any other conceivable transaction, would certainly be unique. We agree with the views expressed in *State v. Easton Social, Literary and Musical Club*¹⁷ that there is no occasion to be astute and to indulge in questionable refinements in order to relieve these corporations of the just consequences of their acts, or to endeavor by artificial or fictitious reasonings to permit persons in combinations to do what individuals without combination could not do. The fact that there is no profit in a sale does not deprive the transaction of its character as a sale, and surely it makes no difference that the sale of the liquor is only incidental to the main purpose of the club.¹⁸ The sale of liquor is but an incident to the business of a drug store or a restaurant. It is certainly but a trifling incident to the business of a large hotel. The business is carried on in department stores, where it is but a minor and incidental branch of the whole business.¹⁹ It is immaterial whether the main purpose of a corporation is social, pleasure, or money-making by the sale of merchandise, if intoxicating liquor is sold at retail as an incident of the main purpose or

¹⁶ See this argument in effect applied to a partnership in *Marmont v. State*, 48 Ind. 21.

¹⁷ 73 Md. 97; 20 Atl. 783; 10 L. R. A. 64.

¹⁸ Citing *Mohrman v. State*, 105 Ga. 709; 32 S. E. 143; 70 Am. St. 74; 43 L. R. A. 398.

¹⁹ Citing *Chicago v. Nitcher*, 183 Ill. 104; 55 N. E. 707; 48 L. R. A. 261; 75 Am. St. 93.

otherwise; and neither is the fact that the public generally are not admitted.”²⁰

Sec. 796. Club's liability for occupation tax.

If clubs, organized along the lines described in these sections and following such practices, are not required to take out licenses to sell liquors to their members, it is equally clear that they are not liable to an occupation or other tax imposed upon dramshops or saloons. A club room is not “a house for retailing spirituous liquors.” “We are of opinion that, upon authority and reason, it must be held, under the facts of the present case, the transaction was not the sale of the liquor in the way of trade, and that neither the association, its members, nor its steward, were engaged in the occupation of selling liquors. If this be true, was the club room a place for retailing liquors? It is very clear, both from the decisions we have cited and our statutes that the club, its members, or steward, are not engaged in the occupation of selling liquors in less quantities than one quart.”²¹

²⁰ *South Shore Club v. People*, 228 Ill. 74; 81 N. E. 805; 12 L. R. A. (N. S.) 519. The court fully approves *People v. Law and Order Club*, 203 Ill. 127; 67 N. E. 855; 62 L. R. A. 884; and disapproves *Klein v. Livingston Club*, 177 Pa. 224; 35 Atl. 606; 34 L. R. A. 94; 55 Am. Rep. 717; and *State v. St. Louis Club*, 125 Mo. 308; 28 S. W. 604; 26 L. R. A. 573.

Other cases in harmony with this Illinois case are *Mohrman v. State*, 105 Ga. 709; 32 S. E. 143; 43 L. R. A. 398; 70 Am. St. 74; *Beauvoir Club v. State*, 148 Ala. 613; 42 So. 1040; *State v. Essex Club*, 53 N. J. L. 99; 20 Atl. 769; *Martin v. State*, 59 Ala. 24; *State v. Neiss*, 108 N. C. 787; 13 S. E.

225; 12 L. R. A. 412; *People v. Soule*, 74 Mich. 250 (N. W.); 2 L. R. A. 494; *United States v. Wittig*, 2 Low Dec. 466; *Territory v. Pacific Club*, 16 Hawaii, 517; *Manning v. Canon City (Colo.)*, 101 Pac. 978; *Spokane v. Baughman (Wash.)*, 103 Pac. 14.

²¹ *Koenig v. State*, 33 Tex. Cr. App. 367; 26 S. W. 835; *State v. Austin Club*, 89 Tex. 20; 33 S. W. 113; 30 L. R. A. 500; *Tennessee Club v. Dwyer*, 11 Lea, 452; 47 Am. Rep. 298.

Under an ordinance taxing social clubs the burden is on the city to show the defendant club is within the provisions of the ordinance imposing the tax. *Manasses Club v. Mobile*, 121 Ala. 561; 25 So. 628.

Sec. 797. Club sales in prohibition territory.

When we come to deal with club sales or the keeping of intoxicating liquors in prohibition districts, a very different question is presented from those discussed in other sections of this chapter. This was the turning point in a Maryland case which the court distinguished from an earlier case in the same State,²² in passing upon a statute not in force when the earlier case was decided. The statute absolutely forbade the sale of liquors within a local option prohibition district, and this was held to prevent the furnishing of liquors by the steward or manager of an incorporated social club to its members, upon the payment of prices fixed by the regulations of the club. The transaction was held to be a sale within the meaning of the local option statute.²³

Sec. 798. Schemes to evade the statute—Bona fides of incorporation.

But the courts have held uniformly that if the method selected to sell liquor to members of the club is a mere device to evade the statute requiring licenses, then the fact of there having been a sale by the club, whether incorporated or not, to one of its members will not prevent a criminal prosecution for the violation of the statute. Thus, where a club, having a treasurer and other officers, met every Sunday, and each person on becoming a member paid certain periodic assessments so long as he was a member to form a fund to pay expenses and for relief, and the treasurer pursuant to the club's order, on each Saturday evening purchased for the club a keg of beer, which he placed in the hall where the meetings

²² Seim v. State, 55 Md. 566; 39 Am. Rep. 419.

²³ State v. Easton Social, etc., Club, 73 Md. 97; 20 Atl. 783; 10 L. R. A. 64; Chesapeake Club v. State, 63 Md. 446 (an equally divided decision); State v. Horacek, 41 Kan. 87; 21 Pac. 204; 3 L. R. A. 687; State v. Lockyear, 95 N. C. 633; 59 Am. Rep. 287;

Krnavek v. State, 38 Tex. Cr. Rep. 44; 41 S. W. 612 (distinguishing State v. Austin Club, 89 Tex. 20; 33 S. W. 113; 30 L. R. A. 500); State v. Neis, 108 N. C. 787; 13 S. E. 225; 12 L. R. A. 412; State v. Kline (Ore.), 93 Pac. 237; Coleman v. State, 53 Tex. Cr. App. 578; 111 S. W. 1011.

of the club were held, and on Sunday, whenever a member desired a glass of beer he got it, drank it on the premises, and paid to the treasurer five cents, which that official placed with the club's funds to pay expenses and for relief for sickness and other mishaps to its members, it was held that the scheme was a mere device to evade the statute and that each sale of a glass was a distinct violation of its provisions. "If the transaction," said the court, "be not an evasion and violation of the law, then a number of persons may do that lawfully which, if done by one person, would be unlawful. It would be a reproach to the law and its administration if a combination of persons could, by such an arrangement, evade the law and thwart the legislative will."²⁴ In an early Massachusetts case the divergent lines in cases of this kind were plainly put in this way: "If the liquors really belonged to the members of the club, and had been previously purchased by them, or on their account, of some person other than the defendant, and if he merely kept the liquors for them, and to be divided among them according to a previously arranged system, these facts would not justify the jury in finding that he kept and maintained a nuisance within the meaning of the statute under which he is indicted. There would be neither selling nor keeping for sale. On the other hand, if the whole arrangement were a mere evasion, and the substance of the transaction were a lending of money to the defendant that he might buy intoxicating liquors to be afterward sold and charged to the associates, or if he was authorized to sell, or did sell, or keep any of the liquors with intent to sell, to any person not members of the club, he might well be convicted. This, however, would be a question not of law but of fact, and would fall wholly within the province of the jury."²⁵ In Massachusetts it was shown that the club in question had four

²⁴ *Marmont v. State*, 48 Ind. 21. The court really rested its opinion upon the fact that the club was only a partnership, and that each sale was a sale by the partnership to a member of it. This

the court held the statute forbade. Followed in *Haggard v. State*, 26 Ind. App. 695; 59 N. E. 1135.

²⁵ *Commonwealth v. Smith*, 102 Mass. 144.

hundred members, officers, a steward, one dollar initiation fee. A card of admission was given to each member. The proceeds were used in buying liquor in the name and as the property of the club. Zinc checks were given the members on their paying for them, which were received for the liquors. Members only were admitted to the club rooms, and no others permitted to partake. Money never passed for liquor but checks only. It was the steward's duty to furnish liquor for checks. One became a member only after "proposal of name and being voted on." Three votes rejected. On joining the members signed the constitution and paid a membership fee. Applicants had been rejected. Records of the club, with constitution, by-laws, minutes of meetings, and signatures of members, treasurer's accounts, were offered in evidence, and the zinc checks. Upon these facts the court in substance instructed the jury: "First. If the club was *bona fide*, and the liquor owned by it, the distribution among the members did not constitute a 'sale' within the meaning of the statute. Second. If two or more united in buying intoxicating liquor, and then distributed it among themselves, they do not violate the statute, and the intent with which they do this is immaterial. If they intend in this manner to obtain intoxicating liquor to drink without thereby subjecting any person to the penalties of the statute, they still act with impunity. It is not a violation of the law if they united in good faith in dividing it. If two persons buy a gallon of liquor and divide it among themselves they act with impunity, but if this is a mere device to cheat the Government out of its license fee and prevent the due execution of law, it is not a protection and the defendant does not act with impunity." ²⁶

²⁶ Commonwealth v. Ewing, 145 Mass. 121; 13 N. E. 365. To same effect is State v. Mercer, 32 Iowa, 405, except that the court held that the facts showed a mere evasion of the law. State v. Sutton (Tex. Cr. App.), 40 S. W. 501; Feige v. State, 49 Tex. Cr. App. 13; 95 S. W. 506; Adkins v. State, 49

Tex. Cr. App. 524; 95 S. W. 509; Rickert v. People, 79 Ill. 85; State v. Tindall, 40 Mo. App. 271; Sothman v. State, 66 Neb. 302; 92 N. W. 303. If the facts are clearly made out, it is the duty of the court to instruct the jury that the defense was not a valid one. Commonwealth v. Tierney, 148 Pa. St.

Sec. 799. Quasi club sales.

There is a kind of *quasi* club transactions that cannot be classified under any other head better than the one we have

552; 24 Atl. 64; Commonwealth v. Brem, 5 Pa. Super. Ct. 104; Commonwealth v. Alpa, 24 Super. Ct. 454; State v. Lockyear, 95 N. C. 633; 59 Am. Rep. 287; State v. Neis, 108 N. C. 787; 13 S. E. 225; 12 L. R. A. 412; People v. Andrews, 115 N. Y. 427; 6 L. R. A. 128; 22 N. E. 358; reversing 50 Hun, 591; 3 N. Y. Supp. 508; State v. Horacek, 41 Kan. 87; 3 L. R. A. 687; State v. Bacon Club, 44 Mo. App. 86; Stewart v. Waterloo Turn Verein, 71 Iowa, 226; 60 Am. Rep. 786; State v. Kline (Ore.), 93 Pac. 237.

In Pennsylvania the court refused to approve an incorporation of a club where it did not appear that any necessity existed except for the disbursing of liquor to the members of the club, although it purported to be "to encourage social intercourse among its members, to establish and maintain a well-regulated club house for the exercise of innocent and lawful amusements and the cultivation of literary attainments." *In re East End Social Club*, 8 Pa. Dist. Rep. 272.

Where several persons clubbed together and appointed one of their number to purchase liquor in bulk for them, each member reimbursing him monthly for the cost of the liquor he consumes, and the person so purchasing for the club acquired the right of property in the stock of liquors and kept possession of them, it was held that

he might be convicted of "keeping for sale" liquors, although he made no profit on the transaction. *King v. Carvech*, 8 Can. Cr. Cas. 78; *King v. Lighthouse*, 4 Can. Cr. Cas. 358; *Bowyer v. Pearcey Supper Club Co.* [1893], 2 Q. B. 156; *Adkins v. State*, 49 Tex. Cr. App. 524; 95 S. W. 506; *Feige v. State*, 49 Tex. Cr. App. 13; 95 S. W. 506; *Sothman v. State*, 66 Neb. 302; 92 N. W. 303; *Regina v. Austin*, 17 Ont. Rep. 743; *In re Lyman*, 28 N. Y. App. Div. 209; 50 N. Y. Supp. 898; *Krnavek v. State*, 38 Tex. Cr. App. 44; 41 S. W. 612; *Sutton v. State* (Tex. Cr. App.), 40 S. W. 996; *Pendennis v. Louisville*, 7 Ky. L. Rep. (abstract) 831; *Mueller & Co. v. Commonwealth* (Ky.), 116 S. W. 336; *Wathan, etc., Co. v. Commonwealth* (Ky.), 116 S. W. 239.

If a permit be issued to an illegal club, it may be revoked under a statute authorizing the revocation of licenses or permits. *In re Lyman*, 28 N. Y. App. Div. 209; 50 N. Y. Supp. 898.

A person selling liquor to a certain number of men who pay him for it in a lump sum is not guilty of making a sale to each of them of the quantity given each on their distribution of it among themselves, even though his servant, without his knowledge or consent, assists in making the distribution. *Mueller, etc., Co. v. Commonwealth* (Ky.), 116 S. W. 336.

here adopted. They are instances where men masquerade under the ostensible form of a club, and yet are in fact mere associations to evade the liquor law. Perhaps these transactions fall under the section relating to schemes to evade the law, but they are of a more temporary character than the clubs there considered. Usually the dues in these clubs are merely nominal and the club is practically one only in name. Thus, where the testimony showed that the steward ordered beer for the club members and placed it in the club room for them, that each member paid one dollar for membership and received tickets for his interest in the beer ordered, and when he desired a glass of beer one of these tickets was put in a box and a glass of beer drawn for him, and that the keg of beer was ordered by the steward for the purchasers of the tickets and was paid for by him, it was held that he had made a sale of the beer and was liable, and that the makeshift device of a club transaction did not protect him.²⁷ But where several persons contributed to a fund and sent one of their number to purchase the liquor, which he did, and they consumed it together, it was held that there was no violation of the statute nor an illegal sale.²⁸ So a foreman of a gang of laborers who

²⁷ *Adkins v. State*, 49 Tex. Cr. App. 524; 95 S. W. 506; *Feige v. State*, 49 Tex. Cr. App. 513; 95 S. W. 506. In the last case it should be remarked that the court held that when the members parted with their money it went into the club's treasury, became the club's money; so that when it took the money and went out to buy the beer, it bought it on its own behalf, and therefore when the manager sold it he became liable.

On a trial for violation of the local option laws, evidence of other clubs cannot be given. *Coleman v. State*, 53 Tex. Cr. App. 578; 111 S. W. 1011.

Cases on the subject of the text in the section are *Bills v. State*

(Tex. Cr. App.), 64 S. W. 1047; *Sothman v. State*, 66 Neb. 302; 92 N. W. 303; *Cullinan v. Criterion Club*, 39 N. Y. Misc. Rep. 270; 79 N. Y. App. 482; *Commonwealth v. Brem*, 5 Pa. Super. Ct. 104.

Those belonging to such a club are not liable for purchases made by its proprietor and secretary who take all the profits. *Chisholm v. Strickland*, 9 N. S. W. L. R. 391. *Contra*, *State v. Mudie* (S. D.), 115 N. W. 107.

²⁸ *Hogg v. People*, 15 Ill. App. 288; *Ball v. Commonwealth* (Ky.), 91 S. W. 1123; 28 Ky. L. Rep. 1344; *Dean v. State*, 49 Tex. Cr. App. 249; 92 S. W. 38; *Wilson v. Commonwealth* (Ky.), 76 S. W. 1077; 25 Ky. L. Rep. 1085.

sells liquor to them, taking payment in cash or deducting the amount of their purchases from their wages, no one of the laborers having any interest in the liquors, is guilty of an illegal sale and cannot claim immunity from the penalty of the statute.²⁹ It may be stated generally that if the sale is merely incidental to the formation of the club, no offense is committed; but if it is the main object of the incorporation or formation it is.³⁰ Such was held, however, not to be the case where the club consisted of one person who owned a barroom, organized for the purpose of violating the law, to which anyone could become a member on paying a few cents, and it had no by-laws or meetings of its members, they having no interest in the club's property or voice in its management.³¹ So if a club be properly organized for social, recreation, or similar purposes, and it so changes the object of its organization that it exists for the purpose of furnishing liquors, its license may be revoked.³²

Sec. 800. Sales to non-members.

Of course, no sales can be made to persons who are not members of the club, even directly or indirectly, as where the purchaser pays through a member of the club,³³ or to the wife

²⁹ *Commonwealth v. Alpa*, 24 Pa. Super. Ct. 454; *Commonwealth v. Hurst* (Ky.), 62 S. W. 1024; 23 Ky. L. Rep. 365; *Wathan, etc., Co. v. Commonwealth* (Ky.), 116 S. W. 239; *Mueller & Co. v. Commonwealth*, 116 S. W. 336.

If there be a doubt whether the money paid was for initiation into the club or for the purchase of liquor, the question must be left to the jury. *Commonwealth v. Hurst* (Ky.), 62 S. W. 1024; 23 Ky. L. Rep. 365.

³⁰ *Regina v. Austin*, 17 Ont. Rep. 743. A gun club; and there was a conviction.

³¹ *In re Lyman*, 28 N. Y. App. Div. 209; 50 N. Y. Supp. 898;

Sutton v. State (Tex. Cr. App.), 40 S. W. 501.

³² *Lyman v. Young Men's Cosmopolitan Club*, 28 N. Y. App. Div. 127; 50 N. Y. Supp. 979; *Lyman v. Gramercy Club*, 39 N. Y. App. Div. 661; 57 N. Y. Supp. 376. The license of the club involved in the previous case was also revoked. *Cullinan v. Trolley Club*, 65 N. Y. App. Div. 202; 72 N. Y. Supp. 629.

A loan or sale by a member of the club of his own liquors on the club premises cannot be used to convict the club of an illegal sale. *Hardy v. State*, 48 Tex. Cr. App. 298; 87 S. W. 1038.

³³ *Stevens v. Wood*, 54 J. P. 742; *Queen v. Langford*, 55 J. P. 484;

of a member for him.³⁴ In the case of a joint stock company, incorporated for the purpose of carrying on the club, and non-members could hold shares of stock, and a sale was made to a person who had inherited a share of stock, but who was not a member, it was held that a sale to such a stockholder was illegal.³⁵ A limited company carrying on a proprietary club had no license; the election of members was in the hands of a committee. Liquor was supplied by the company and paid for by a person who had been elected an "honorary member," pending inquiries concerning him and pending his election as a member, and after he had paid his subscription. He was subsequently rejected as a member, and his subscription was returned. It was held that there was a sale by retail by the company for which it had incurred a penalty, though if the sale had been to a member it would not have incurred it.³⁶ But if the steward of the club sell liquors in violation of his instructions from the governing body, the club will not be liable because of his act, if the sale be a violation of the law.³⁷

Sec. 801. Steward or servant of club liable.

If the club violates the law in selling or dispensing of the liquor, the steward or servant of the club who participates in

Creighton v. People, 36 Colo. 315; 83 Pac. 1057. See also *In re City Tattersall's Club*, 29 Vict. L. R. 257; 25 Austr. L. T. 85; 9 Austr. L. R. 165; *State v. Warcholik*, 80 Conn. 351; 68 Atl. 379; *Pendennis v. Louisville*, 7 Ky. L. Rep. (abstract) 831.

³⁴ *Woodley v. Simmonds*, 60 J. P. 150.

³⁵ *National Sporting Club v. Cope*, 82 L. T. 352; 48 W. R. 446; 64 J. P. 310; 19 Cox C. C. 485.

³⁶ *Bowyer v. Percy Supply Club* [1893], 2 Q. B. 154; 5 R. 472; 69 L. T. 447; 42 W. R. 29; 17 Cox C. C. 669; 57 J. P. 470.

A stranger entered a working-

man's subscription club, by one of the rules of which visitors were forbidden to pay money direct to the manager. W., a member, entered the stranger's name as a visitor. The stranger then put down some small change, asking for two pints of beer. W. received the money and the ale was supplied the stranger. It was held that W. sold the liquor to the stranger, and having sold without a license, had violated the statute. *Stevens v. Wood*, 54 J. P. 742.

³⁷ *Newman v. Jones*, 17 Q. B. Div. 132; 55 L. J. M. C. 113; 55 L. T. 327; 50 J. P. 373.

the sale violates its provisions;³⁸ but such is not the case it would seem, where the club is incorporated;³⁹ although cases hold otherwise.⁴⁰ But if he sells to persons not members, even though they go through the form of paying through a member, he is liable for an illegal sale and the member is liable for aiding and abetting the sale.⁴¹ But if the plan of the club is legal the manager commits no offense in furnishing members of the club liquors pursuant to their rules.⁴² Where a manager received all the club members' fees and carried it on "at his own expense" after the club had failed, and sold beer to a member, it was held that he had violated the statute.⁴³ So where a steward of a club sold liquor to the wife of a club member, first asking her if it was her husband, it was held that he was guilty of selling to a person not a member of the club.⁴⁴ So if a manager sell liquor in violation of his instructions, and his act is a violation of the law, he can not shield himself by saying he made the sale on behalf of the club.⁴⁵ And where a manager conducted the club and consented to an illegal method of disposing of its liquors to its members, he was held liable for sales made in his absence by servants of the club pursuant

³⁸ *Ex parte* Coulson, 33 N. B. 341; 1 Can. Cr. Cas. 31; Krnavek v. State, 38 Tex. Cr. App. 44; 41 S. W. 612; King v. Caveich, 8 Can. Cr. Cas. 78; Regina v. Hughes, 29 Ont. Rep. 179; Regina v. Slattery, 20 Ont. Rep. 148.

³⁹ Regina v. Slattery, 20 Ont. Rep. 148; Regina v. Charles, 24 Ont. 432; Regina v. Hodgins, 24 Ont. 433; Graff v. Evans, 8 Q. B. Div. 373; 51 L. J. M. C. 25.

⁴⁰ Queen v. Hughes, 2 Can. Cr. Cas. 5; Queen v. Harrell, 1 Can. Cr. Cas. 510.

⁴¹ Stevens v. Wood, 54 J. P. 742; Queen v. Langford, 55 J. P. 484.

⁴² Newell v. Hemingway, 54 J. P. 134; 58 L. J. M. C. 46; Stevens v. Wood, 54 J. P. 742; Queen v. Walsh, 29 Nov. Sco. 521; reversing 19 Nov. Sco. 336.

As to what is a sale by a steward, see Adkins v. State, 49 Tex. Cr. App. 524; 95 S. W. 506; Feige v. State, 59 Tex. Cr. App. 513; 95 S. W. 506.

⁴³ Lyman v. O'Reilly [1898], 2 Irish Rep. 48.

⁴⁴ Woodley v. Simmons, 60 J. P. 150.

⁴⁵ Newman v. Jones, 17 Q. B. Div. 132; 55 L. J. M. C. 113; 55 L. T. 327; 50 J. P. 373.

to such method.⁴⁶ But a sale to members⁴⁷ in the ordinary way in which liquors are sold in clubs is a sale of liquor under a statute permitting the formation of such clubs.⁴⁸ So if a servant sell liquor to one not a member of the club, believing *bona fide* that he is a member, and not being guilty of negligence in ascertaining whether or not he was a member, he is not guilty of an illegal sale nor is the club or its managing board.⁴⁹ Yet an officer of a club must be taken to know its members; and if he serves liquor to a stranger on the premises who is not a member, it is *prima facie* evidence that when he sold the liquor the stranger did not occupy the premises *bona fide* as a member, and he may be convicted of selling liquors without a license; and he cannot excuse himself by showing that he was a servant or officer of the club, unless he sells in accordance with the terms of the license of the club.⁵⁰ Where the statute provided that a club could only sell liquor to be drunk on the premises, and its steward sold a bottle of wine to a member, who took it off the premises and drank it; and there was no evidence that the steward knew or intended that it was to be taken away, it was held that he was not guilty of a violation of the statute in making a sale of liquor to be taken off the premises.⁵¹ If the law requires the club to sell the liquor in its club house, it can have only one club house; and a sale at a place not the proper club house will render the servant or officer making it liable under the statute.⁵²

⁴⁶ Feige v. State, 49 Tex. Cr. App. 513; 95 S. W. 506.

⁴⁷ And to guests of a club in New Zealand.

⁴⁸ Plank v. McIlvenney, 21 N. Z. 508; Davis v. Burnett [1902], 1 K. B. 666; 18 T. L. R. 354; Newell v. Hemingway, 58 L. J. M. C. 46; 60 L. T. 544; 16 Cox C. C. 604; 53 J. P. 324.

⁴⁹ Graves v. Williams [1905], Viet. L. R. 215; 26 Austr. L. T. 189; 11 Austr. L. R. 98.

⁵⁰ O'Connor v. Price, 14 Viet. L. R. 946; 10 Austr. L. T. 155;

State v. Warcholik, 80 Conn. 351; 68 Atl. 379.

⁵¹ Owen v. Geyer, 9 Juta, (H. C.) 162.

⁵² Regina v. Charles, 24 Ont. Rep. 432.

A manager, who is an officer of a club, having a general superintendency over its affairs, including its bar, from which liquors are purchased, has been held guilty of keeping a tippling house open on Sunday, where he sold liquors on that day. Mohrman v. State, 105 Ga. 709; 32 S. E. 143.

CHAPTER XXVI.

MASTER'S LIABILITY FOR ACTS OF SERVANT.

SECTION.

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SECTION.

- 813. Sales by partners.
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- 824. Agent for purchaser participating in illegal sale.

Sec. 802. Agent directed to make sales that are unlawful.

If a master or principal employ a servant or agent to perform an unlawful act such master or principal will be liable for the servant's or agent's act if the act be forbidden by the statute and a penalty be provided for the violation of the statute in the particular instance. Such is the case where the master expressly authorizes his servant to make an illegal sale.¹ Such an instance is where he employs a person to sell

¹ Lewis v. State, 21 Ark. 209; Edgar v. State, 45 Ark. 356; Schmidt

v. State, 14 Mo. 137; State v. Baserman, 54 Conn. 88; 6 Atl. 185;

liquor for him without having a license so to do.² If the servant has general authority to sell unlawfully, a single sale by him in pursuance of that authority will render the master criminally liable.³ If the fact of agency be established the prosecution is not required to show that the servant had no permit to make the particular sale,⁴ for even though he had, and yet acted as the servant of the master, the latter would be liable.⁵ So an illegal sale of liquor by a servant pursuant to the directions of his licensed master, or even with his assent, renders the latter liable.⁶ So a sale in violation of the local option law by a master through his servant renders the latter liable.⁷ If a master knows his servant contemplates making a sale in violation of law, and takes no steps to prevent him, having the ability to do so, the sale is the same as if he had authorized it.⁸ Of course, to hold the master it must be

Thompson v. State, 5 Humph. 138; Kinnebrew v. State, 80 Ga. 232; 5 S. E. 56; Commonwealth v. Major, 6 Dana, 293; State v. Wiggin, 20 N. H. 449; State v. Falk, 51 Kan. 298; 32 Pac. 1122; State v. Potter, 125 Mo. App. 465; 102 S. W. 668; State v. Gilmore, 80 Vt. 514; 68 Atl. 658.

² Schmidt v. State, 14 Mo. 137; Cagle v. State, 87 Ala. 38, 93; 6 So. 300; United States v. Voss, 1 Cranch C. C. 101; Fed. Cas. No. 16628; Noecker v. People, 91 Ill. 494; Commonwealth v. Hurley, 160 Mass. 10; 35 N. E. 89; Forrester v. State, 63 Ga. 349; State v. Skinner, 34 Kan. 256; 8 Pac. 420; State v. Falk, 51 Kan. 298; 32 Pac. 1122; Commonwealth v. Nichols, 10 Met. 259; 43 Am. Dec. 432; Noecker v. People, 91 Ill. 494; Johnson v. State, 37 Ark. 98; State v. Keith, 37 Ark. 96; Lane v. State, 37 Ark. 272; Dunning v. Owen, 76 L. J. K. B. 796 [1907]; 2 K. B. 237; 97 L. T.

241; 71 J. P. 383; 23 T. L. R. 494.

³ Kinnebrew v. State, 80 Ga. 232; 5 S. E. 56; Edgar v. State, 45 Ark. 356; State v. Basserman, 54 Conn. 88; 6 Atl. 185; Snider v. State, 81 Ga. 753; 7 S. E. 631; 12 Am. St. Rep. 350.

⁴ State v. Skinner, 34 Kan. 256; 8 Pac. 420.

⁵ Dunning v. Owen [1907], 2 K. B. 237; 71 J. P. 383; 76 L. J. K. B. 796.

⁶ State v. Wiggin, 20 N. H. 449; McGovern v. State, 49 Tex. Cr. App. 35; 90 S. W. 502; State v. Curtiss, 69 Conn. 86; 36 Atl. 1014; State v. Skinner, 34 Kan. 256; 8 Pac. 420; Zeigler v. Commonwealth (Pa.), 14 Atl. 237; Commonwealth v. Major, 6 Dana, 293.

⁷ Roberts v. State, 52 Tex. Cr. App. 355; 107 S. W. 59.

⁸ Lambie v. State, 151 Ala. 86; 44 So. 51.

A sale on licensed premises by one not the agent or servant of

shown that the person making the sale was his agent at the time of the sale.⁹ The fact of agency must be determined by the real understanding between the accused and his alleged agent.¹⁰

the licensee, is unlawful; and if the licensee permit the sale, he is guilty of aiding and abetting such sale. *Peckover v. Defries*, 95 L. T. 883; 71 J. P. 38; 21 Cox C. C. 323; 23 T. L. R. 20.

⁹ *Southern Express Co. v. State*, 1 Ga. App. 700; 58 S. E. 67; *State v. Midkiff*, 125 Mo. App. 397; 102 S. W. 590. See *State v. Madeira*, 125 Mo. App. 508; 102 S. W. 1046.

¹⁰ *Anderson v. State*, 22 Ohio St. 305. A liquor dealer is responsible for actionable injuries caused by sales of liquor made by his agents or servants, and it is no defense that such sale was made without his knowledge or against his express orders. He cannot avoid such liability by leaving a competent and careful bartender and giving him instructions to obey the law. The proposition that one engaged in the sale of intoxicating liquors shall be held responsible for the acts of his servants in that business, even though in the particular transaction he disobeyed his instructions, is in strict accord with the general rules governing the relation of master and servant. No man can be excused from responding for the negligent conduct of his servant because of having instructed him to be careful, or for his frauds because of having told him to be honest. He must, in addition, use proper care and diligence to see

that the business is carried on, by whomsoever he employs, in the manner required by law, and whether he has exercised such diligence is a fact to be determined by a jury. It is the exclusive province of the jury to say what weight the facts proven in such case shall have in determining whether a liquor dealer has exercised such diligence. While he is not liable for wrongs which his agent or servant may step aside from his employment to commit, he is fully responsible for the manner in which his business is conducted, and if he gives proper direction for the conducting of his business, he must take upon himself the risk of their being obeyed. *Barnaby v. Wood*, 50 Ind. 405; *Pelly v. Wills*, 141 Ind. 688; 41 N. E. 354; *Keedy v. Howe*, 72 Ill. 133; *Fentz v. Meadows*, 72 Ill. 540; *Worley v. Spurgeon*, 38 Ia. 465; *George v. Gobey*, 128 Mass. 289; 35 Am. Rep. 376; *Kreiter v. Nichols*, 28 Mich. 496; *Kehrig v. Peters*, 41 Mich. 475; 2 N. W. 801; *Gullikon v. Gjourn*, 82 Mich. 503; 46 N. W. 723; *Bodge v. Hughes*, 53 N. H. 614; *Smith v. Reynolds*, 8 Hun (N. Y.), 128. And where a statute provides that "any person or persons who shall, by selling, etc., have caused the intoxication, in whole or in part, of such person" shall be liable in damages, the person who actually makes the sale of liquors is per-

Sec. 803. Agent's authority.

There is no difficulty in holding a principal or master liable for his agent's or servant's illegal act where the latter had from the former an express authority to do that act, but there is difficulty in determining whether the former is liable in the absence of proof of an express authority or direction to do such act. And in the examination of this question care should be taken to distinguish the cases proceeding upon the common law liability of a master for his servant's acts from those governed by the express provision of some statute modifying or changing the rule of that law. The rule at common law is that a master is not liable for the unauthorized criminal act of his servant. "The general rule is," said Judge Blackford of Indiana, "that a master is liable in a civil suit for the negligence or unskillfulness of his servant when he is acting in the employment of his master, but that he is not subject to be punished by indictment for the offenses of his servant unless they are committed by his command, or with his assent."¹¹ If the act performed by the servant is authorized by the master there is no doubt but what the latter is liable, especially in cases of illegal sales.¹² Proof that the illegal sale took place in the defendant's saloon, in his absence, without any showing that the sale by his barkeeper, although by a person behind the bar, will not support a conviction of an illegal sale by him.¹³ Of course, the saloon keeper may always show, in case of an illegal sale, that the person selling the liquor was not his agent for the purpose of making sales, as where his porter made the sale.¹⁴ To bind the master by

sonally liable for the injurious consequences which result, whether he be the owner himself of the liquor sold, or the clerk, servant or agent of such owner. *Barnaby v. Wood*, 50 Ind. 405; *Worley v. Spurgeon*, 38 Ia. 465.

¹¹ *Hipp v. State*, 5 Blackf. 149; 33 Am. Dec. 463; a case of unlawful sale of liquors by a wife in the absence of her husband, the defendant, and relying on *Rex v. Hug-*

gins, 2 Lord Reym, 1574, where a deputy warden kept a prisoner in an unhealthy jail in the absence of knowledge on the part of his superior, the defendant.

¹² *Molihan v. State*, 30 Ind. 266.

¹³ *Wreidt v. State*, 48 Ind. 580.

¹⁴ *Minden v. Silverstein*, 36 La. Ann. 912; *Jull v. Treesnor*, 14 N. Z. L. R. 513. But see *Collins v. State*, 34 Tex. Cr. App. 95; 29 S. W. 274.

the servant's act the sale must be made by him in the ordinary course of his business, and the master will not be bound if the sale is an isolated one, wholly unauthorized.¹⁵ But if the illegal sale is within the scope of the agent's employment the tendency is to hold his principal liable.¹⁶

¹⁵ *Regina v. King*, C. P. (Can.) 246; *Hugill v. Merrifield*, 12 C. P. (Can.) 269; *Austin v. Davis*, 7 Ont. Rep. 478.

But he would be liable if he knew of isolated sales and kept the servant. *Hogg v. Davidson*, 3 F. (Just. Cas.) 49.

An agent cannot authorize a person to sell his principal's liquor illegally and thereby render the principal liable. *Kittrell v. State*, 89 Miss. 666; 42 So. 609; *Queen v. Major*, 9 East. Dist. Ct. Rep. 186.

¹⁶ *Mahoney v. LePage*, 21 Austr. L. T. 200; 6 Austr. L. R. 23; *Commissioners v. Cartman* [1896], 1 Q. B. 655; 60 J. P. 357; 65 L. J. M. C. 113; 74 L. T. 726; 44 W. R. 637; 12 T. L. R. 334; *Coppen v. Moore* No. 2 [1898], 2 Q. B. 306; 62 J. P. 453; 67 L. J. Q. B. 689; 78 L. T. 520; 46 W. R. 620; 14 T. L. R. 414; *Newman v. Jones*, 17 Q. B. Div. 132; 50 J. P. 373; 55 L. J. M. C. 113; 55 L. T. 327; *Regina v. Gilroys*, 4 Sc. Sess. Cas. 3rd Sess. 656; *Boyle v. Smith* [1906], 1 K. B. 432; 70 J. P. 115; 75 L. J. K. B. 282; 94 L. T. 30; 54 W. R. 519; 22 T. L. R. 200; *Humphries v. Commonwealth*, 6 Ky. L. R. (abstract) 594.

The general rule is that a principal or master is liable in a civil suit for the acts of his agent or servant when he is acting in his employment, but that he is not

subject to be punished by indictment for the offenses of his agent or servant, unless they were committed by his command or with his assent. Men must not be held responsible for crimes committed by others, without some proof that they either procured, counseled or advised their perpetration. *Hipp v. State*, 5 Blackf. (Ind.) 149; *Lauer v. State*, 24 Ind. 131; *Hanson v. State*, 43 Ind. 550. Accordingly it has been held that where, on the trial of an indictment for selling intoxicating liquors to a minor, the evidence showed that the person who sold the liquor was, at the time of the sale, behind the counter of the saloon of a defendant, acting as barkeeper, but did not also show that such person was the agent of the defendant, or was employed by him, or that the defendant had any knowledge of the sale that the evidence was insufficient to show the guilt of the defendant. *Lauer v. State*, 24 Ind. 131; *Anderson v. State*, 39 Ind. 553; *Hanson v. State*, 43 Ind. 550; *Thompson v. State*, 45 Ind. 495; *State v. Leach*, 17 Ind. App. 174; 46 N. E. 549. Also, that under an indictment against a saloon keeper for selling intoxicating liquors to one known to be in the habit of becoming intoxicated, the defendant was not liable where the sale was made in his absence, by his bartender, without his knowl-

Sec. 804. Agent in charge of premises—Barkeeper.

Sales by agents in general charge of the premises—an agent who is something more than a mere barkeeper—is presumptively a sale by the master's authority and the latter will be liable, but he may show that the sale was without his authority

edge or consent, and against his express direction. *Hipp v. State*, 5 Blackf. (Ind.) 149; *O'Leary v. State*, 44 Ind. 91; *Lathrope v. State*, 51 Ind. 192. Also, that a saloon keeper was not criminally liable for the sale of intoxicating liquors on Sunday by his barkeeper where the saloon keeper had instructed him that he must not sell on Sunday, under penalty of discharge, and in violation of his instructions and without the knowledge or consent of his principal he did make a sale on Sunday. *Rosenbaum v. State*, 24 Ind. App. 510; 57 N. E. 1050. See *People v. Blake*, 52 Mich. 566; *People v. Robey*, 52 Mich. 577; 50 Am. Rep. 270. A licensee, to sell intoxicating liquors, is bound at his peril to see that the conditions of his license are complied with by his agents or servants. *Rex v. Dixon*, 3 Maule & S. 11; *Rex v. Medley*, 6 Car. & P. 292; *McCutcheon v. People*, 69 Ill. 601; *Mollihan v. State*, 30 Ind. 266; *State v. Wentworth*, 65 Me. 234; 20 Am. Rep. 688; *Commonwealth v. Park*, 67 Mass. (1 Gray) 553; *Commonwealth v. Emmons*, 98 Mass. 6; *Commonwealth v. Uhrig*, 138 Mass. 492; *Commonwealth v. Barnes*, 138 Mass. 511; *Commonwealth v. Kelly*, 140 Mass. 441; 5 N. E. 834; *Murphy v. McNulty*, 145 Mass. 464; 14 N. E. 532; *State v. Dur-*

kem, 23 Mo. App. 387; *State v. Reiley*, 75 Mo. 521; *American v. Kall*, 34 Hun (N. Y.), 126; *State v. Dow*, 21 Vt. 484. But to render a defendant liable for sales made by his agent or servant, knowledge or consent must be shown. *Metzler v. State*, 18 Ind. 35; *Wreidt v. State*, 48 Ind. 579; *Goods v. State*, 3 Green (Ia.), 566; *Taylor v. Pickett*, 52 Ia. 467; 3 N. W. 514; *Minden v. Silverstein*, 36 La. Ann. 912; *Commonwealth v. Putnam*, 70 Mass. (4 Gray) 16; *Gaiocchio v. State*, 9 Tex. App. 387.

If a sale is made by an agent or servant in disobedience of orders, the master is not liable. *Rosenbaum v. State*, 24 Ind. App. 510; 57 N. E. 1050; *Commonwealth v. Nichols*, 51 Mass. (10 Metc.) 259; *Commonwealth v. Wachendorf*, 141 Mass. 270; 4 N. E. 817; *Kirkwood v. Auntenreith*, 21 Mo. App. 73; *State v. Shortell*, 93 Mo. 123. But in some cases it has been held that a general authority by an employer to his agent or servant to sell without restriction will render him answerable criminally for any single sale made by such agent or servant. *Forrester v. State*, 63 Ia. 349; *Kinnebrew v. State*, 80 Ga. 232; 5 S. E. 56; *Mohhan v. State*, 30 Ind. 266; *Hofner v. State*, 94 Ind. 84; *Hall v. McKechnie*, 22 Barb. (N. Y.) 244.

and against his express directions.¹⁷ Of course, in all such instances the good faith of the defendant in giving the orders not to sell is a question for the jury, for if they were a mere cloak to cover up the real fact of authorization, and to enable him to escape punishment, and still reap the benefit of the sale, his orders will not protect him.¹⁸ And the same rule applies in case of a violation of the statute prohibiting music in the saloon.¹⁹ Where a contractor opened a store at his works, he not residing there, and placed a shopman in charge of it, and the manager of the works took temporary charge of the store at the request of the shopman, and in the latter's absence the manager sold liquor in the store, which was an unlicensed place, it was held that the contractor was not liable.²⁰ An English statute²¹ provides that, "If any licensed person permits drunkenness or any violent, quarrelsome or riotous conduct to take place on his premises, or sells any intoxicating liquor to any drunken man, he shall be liable to" a named penalty. It is held that acts of the master's servants will render him liable in all cases where they act within the scope of their employment, although in breach of

¹⁷ Kirkwood v. Autenreith, 21 Mo. App. 73; Anderson v. State, 22 Ohio St. 305; State v. Dow, 21 Vt. 484; Johnson v. State, 83 Ga. 553; 10 S. E. 207; Commonwealth v. Merriam, 148 Mass. 425; 19 N. E. 405; Kittrell v. State, 89 Miss. 666; 42 So. 609; *Ex parte* Norris, 23 N. S. W. 27; 6 S. R. (N. S. W.) 47; Commonwealth v. Holmes, 119 Mass. 195; State v. Burchinal, 2 Harr. (Del.) 528; Anderson v. State, 22 Ohio St. 305; Commonwealth v. Lafayette, 148 Mass. 130; 19 N. E. 26.

¹⁸ Commonwealth v. Rooks, 150 Mass. 59; 22 N. E. 436; Commonwealth v. Stevens, 153 Mass. 421; 26 N. E. 992; State v. Wentworth, 65 Me. 234; 20 Am. Rep. 688; Hugill

v. Merifield, 12 C. P. (Can.) 262; Austin v. Davis, 7 Ont. App. 478; State v. Pierce, 111 Mo. App. 216; 85 S. W. 663; Commonwealth v. Coughlin, 182 Mass. 558; 66 N. E. 207.

¹⁹ State v. Barnett, 110 Mo. App. 584; 85 S. W. 615.

²⁰ Queen v. Maybe, 9 East. Dist. Ct. Rep. 186.

The burden is usually on the saloon keeper to show his bar-keeper made the illegal sale in violation of his orders. Anderson v. State, 22 Ohio St. 305; State v. Fagan (Del.), 74 Atl. 692; Ollre v. State (Tex. Cr. App.), 123 S. W. 1116.

²¹ 35 and 36 Vict. c. 94, § 13.

express general instructions.²² But he is not liable for their acts outside the scope of their employment.²³ "The courts hold this to be one of the excepted cases—where the master is responsible criminally for the act of his servant or manager; if it be held otherwise, the statute may be very easily evaded. It may be reasonably assumed that the law requires some responsible person to be always on such premises, and in charge of them, who represents the master in the conduct of the house, and though a master is not usually responsible for the crimes of his agent this may well be deemed an exception."²⁴ Thus, where a defendant "was licensed to sell by retail, at his brewery, beer for consumption on the premises, employed a drayman to deliver beer to customers only who had previously given orders for it, and he had been expressly ordered not to sell or deliver beer to other persons, and to bring back to the brewery any beer which he was unable to deliver. The drayman sold and delivered some bottled beer from his van to persons in a street who had not previously ordered it. It was held that the respondent [defendant] was not liable to conviction."²⁵ But where the master knew his servant had made several such sales he was held liable.²⁶ Sales by barmaids are generally held not to bind the keeper of the house.²⁷

²² *Commissioners v. Cartman* [1896], 1 Q. B. 655; 60 J. P. 357; 65 L. J. M. C. 113; 74 L. T. 726; 44 W. R. 637; 12 T. L. R. 334; *Coppen v. Moore* (No. 2) [1898], 2 Q. B. 306; 62 J. P. 453; 67 L. J. Q. B. 689; 78 L. T. 520; 46 W. R. 620; 14 T. L. R. 414; *Newman v. Jones*, 17 Q. B. Div. 132; 50 J. P. 373; 55 L. J. M. C. 113; 55 L. T. 327; *Greig v. Macleod* [1908], Sc. C. J. 14. See *Emery v. Nolloth* [1903], 2 K. B. 264; 72 L. J. K. B. 620; 89 L. T. 100; 52 W. R. 107; 67 J. P. 354; 20 Cox C. C. 507; *Conlon v. Muldowney* [1904], 2 Irish Rep 498; *Groom v. Grimes*, 89 L. T. 129; 67 J. P. 345; 20 Cox C. C. 515.

²³ *Regina v. Gilroys*, 4 Sc. Sess. Cas. 3rd series, 656; *Boyle v. Smith*, [1906], 1 K. B. 432; 70 J. P. 115; 75 L. J. K. B. 282; 94 L. T. 30; 54 W. R. 519; 22 T. L. R. 200; *Mullins v. Collins*, 43 L. J. M. C. 67; L. R. 9 Q. B. 292; 29 L. T. 838; 22 W. R. 297.

²⁴ *Patterson's Licensing Acts* (19th Ed.), p. 366.

²⁵ *Patterson's Licensing Acts* (19th Ed.), p. 342, citing *Boyle v. Smith*, *supra*.

²⁶ *Hogg v. Davidson*, 3 F. (Just. Cas.) 49.

²⁷ *McKenna v. Harding*, 69 J. F. 354; *Allchorn v. Hopkins*, 69 J. P. 355.

**Sec. 805. Evidence must show authority to bind master—
Sales by bartender.**

The cases turn largely upon questions of evidence: what is and what is not sufficient to bind the master, for all the cases agree that the evidence, to convict the master, must show that the criminal act of the servant was authorized—and an assent thereto is the same—by the master. “We must not hold men responsible for crimes committed by others without some proof that they either procured, counseled or advised their perpetration. We know full well that in this class of cases the guilty may sometimes escape for a failure of this proof, and that it may sometimes be impossible to produce it in cases where it exists. But these considerations are also applicable to every other class of crimes.”²⁸ “The section on which the indictment is founded makes it penal if the defendant, by himself or his agent, sold to the minor. But can we assume that the defendant, when he left his bartender in charge of the bar, made him his agent to sell to a minor, an act which would be in violation of the law? There is no evidence that he authorized any such sale. If that fact can be found it must result as an inference from the fact that the bartender was left in charge of the bar. We think that no such inference, from that fact alone, can arise. If it had been shown that the defendant had authorized and instructed his barkeeper to sell to the infant in question, or to infants generally, or if he had been present authorizing or assenting to the sale to the minor, the case would be different. As the evidence does not show that the bartender was the agent of the defendant to make the sale in question, we think that, on this point in the case, it was not sufficient to justify the finding

²⁸ *Lauer v. State*, 24 Ind. 131; *State v. Hayes*, 67 Iowa, 27; 24 N. W. 575.

Under a statute providing that “if any person having a license to keep a dramshop shall knowingly permit any person to play at any game of cards” on the licensed

premises, he shall be liable to a fine, a saloon keeper is not liable to the fine when his barkeeper permitted it without his master’s knowledge, and contrary to his orders. *Wilson v. State*, 64 Ark 586; 43 S. W. 972.

of the court."²⁹ This and many other cases hold that mere proof that the barkeeper of the defendant sold liquor to a person to whom a statute forbade the sale was not sufficient proof of a sale by authority of the defendant.³⁰ But proof of a sale by an agent of the defendant, or of one in charge of the place, is sufficient evidence to submit the case to the jury.³¹ However, the evidence must connect the defendant with the sale or he cannot be convicted.³²

Sec. 806. Statute making master liable for illegal sale by his servant.

Statutes are in force in many States which make the master liable for illegal sales made by his servant, regardless of the fact that the sales were unauthorized,³³ and often regardless

²⁹ *Hanson v. State*, 43 Ind. 550; *O'Leary v. State*, 44 Ind. 91.

³⁰ *Anderson v. State*, 39 Ind. 553; *Wetzler v. State*, 18 Ind. 35; *Wreidt v. State*, 48 Ind. 579; *Lathrop v. State*, 51 Ind. 192; *Thompson v. State*, 45 Ind. 495; *Zeller v. State*, 46 Ind. 304; *Freedman v. State*, 37 Tex. Cr. App. 115; 38 S. W. 993.

³¹ *Locke v. Commonwealth*, 113 Ky. 864; 69 S. W. 763; 24 Ky. L. Rep. 654; *Commonwealth v. Lafayette*, 148 Mass. 130; 19 S. E. 26.

³² *Sweeney v. State*, 49 Tex. Cr. App. 226; 91 S. W. 575; *Freedman v. State*, 37 Tex. Cr. App. 115; 38 S. W. 993.

Where the owner of the saloon had not delegated to his barman charge or control of the house or business in it, and the barman, without his knowledge, sold liquors to a minor, the owner was held not guilty. *Emery v. Nolloth*, 72 L. J. K. B. 620 [1903], 2 K. B. 264; 89 L. T. 100; 52 W. R. 107;

67 J. P. 354; 20 Cox C. C. 507; *Conlon v. Muldowney* [1904], 2 Irish Rep. 498; *Groom v. Grimes*, 89 L. T. 129; 67 J. P. 345; 20 Cox C. C. 515.

Instructions to clerk about sales are admissible evidence to show authority. *State v. Lewis*, 86 Minn. 174; 90 N. W. 318.

³³ *Loeb v. State*, 75 Ga. 258; *State v. Stockman*, 9 Kan. App. 888; 58 Pac. 1006; *People v. Hughes*, 86 Mich. 180; 48 N. W. 945; *Snider v. State*, 81 Ga. 753; 7 S. E. 631; 12 Am. St. 350; *McCutcheon v. People*, 69 Ill. 601; *Cloud v. State*, 36 Ark. 151; *State v. Stewart*, 31 Me. 515; *Mogler v. State*, 47 Ark. 109; 14 S. W. 473; *Rex v. Parsons*, 20 Juta, 140; *Boatright v. State*, 77 Ga. 717; *State v. Constantine*, 43 Wash. 102; 86 Pac. 384; *State v. McGuinness*, 38 Mo. App. 15; *Queen v. Derringer*, 9 East. Dist. Ct. Rep. 168; *State v. Webber*, 111 Mo. 204; 20 S. W. 33; *Rex v. Wynne*, 21 Juta, 679; *State v. Kittelle*,

of what his instructions to him may have been.³⁴ Thus, where a statute imposes a penalty upon one who shall sell by himself or another, it is construed that it was the intention of the Legislature that if a principal made a sale by his agent he should be liable, and this intention was derivable from the fact that the phrase "by another" had been used.³⁵ And a like decision was made under a statute making it an offense in "any person who may own or have any interest in liquor sold contrary to" its provisions.³⁶ Where a statute provided that "no person or persons, by himself or another, shall sell, or cause to be sold, or furnished, or permit any other person or persons in his employ" to sell liquors to minors, it was held that a sale in violation of the principal's instructions laid him liable to its penalty.³⁷

110 N. C. 560; 15 S. E. 103; 28 Am. St. Rep. 698; 15 L. R. A. 694; State v. McConnell, 90 Iowa, 197; 57 N. W. 707; Mullinix v. People, 76 Ill. 211; State v. Gilmore, 80 Vt. 514; 68 Atl. 658; Rex v. Weddell, 22 Juta, 261.

³⁴ Noecker v. People, 91 Ill. 494; George v. Gobey, 128 Mass. 289; 35 Am. Rep. 376; Edwards v. Brown, 67 Mo. 377; State v. Kittelle, *supra*; Paducah v. Jones, 126 Ky. 829; 104 S. W. 971; 31 Ky. L. Rep. 1203; State v. Webber, *supra*; Carroll v. State, 63 Md. 551; 3 Atl. 29; State v. Gilmore, 80 Vt. 514; 68 Atl. 658; Riley v. State, 43 Miss. 397; Gathings v. State, 44 Miss. 343; State v. Durkem, 23 Mo. App. 387; Greene Co. v. Wilhite, 29 Mo. App. 459; Draper v. Fitzgerald, 30 Mo. App. 518.

³⁵ State v. Denoon, 31 W. Va. 122; 5 S. E. 315; Cloud v. State, 36 Ark. 151; People v. Longwell, 120 Mich. 311; 79 N. W. 484; Hammer v. Eldridge, 171 Mass. 250; 50 N. E. 611.

³⁶ Fahey v. State, 62 Miss. 402; Mogler v. State, 47 Ark. 109; 14 S. W. 473; Teasdale v. State (Miss.), 3 So. 245.

³⁷ Snider v. State, 81 Ga. 753; 7 S. E. 631; Loeb v. State, 75 Ga. 258.

Where a statute made the person liable for a sale who was in possession of the house, a sale by his clerk, even in violation of orders, made the person in possession liable. Locke v. Commonwealth (Ky.), 69 S. W. 763; 24 Ky. L. Rep. 654. If the statute makes the person in possession of the premises liable for the sale of his clerk, unless unauthorized, the oath of such person that he did not authorize the sale may be disregarded. King v. Conrad, 5 Can. Cr. Cas. 414.

Upon the trial under an indictment for selling liquor, the only witness for the commonwealth testified that he bought a pint of whisky at defendant's storehouse from defendant's clerk; that he

Sec. 807. Sale by bartender to minors, intoxicated person or habitual drunkard.

While a master or saloon keeper is liable for sales by his barkeeper to minors, intoxicated persons or habitual drunkards the same as if he himself had made them,³⁸ yet he is not liable if he did not authorize or assent to them; and mere proof that his bartender made them, in his absence, is not sufficient proof, according to one line of cases, that the act was authorized or assented to by the master or saloon keeper.³⁹ Evidence, however, of sales to infants on other occasions by the barkeeper, with the defendant's knowledge, and that the latter made no objection, or still continued the barkeeper in

had never bought any whisky or other liquor from defendant, and never, except on this occasion, had bought any at his house, and that he did not know whether defendant kept whisky for sale at his house or not. It was held that, as it did not appear that the whisky sold was defendant's whisky, or that defendant kept whisky for sale, the court should have given a peremptory instruction to find for defendant. *Good v. Commonwealth*, 12 Ky. Law Rep. (abstract) 468.

³⁸ *Commonwealth v. Joslin*, 158 Mass. 482; 33 N. E. 653; 21 L. R. A. 449; *Ex parte Baird*, 34 N. B. 213; *Crampton v. Starr*, 24 Viet. L. R. 537; 5 Austr. L. R. 2; *Ex parte McKeen*, 32 N. B. 84.

If the evidence show that the sales were made by one for whose act the defendant is liable, it is not necessary to define to the jury the terms of "agency" and "employee." *Geo. Scalpi & Co. v. State* (Tex. Civ. App.), 73 S. W. 441; 74 S. W. 754.

What is a sale by agent. *Ex*

parte Bamke, 1 S. C. N. S. W. 177. A corporation selling liquor illegally through its agent may be convicted. *Southern Express Co. v. State*, 1 Ga. App. 700; 58 S. E. 67.

³⁹ *Lauer v. State*, 24 Ind. 131; *O'Leary v. State*, 44 Ind. 91; *Hanson v. State*, 43 Ind. 550; *Wreidt v. State*, 48 Ind. 579; *Lathrope v. State*, 51 Ind. 192; *Thompson v. State*, 45 Ind. 495; *Zeller v. State*, 46 Ind. 304; *Commonwealth v. Putnam*, 4 Gray, 16; *Johnson v. State*, 83 Ga. 553; 10 S. E. 207; *State v. Hayes*, 67 Iowa, 27; 24 N. W. 574; *People v. Hughes*, 86 Mich. 180; 48 N. W. 945; *People v. Parks*, 49 Mich. 333; 13 N. W. 618; *State v. Shortell*, 93 Mo. 123; 5 S. W. 691; *State v. Reily*, 75 Mo. 521; *State v. McGrath*, 73 Mo. 181; *Gaiocchio v. State*, 9 Tex. App. 387; *State v. Carron*, 73 N. H. 434; 62 Atl. 1044; *Daniel v. State*, 149 Ala. 44; 43 So. 22; *Mahoney v. LePage*, 21 Austr. L. T. 200; 6 Austr. L. R. 23; *People v. Metzger*, 95 Mich. 121; 54 N. W. 639.

his employment, is admissible, and from this the jury may draw the inference that the sale was authorized or assented to by the principal.⁴⁰ If a saloon keeper instruct his barkeeper not to sell to minors, but leaves it to him to determine whether or not the purchaser is a minor, he is not liable if his barkeeper make an honest mistake as to the age of the purchaser.⁴¹

Sec. 808. Sale out of hours or at prohibited times.

A sale by a barkeeper out of hours or at prohibited times will not render his principal liable unless he was authorized to make the sale at that time, or it was made with his principal's assent, and the mere proof of the sale will not justify

⁴⁰ *Lauer v. State*, 24 Ind. 131. But it was held error to instruct the jury, on a charge of an illegal sale to a slave by a clerk, "that if the defendant had previously sanctioned the acts of his clerk in selling liquor to slaves under similar orders, and if they believed that the defendant, if he had been present, would have done as his clerk did, they were authorized to find him guilty." *Patterson v. State*, 21 Ala. 571.

⁴¹ *Commonwealth v. Stevens*, 153 Mass. 421; 26 N. E. 992; 25 Am. St. 647; 11 L. R. A. 357; *Commonwealth v. Joslin*, 158 Mass. 482; 33 N. E. 653; 21 L. R. A. 449.

It may be remarked, however, that under the facts in the Massachusetts case, if the sale had been by the saloon keeper, he having no more knowledge than his barkeeper concerning the age of the purchaser, he could not have been convicted under the rule in that State concerning sales to minors appearing and supposed to be of full age.

Where a barmaid sold liquors after hours, on evidence of permission from him, the master was held liable. *Crampton v. Starr*, 24 Vict. L. R. 537; 5 Austr. L. R. 2. But where a servant of the licensee knocked at the door of her master's hotel on Sunday, whereupon something was handed out to her, which she took to a neighboring house, and shortly afterwards she returned to the hotel, and, after remaining inside a few minutes, came out again with something under her cloak, with which she went in the direction of the same house, and, as she was entering the door, the police stopped her and took a bottle of beer from under her cloak, it was held that there was no evidence of a sale of beer by the licensee through his servant. *Ex parte McCarthy*, 24 N. S. W. 137.

The mere act of a servant complying with a request of a stranger to go out and purchase liquor for him with money then handed to him is not a sale by his master. *King v. Rogers*, 11 Can. Cr. Cas. 257.

a conviction.⁴² But if it be shown that the master's barkeeper was behind the bar when the sale was made, even if made by the porter, that is sufficient evidence to sustain a conviction of the master, it being taken that the circumstances were sufficient to show that the master authorized the sale.⁴³

Sec. 809. Evidence sufficient to show illegal sale was authorized.

The evidence, to convict the principal, must be such as to raise a *prima facie* case that the act of the servant in making the sale was the authorized act of the principal. This is usually done by showing that the sale took place in the principal's place of business by one who was his agent or barkeeper or clerk. This raises a presumption that the sale was authorized.⁴⁴ In such an instance it is not error to charge the jury that "nothing to the contrary appearing, evidence of a sale by a servant in his master's shop of his master's goods there kept for sale would, if believed, warrant the jury in finding the sale was authorized by the master, and this would be so although the defendant was not on the premises at the time the sale was made."⁴⁵ Of course, proof of sales, under the circumstances stated, does not preclude the defendant

⁴² Commonwealth v. Wachendorf, 141 Mass. 270; 4 N. E. 817; *Ex parte* Broadhead, 23 N. S. W. 46.

⁴³ Collins v. State, 34 Tex. Cr. App. 95; 29 S. W. 274. But see another case of a porter making a sale. Minden v. Silverstein, 36 La. Ann. 912. In Missouri a sale on Sunday by a barkeeper is presumptive evidence that the sale was authorized by his master. State v. Terry, 104 Mo. App. 400; 79 S. W. 477.

It is a question for the jury whether instructions to a barkeeper not to sell on Sunday were given in good faith. Moore v. State, 64 Neb. 557; 90 N. W. 553.

⁴⁴ State v. Wentworth, 65 Me. 234; 20 Am. Rep. 688; Commonwealth v. Hurley, 160 Mass. 10; 35 N. E. 89; Fullwood v. State, 67 Miss. 554; 7 So. 432; State v. Reiley, 75 Mo. 521; State v. Durham, 23 Mo. 387; State v. Quinn, 40 Mo. App. 627; Martin v. State, 30 Neb. 507; 46 N. W. 621; Commonwealth v. Nichols, 10 Met. 259; 43 Am. Dec. 432; Commonwealth v. Perry, 148 Mass. 160; 19 N. E. 212; Molihan v. State, 30 Ind. 266.

⁴⁵ Commonwealth v. Houle, 147 Mass. 380; 17 N. E. 896.

from showing that the sale was not authorized, by proving that it was made without his knowledge, or without his express or implied assent, or against his express orders.⁴⁶ To rebut this evidence it is proper for the prosecution to show that he was present when the sale was made. That fact is simply one for the jury to consider and is not conclusive that the defendant authorized the sale.⁴⁷ The defendant may show that the sale took place in direct violation of his particular instructions given to his barkeeper,⁴⁸ but it will avail him nothing if he was present and knew or consented to the sale.⁴⁹ Of course, it must be shown that the person making the sale sustained the relation of agent or servant to the defendant, for if he did not there can be no conviction, and mere proof that some one behind the defendant's bar sold the liquors has been held not sufficient to show that the salesman was the agent of the defendant.⁵⁰ Whether or not the facts proven show knowledge of the sale or consent thereto by the defendant is a question for the jury.⁵¹

Sec. 810. Keeping saloon open.

A saloon keeper, where a statute requires it, is bound to close his saloon and see that it is kept closed during closing hours. If, therefore, his barkeeper opens it or keeps it open

⁴⁶ Klug v. State, 77 Ga. 734.

⁴⁷ People v. Bauman, 52 Mich. 584; 18 N. W. 369; Commonwealth v. Rooks, 150 Mass. 59; 22 N. E. 436. In this last case it was held that it was not necessary to prove the principal's consent to a general violation of the law in order to establish his consent in the particular instance.

It has been held that proof of a single sale is not sufficient. State v. Mahoney, 23 Minn. 181; but it certainly would if shown to have taken place on the accused's premises, where was all the outfitting

of a saloon, or in his saloon. State v. Williams, 3 Hill L. (S. C.) 91.

⁴⁸ Commonwealth v. Rooks, 150 Mass. 59; 22 N. E. 436; Commonwealth v. Stevens, 153 Mass. 421; 26 N. E. 992.

⁴⁹ State v. Mueller, 38 Minn. 497; 38 N. W. 691.

⁵⁰ Anderson v. State, 39 Ind. 553; Wreidt v. State, 48 Ind. 579; Commonwealth v. Hagan, 152 Mass. 565; 26 N. E. 95 (a sale by a scrubbing woman in the saloon).

⁵¹ Neideiser v. State, 6 Baxt. 699; Hugill v. Merifield, 12 C. P. (Can.) 262; Austin v. Davis, 7 Ont. App. 478.

during such hours, his employer will be liable under the statute.⁵² And this is true even though he keeps the saloon open in violation of express orders to close it.⁵³ On a charge that the owner kept the saloon open, proof that he did it by agent may be given.⁵⁴ But it has been held that if the bartender kept the saloon open in violation of his principal's orders then the principal is not liable.⁵⁵

Sec. 811. Neglect of servant to keep records.

In Massachusetts a statute requires all express companies or carriers receiving beer for delivery in "dry" towns to keep a record of it, to be inserted in a book for that purpose, showing the date of its reception and a correct copy of the directions on the vessel, cask or bottles. In a prosecution against a person for a failure to keep such a record it was held not sufficient to sustain a conviction to merely show acts done by his servant in the course of his employment which were a violation of the statute; but it must be shown that the master participated in the servant's act or countenanced it or otherwise approved of it.⁵⁶

Sec. 812. Permitting persons on premises.

Where a statute made it unlawful for the proprietor of a saloon to permit any person or persons other than the members of his family to go into the room and place where intoxicating liquors were sold upon such days and hours when the sale of such liquors was prohibited by law, it was held that evidence to the effect that the bartender, who was in charge

⁵² *People v. Lundell*, 136 Mich. 303; 99 N. W. 12; 11 Detroit Leg. N. 1.

⁵³ *Lehman v. District of Columbia*, 19 App. D. C. 217; *Garland v. Derir*, 20 W. N. (N. S. W.) 1. *Contra*, *Blaylock v. State*, 108 Tenn. 185; 65 S. W. 398; *State v. Sordini*, 84 Minn. 444; 87 N. W. 1130

(evidence of keeping open on other days admitted).

⁵⁴ *People v. Possing*, 137 Mich. 303; 100 N. W. 396; 11 Detroit Leg. N. 249.

⁵⁵ *Jones v. Paducah (Ky.)*, 115 S. W. 801.

⁵⁶ *Commonwealth v. Riley*, 196 Mass. 60; 81 N. E. 881; 10 L. R. A. (N. S.) 1122.

of the saloon during the absence of the proprietor from the city, entered the saloon at a prohibited time, and against his positive instructions not to enter it on days and hours prohibited by law, was not sufficient to justify a conviction of the proprietor for such act of his bartender.⁵⁷

Sec. 813. Sales by partner.

If a firm of partners be licensed to sell liquors, a sale by any member of the firm or by any one of the partners, pursuant to the license, is valid.⁵⁸ But a license for one firm or partnership does not empower another firm of which a member of the licensed firm is a partner to sell without a license,⁵⁹ and a license to one member of a partnership will not authorize his co-partner to sell liquor.⁶⁰ If one partner buy out the other he may continue the sales at the licensed place.⁶¹ If one of the partners make an illegal sale in the course of the

⁵⁷ *Wilson v. State*, 19 Ind. App. 389; 46 N. E. 1050. The case was made to turn upon the word "permit" used in the statute. "If the mere fact that a person other than the proprietor or some member of his family is seen to enter or be within a place where intoxicants are sold under this act made the person so entering or being therein guilty of a crime for such entry and presence therein, then the abuses complained of by appellee's counsel could not exist. We are not inclined to hold appellant responsible for alleged defects in the law. If we permit this judgment to stand, we cannot see how honest-meaning dealers can be protected, nor do we wish to place generally in the criminal law of the State such a principal as that a man may be held guilty of a crime caused by the act of another when that act was done in his absence, and against his express

command. Nowhere have we been able to find where the courts compelled a man involuntarily and against his will to be guilty of a crime, against the commission of which he protested, was not present when it was committed, and the evidence showed he tried to prevent it." See *Gregory v. United States*, 17 Blatchf. 325.

⁵⁸ *Shaw v. State*, 56 Ind. 188; *Keiser v. State*, 58 Ind. 379.

⁵⁹ *Wharton v. King*, 69 Ala. 365; *Scott v. State*, 46 Tex. Cr. App. 176; 82 S. W. 656.

⁶⁰ *Shaw v. State*, 56 Ind. 188. (He cannot claim protection as agent of the licensed member.) *State v. McConnell*, 90 Iowa, 197; 57 N. W. 707.

⁶¹ *Commonwealth v. James*, 98 Ky. 30; 32 S. W. 219; *State v. Gerhard*, 48 N. C. 178; *In re Kornman*, 13 Pa. Co. Ct. Rep. 147; 23 Pittsb. L. J. (N. S.) 476.

partnership business—as a sale to a minor—the other partner may be convicted of having made an illegal sale, although he was not present when it was made and had no knowledge that it was made and in no way assented thereto.⁶² This is especially true if the convicted partner is present and consents to the sale,⁶³ or the sale is made through their authorized agent or clerk.⁶⁴ They may be indicted jointly for the illegal sale.⁶⁵ If one member of the firm violate the statute forbidding the keeping of the saloon open on Sundays he may be indicted as an individual and be convicted.⁶⁶ If only one member of a firm hold a license he cannot sell the partnership liquors,⁶⁷ and if he do the firm cannot recover the price of the liquor sold.⁶⁸

⁶² *Robinson v. State*, 38 Ark. 641; *Walter v. State*, 38 Ark. 656; *Whitton v. State*, 37 Miss. 379; *State v. Bierman*, 1 Strob. (S. C.) 256; *Commonwealth v. Smith*, 127 Ky. 171; 105 S. W. 397; 32 Ky. L. Rep. 35. See *People v. Bronner*, 145 Mich. 399; 108 S. W. 672. *Contra*, *Acree v. Commonwealth*, 13 Bush, 353. Both may be convicted. *Ellison v. Commonwealth* (Ky.), 69 S. W. 765; 24 Ky. L. Rep. 657.

⁶³ *State v. Neal*, 27 N. H. 131; *State v. Simmons*, 66 N. C. 622; *State v. Sterns*, 28 Kan. 154; *State v. Wadsworth*, 30 Conn. 55; *Tracy v. Perry*, 5 N. H. 504.

⁶⁴ *State v. Seroggins*, 107 N. C. 959; 12 S. E. 59; 10 L. R. A. 542.

A joint illegal transaction by two, whether there be a partnership or not, in pursuance of a common design, renders both parties liable. *Phillips v. State*, 95 Ga. 478; 20 S. E. 270.

⁶⁵ *State v. Simmons*, 66 N. C. 622; *Mullins v. Bellemore*, 7 Low. Can. 228; see *State v. Edwards*, 60 Mo. 490.

There may be a several conviction according to the Canadian case.

⁶⁶ *Morris v. State*, 48 Tex. Cr App. 562; 89 S. W. 832.

⁶⁷ *Plisson v. Skinner*, 4 Terr. L. R. (Can.) 391.

⁶⁸ *Brown v. Moore*, 32 S. C. R. (Can.) 93; *Plisson v. Skinner*, 4 Terr. L. R. (Can.) 391.

T. & Co. carried on the liquor business at Knysue, South Africa, and had a branch business at Millwood, of which M. was the manager. M. had a license to sell liquor; T. & Co. had not. All liquors required by M. was ordered through T. & Co. from Europe; and it was charged against the Millwood business at cost price, the business at Knysue making no profit on these orders, though those running it made themselves liable for the price to the sellers in Europe. T. was convicted of selling without a license; and it was said that the conviction was right; for even if T. & Co. were partners in the Millwood business, they acted merely as agents in ordering the

Sec. 814. Sale by member of defendant's family.

Where the defendant's son, a boy of twelve years, sold liquor on Sunday on his father's premises, but it was not

liquors from Europe. *Queen v. Thesen*, 6 *Juta* 68.

A statute provided that "not more than one license under this act shall be assessed against or collected from partners trading or business done under a firm name." It was held that this did not apply to an individual engaged in selling liquors; but did apply to a partnership conducting a business under one license. *Mobile v. Phillips*, 146 *Ala.* 158; 40 *So.* 826.

If two principals make a sale they are jointly liable. *Wilson v. State*, 53 *Tex. Cr. App.* 556; 110 *S. W.* 904.

As a general rule of law, a partner is not liable criminally for the criminal acts of his co-partner, or his agent employed to do his legal business, and in Kentucky it has been held that if one partner sells intoxicating liquors unlawfully, in the absence and without the knowledge or consent of the other, the latter is not liable. *Acree v. Commonwealth*, 13 *Bush (Ky.)*, 353.

In some States, a new rule of evidence, affecting the responsibility of parties so situated, has been established by statute. For instance, the statute in Mississippi prohibits, among other things, the sale of any vinous or spirituous liquors by any person having license to retail the same, to any intoxicated person, and that "the person so offending (and also any person who may own, or have any interest in, any vinous or spiritu-

ous liquors sold contrary to this act), shall be liable to indictment, etc. *Rev. Code*, 199, art. 9. Under this statute it has been held that one partner may be indicted and convicted for a sale of such liquor to an intoxicated person by his associate, though he was not present and did not consent thereto. *Whitton v. State*, 37 *Miss* 379.

In Arkansas like decisions were made under a statute which made it a misdemeanor for "any person, who shall sell, either for himself or another," or be interested in the sale of any "intoxicating liquors" to any minor "without the written consent or order of the parent." *Robinson v. State*, 38 *Ark.* 641; *Waller v. State*, 38 *Ark.* 656.

In other States, however, the criminal liability is made to hinge upon the fact that the unlawful sale was made for the joint benefit of the parties. For instance, in Michigan it was held that if the defendant, a partner, participates in the profits, the act of one was the act of the other and either of them might be prosecuted under the law. *Smith v. Adrian*, 1 *Mich.* 495.

And to the same effect was the decision of the Supreme Court in New Hampshire. *State v. Neal*, 27 *N. H.* 131.

In Georgia it has been held that, where one by the use of his capital or credit, aids in procuring and furnishing whisky to another

proven that the boy was in his father's employment, it was held that the onus of proof that the boy was not authorized to sell lay upon the defendant. "Had the sale been made," said the court, "by a barman or the publican's wife it would undoubtedly have been made by an authorized person." In this case liquor could be sold to lodgers and *bona fide* travelers.⁶⁹ Where the sale was by the licensee's son who lived with him, it was held that it was a sale by a person "suffered to be or remain" on the premises, and the burden was on the defendant to show that it was made without his authority.⁷⁰ And where the defendant's sister lived with him in his house, not paying board, and she there sold liquor contrary to the statute, and he swore she kept the shop with his permission in his house, and that he was not interested in the shop business and derived no profit at all from it, and she gave no evidence, his conviction of an illegal sale was upheld.⁷¹

Sec. 815. Sales by wife of husband's liquors.

A husband who is a saloon keeper is not liable for unauthorized sales by his wife in his absence, but he may be if he authorized sales the same as if made by his authorized agent.⁷² Of course, sales made by her by his command, or with his knowledge and consent, or even in his presence, if not contrary to his express orders, are his sales, and he is liable

for the purpose of being unlawfully sold by the latter, and it is sold, and the former, by the agreement for conducting the business, is to receive, and does actually receive, a given per cent. on the cost of all the whisky so furnished and sold, they are both guilty of selling the liquor unlawfully whether under the terms of such agreement a technical partnership between them existed or not. *Philips v. State*, 95 Ga. 478; 20 S. E. 270.

And in North Carolina it has been held that if such liquor is

sold unlawfully in the presence of partners by their clerks both partners are liable to be indicted for the offense. *State v. Scoggins*, 107 N. Car. 859; 12 S. E. Rep. 59.

⁶⁹ *Henry v. Fulton*, 8 N. Z. L. R. 551.

⁷⁰ *King v. Conrad*, 35 Nov. Sco. 79.

⁷¹ *Ex parte McCormack*, 32 N. W. 272.

⁷² *State v. Baker*, 71 Mo. 475; *Seibert v. State*, 40 Ala. 60; *Commonwealth v. Costello*, 1 Wilcox (Pa.), 182; *Henry v. Fulton*, 8 N. Z. L. R. 551.

therefor.⁷³ Unless it be shown that the wife is the agent of her husband, then, to bind him, the sale must be shown to have taken place in his presence, so near that she acts under his immediate influence and control⁷⁴ and thus becomes his agent.⁷⁵ A sale by her in his absence and not in his line of business, does not necessarily show a sale by him,⁷⁶ but it may be shown, of course, that it was made for him. To prove this it may be shown that the sale was at his store and that she had frequently made sales there.⁷⁷ If she sell liquor under such circumstances as authorizes the inference that it was with his consent, he being absent, he will be liable the same as if the sale had been made by any of his servants under like circumstances.⁷⁸

Sec. 816. Husband's liability for sale of wife's liquors.

If a wife keep liquors in her husband's house unlawfully, with his knowledge, and unlawfully sells them, or if he assists her in keeping and selling them, he is liable for her act, for it is presumed she acted under his coercion.⁷⁹ This is true although she hold a license to sell, for her illegal acts are attributed to his coercion.⁸⁰ While it has been held that the husband is liable for his wife's illegal act known to him, on

⁷³ Commonwealth v. Reynolds, 114 Mass. 306; Commonwealth v. Barry, 115 Mass. 146; Geuring v. State, 1 McCord (S. C.), 573; State v. Leonard, 72 Vt. 102; 47 Atl. 395.

⁷⁴ Commonwealth v. Flaherty, 140 Mass. 454; 5 N. E. 258; Commonwealth v. Gormley, 133 Mass. 580; Commonwealth v. Lafayette, 148 Mass. 130; 19 N. E. 26.

⁷⁵ Commonwealth v. Hyland, 155 Mass. 7; 28 N. E. 1055.

⁷⁶ Hettenbach v. Isley, 7 Viet. L. R. 104; Allen v. Lamb, 57 J. P. 377.

⁷⁷ Guaereno v. State, 148 Ala. 637; 42 So. 833.

Contra, Ex parte Ryan, 1 W. N. C. (N. S. W.) 122.

⁷⁸ Commonwealth v. Newhard, 3 Pa. Super. Ct. 215; Henry v. Fulton, 8 N. Z. L. R. 551; Commonwealth v. Lafayette, 148 Mass. 130; 19 N. E. 26.

⁷⁹ Faircloth v. State, 73 Ga. 426; Commonwealth v. Kennedy, 119 Mass. 211; Commonwealth v. Carroll, 124 Mass. 30; Commonwealth v. Pratt, 126 Mass. 462; Commonwealth v. Daley, 148 Mass. 11; 18 N. E. 579.

⁸⁰ Commonwealth v. Barry, 115 Mass. 146.

the theory that he had the power to prevent it, and it was his duty to do so,⁸¹ yet the more rational view is that if he took reasonable steps to prevent her conduct, by protesting against it and urging her to quit it, he will not be liable, the courts evidently being unwilling to impose upon him a line of conduct or action that will probably disrupt his marital relations. "We are aware," said the Supreme Court of Massachusetts, "that in some of the decisions expressions have been used which indicate that it is a substantive part of the law that, to excuse himself, the husband must show that he has used all reasonable and practicable means to restrain his wife, but, taking all the decisions together, we think it appears that his whole conduct, including what he did and said, as well as what he could reasonably have done and did do, is admitted as evidence only for the purpose of proving or disproving his consent in fact to the acts done by his wife."⁸² And where the sales were by her in her own rented house, and she refused to stop selling upon his request, it was held that he could not be convicted of her illegal sale.⁸³ It is no defense for the husband that the wife owned the tavern in which he sold the liquor, and that he acted as her agent, unless she had a license to sell liquor there.⁸⁴

Sec. 817. Liability of wife.

When a wife sells out of the presence of her husband, so that it cannot be said she was under his coercion or control, of her own free will, she commits an offense, is liable to conviction, and he does not commit one and is not liable.⁸⁵ And

⁸¹ *State v. McDaniel*, 1 *Houst. Crim. (Del.)* 506.

⁸² *Commonwealth v. Hill*, 145 *Mass.* 305; 14 *N. E.* 124.

⁸³ *Bailey v. Commonwealth* (Ky.) 92 *S. W.* 545; 29 *Ky. L. Rep.* 105.

⁸⁴ *Orange Co. v. Dougherty*, 55 *Barb.* 332. But this case rests upon the principle that an agent can not claim immunity from liability where his principal has no license.

If a wife be indicted jointly with her husband, what the agent running the business said is not admissible in evidence against her. *State v. Fertig*, 98 *Iowa*, 139; 67 *N. W.* 87.

⁸⁵ *State v. Haines*, 35 *N. H.* 207; *Pennybaker v. State*, 2 *Blackf.* 484; *Commonwealth v. Daley*, 148 *Mass.* 11; 18 *N. E.* 579; *Commonwealth v. Burk*, 11 *Gray*, 437; *Commonwealth v. Murphy*, 2 *Gray*, 560.

where the sale was even made in his presence by her, but she was the active party and the occupant of the house in which the sale took place, it was held that she was guilty, the presumption of her coercion being overcome by these facts.⁸⁶ Where the husband was in jail and while there she made the sale, it was held that she could be convicted of a sale without a license.⁸⁷ And where a wife sold grog on her husband's premises the court had no difficulty in finding her guilty.⁸⁸ Where the wife was lessee of the premises in which her husband sold liquor in her presence without a license, contrary to a statute making the owner or lessee liable for liquor sold thereon without a license, it was held that she was liable to a fine.⁸⁹ But she is not liable for illegal sales made by her husband, though he be the manager of her store, when made without her knowledge or consent.⁹⁰ A conviction of the wife of an illegal sale is not a bar to a conviction of her husband for a sale made by her in his presence, unless the sales were one and the same.⁹¹ Under a charge of being a common seller she may be convicted, although her husband provided the liquor she unlawfully sold, she at the time not acting under his coercion.⁹² Under the modern woman's acts she is liable for an illegal sale if her liquor is sold by her husband in her presence, he acting as her clerk.⁹³ If a husband make an illegal sale of liquor, and she, in his absence, deliver the

⁸⁶ Regina v. McGregor, 20 Ont. Rep. 115, distinguishing Regina v. Williams, 42 Up. Can. 462. See Regina v. McAuley, 14 Ont. Rep. 463.

⁸⁷ Regina v. Williams, 42 Up. Can. 462.

⁸⁸ *Ex parte* Ryan, 1 W. N. C. (N. S. W.) 122. Often so decided, said the judge. See also State v. Jordan, 87 Mo. App. 466; Smith v. Commonwealth (Ky.), 48 S. W. 1081. In all three of these cases the wife was convicted of selling her husband's liquor.

⁸⁹ Regina v. Campbell, 2 Pac. Rep. (Can.) 55. The same was held where the husband sold her liquors off the licensed premises. Seagar v. White, 48 J. P. 436; 51 L. T. 261.

⁹⁰ Thurman v. Adams (Miss.), 33 So. 944.

⁹¹ State v. Leonard, 72 Vt. 102; 47 Atl. 395.

⁹² Commonwealth v. Welch, 97 Mass. 593.

⁹³ City Council v. Van Roven, 2 McCord (S. C.), 465.

liquor, she thereby commits an offense against the statute forbidding the sale.⁹⁴

Sec. 818. Joint liability of husband and wife.

If a wife and her husband participate as principals in an unlawful sale of liquor, and it be shown she was not under his coercion, they may be jointly indicted and convicted.⁹⁵ And the same is true if they jointly maintain a liquor nuisance.⁹⁶

Sec. 819. Liability of agent for sales who is unprotected by a license.

The principal's license protects his servant making a sale for him, in an otherwise lawful manner, from the charge of an illegal sale, and if indicted for having made an unlawful sale he may show (and he has the burden to do so)⁹⁷ that he acted as the agent of his licensed principal, as a complete defense.⁹⁸ And a licensee selling liquors of another in the former's licensed premises, as his agent, is not liable to a prosecution for selling without a license.⁹⁹ But if neither the

⁹⁴ Commonwealth v. Whalen, 16 Gray, 25.

⁹⁵ Commonwealth v. Hamor, 8 Gratt. 698.

⁹⁶ Commonwealth v. Tryon, 99 Mass. 442; State v. Fertig, 98 Iowa, 139; 67 N. W. 87.

⁹⁷ Rana v. State, 51 Ark. 481; 11 S. W. 692.

⁹⁸ State v. Hunt, 29 Kan. 762; Johnson v. State, 37 Ark. 98; Lane v. State, 37 Ark. 272; State v. Keith, 37 Ark. 96; State v. Hammack, 93 Mo. App. 521 (clerk to a licensed pharmacist selling liquors on prescription); Commonwealth v. Johnston, 5 Pa. Super. Ct. 585; 28 Pittsb. L. J. (N. S.) 141; 44 W. N. C. 92.

A person whose duty it is to make change for his employer has been convicted as aiding and assist-

ing in sale to a minor where he made change for the sale. Johnson v. People, 83 Ill. 431.

But see Black v. State, 112 Ga. 29; 37 S. E. 108 (defendant was medium of passing money from purchaser to seller).

The agent must ascertain at his peril that his principal holds a license. Tardiff v. State, 23 Tex. 169; Witherspoon v. State, 39 Tex. Cr. App. 65; 44 S. W. 164, 1096.

A volunteer cannot thus defend. *Ex parte* Benoth, 1 S. C. (N. S. W.) 22; see *Ex parte* Dudley, 1 S. C. (N. S. W.) 63.

⁹⁹ State v. Keith, 37 Ark. 96; Johnson v. State, 37 Ark. 98.

Contra, Plisson v. Skinner. 4 Terr. L. R. (Can.) 391.

principal nor the agent hold a license to retail liquors, then all sales made by him as such agent are illegal. "If the respondent justify the act of selling under H as his principal, he must show an authority in his principal to sell. The agent who does the act can stand in no better situation than his principal. He justifies under him, and if the principal had no authority to sell, the agent could have none."¹ This rule extends to the agent of a brewing company selling liquors at

¹State v. Bugbee, 22 Vt. 32; Abel v. State, 90 Ala. 631; 8 So. 760; Baird v. State, 52 Ark. 326; 12 S. W. 566; Menken v. Atlanta, 78 Ga. 668; 2 S. E. 559; State v. Finan, 10 Iowa, 19; State v. Stucker, 33 Iowa, 395 (by statute); State v. Kreichbaum, 81 Iowa, 633; 47 N. W. 872 (by statute); Commonwealth v. Hadley, 11 Met. 66; Commonwealth v. Sinclair, 138 Mass. 493; People v. Lester, 80 Mich. 643; 45 N. W. 492; People v. Rice, 103 Mich. 350; 61 N. W. 540; People v. DeGroot, 111 Mich. 245; 69 N. W. 248; Hays v. State, 13 Mo. 246; State v. Bryant, 14 Mo. 340; State v. Morton, 42 Mo. App. 64; State v. O'Connor, 65 Mo. App. 324; Wason v. Underhill, 2 N. H. 505; State v. McGuire, 64 N. H. 529; 15 Atl. 213; French v. People, 3 Parker Cr. Rep. 114; State v. Chastain, 19 Or. 176; 23 Pac. 963; State v. Hoxsie, 15 R. I. 1; 22 Atl. 1059; 2 Am. St. 838; Tardiff v. State, 23 Tex. 169; La Norris v. State, 13 Tex. App. 33; 44 Am. Rep. 699; Davidson v. State, 27 Tex. App. 262; 11 S. W. 371; Commissioners v. Daugherty, 55 Barb. 332; Rana v. State, 51 Ark. 481; 11 S. W. 692; Berning v. State, 51 Ark. 550; 11 S. W. 882; State v. Deevers, 38 Ark. 517;

Cloud v. State, 36 Ark. 151; People v. Drennan, 86 Mich. 445; 49 N. W. 215; State v. Delemater, 20 S. D. 23; 104 N. W. 537; Barnes v. State (Tex. Cr. App.), 88 S. W. 804; Webster v. State, 110 Tenn. 491; 82 S. W. 179; Fields v. State (Tex. Cr. App.), 98 S. W. 867; Butler v. Augusta, 100 Ga. 370; 28 S. E. 164; Hall v. State, 125 Ga. 31; 53 S. E. 807; Dunning v. Owen [1907], 2 K. B. 237; 76 L. J. K. B. 796; 97 L. T. 241; 71 J. P. 383; 21 Cox C. C. 485; 23 T. L. R. 494; Regina v. Howard, 45 Up. Can. 346; Regina v. Breen, 36 Up. Can. 84; Regina v. Williams, 42 Up. Can. 462; Lambe v. Jobin, 12 L. N. (Can.) 407; State v. Brown, 93 Mo. App. 543; 67 S. W. 711; State v. Barnett, 111 Mo. App. 552; 86 S. W. 460; Shuster v. State (N. J. L.), 41 Atl. 70 (a sale off premises); State v. Russell (Del.), 69 Atl. 839; Barnes v. State (Tex. Cr. App.), 88 S. W. 804 (employee exchanged his employer's brandy for peaches); Cantwell v. State, 47 Tex. Cr. App. 511; 85 S. W. 19.

Contra, United States v. Paxton, 1 Cranch C. C. 44; Fed. Cas. No. 16013; United States v. Shuck, 1 Cranch 56; Fed. Cas. No. 16285.

a place not covered by a license,² and to a Pullman car conductor.³ One who is a mere volunteer in the illegal sale of another's liquor, without compensation, cannot deny his agency and escape punishment.⁴ So where a statute made it an offense to sell liquors without first taking an oath not to adulterate them, and give a bond to that effect, a sale by an agent of a person who has not complied with the statute renders him liable to punishment.⁵ A sale by an agent under his principal's forfeited license is no defense.⁶ In the prosecution of an agent for having made a sale without his principal being licensed he may be charged as having made the sale without a license, and it is not necessary to charge that he made it as agent for an unlicensed principal, at least if a statute provides that all persons participating in an illegal

² Peitz v. State, 68 Wis. 538; 32 N. W. 763; Mayer v. State, 83 Wis. 339; 53 N. W. 444.

³ La Norris v. State, 13 Tex App. 33; 44 Am. Rep. 699.

Speaking of a sale by an agent whose principal was unlicensed, the Supreme Court of Oregon said: "As statutes of this character bind the party to know the facts and to keep them at his peril, neither the motives nor the intent of the defendant can relieve him, when the sale is made without a license. The intent is immaterial where the statute makes the act indictable irrespective of guilty knowledge; and in such case ignorance of fact, no matter how sincere, can be no defense. It is enough that under the statute the commission of the act prohibited constitutes the offense, irrespective of the motives or knowledge of the defendant, and as his principal had no license to sell, the defendant must stand for him, so far as appertains to his prosecution." State v. Chastain, 19 Or. 176; 23 Pac. 963.

⁴ Hiers v. State, 52 Fla. 25; 41 So. 881; Peckover v. Defries, 95 L. T. 883; 71 J. P. 38; 23 T. L. R. 20; 21 Cox C. C. 323; Winter v. State, 133 Ala. 176; 31 So. 717.

⁵ State v. Brown, 93 Mo. App. 543; 67 S. W. 711.

⁶ State v. Barnett, 111 Mo. App. 552; 86 S. W. 460.

Where a vine-grower sold his wine through an unlicensed agent, at a place elsewhere than at his vineyard where it was made, it was held that the agent was not guilty of an illegal sale. Musgrove v. Graham, 4 S. R. (N. S. W.) 475; 21 W. N. C. (N. S. W.) 145.

Although a statute makes it *prima facie* evidence that the person selling the liquor is the owner of it, yet the seller may show that he was not the owner of it nor of the money received for it, and also that he was not acting as the agent of the owner in making the sale. Hiers v. State, 52 Fla. 25; 41 So. 881; Huffman v. Walterhouse, 19 Ont. Rep. 186.

sale are liable as principals.⁷ But it has been held that under a charge of selling liquor, an agent selling his principal's liquor cannot be convicted.⁸

Sec. 820. Liability of agent for acts in violation of law.

If a servant or agent makes an unlawful sale his master's or principal's license will not protect him. His master cannot authorize him to violate the law. So, too, if he performs any other act, in the line of his duty, that is a violation of the statute he will be liable, even though his master be not. He cannot shield himself behind the fact that he performed the act in the service of another.⁹ Thus, if he sell liquor to a minor he is liable, although the liquors sold were those of his principal and he made the sale for him.¹⁰ And where a statute provided that all servants and agents selling liquor unlawfully might be charged and convicted as principals, and other sections provided that whoever should "erect or establish, continue, or use any building" for selling liquor "should be

⁷ *People v. Soule*, 74 Mich. 250; 41 N. W. 908; *Johnson v. People*, 83 Ill. 431.

⁸ *Campbell v. State*, 79 Ala. 271.

A statute forbade the employment of an unlicensed person, not a servant, to sell liquors. W. sold his interest in an inn to M., and, pending the transfer of the license, ostensibly employed him as barman. It was held that he was not guilty; as the actual owner could not be said to have been "employed" to sell. *Ex parte Ward*, 2 Sel. Cas. N. S. W. 872.

⁹ *Commonwealth v. Merriam*, 148 Mass. 425; 19 N. E. 405; *Schultz v. State*, 32 Ohio St. 276; *Thompson v. State*, 5 Humph. 138; *Marshall v. State*, 49 Ala. 21; *Moore v. State*, 64 Neb. 557; 90 N. W. 553; *Commonwealth v. Brown*, 154 Mass. 55; 27 N. E. 776; 13 L. R. A. 195; *State v. Finan*, 10 Iowa,

19; *Roberts v. O'Connor*, 33 Me. 496; *Wolfe v. State*, 38 Tex. Cr. App. 537; 43 S. W. 997; *State v. Lucas*, 94 Mo. App. 117; 67 S. W. 971; *Pigford v. State* (Tex. Cr. App.), 74 S. W. 323; *State v. Barnett*, 111 Mo. App. 688; 86 S. W. 572; *Newman v. Jones*, 17 Q. B. Div. 132; 50 J. P. 373; 55 L. J. M. C. 113; 55 L. P. 327; *State v. Gallagher*, 126 Mo. App. 729; 106 S. W. 111; *State v. Collins*, 28 R. I. 439; 67 Atl. 796.

Whatever is a defense for the master (except that the agent's act was unauthorized) is a defense for the servant. *Commonwealth v. Mahoney*, 152 Mass. 493; 25 N. E. 833.

¹⁰ *Marshall v. State*, 49 Ala. 21; *Butler v. Augusta*, 100 Ga. 370; 28 S. E. 164; *State v. Gallagher*, 126 Mo. App. 729; 106 S. W. 111.

deemed guilty of a nuisance," a barkeeper in the saloon was held liable to be convicted of maintaining a nuisance.¹¹ The same ruling was made under a similar statute in Maine¹² and in Massachusetts on proof of mere sales¹³ or on proof of assisting in keeping the premises.¹⁴ Under an indictment for illegally keeping liquor the barkeeper of the owner in charge there may be convicted.¹⁵ So a barkeeper assisting his employer in illegally keeping the saloon open on election day or any other prohibited time, is equally liable with his employer.¹⁶ In the instances of keeping a nuisance, if the master be present directing and controlling the sales, or is present so that in law the act is his and he is liable therefor, the servant is not liable.¹⁷ It is otherwise if the sales that constitute the nuisance are made in the absence of the principal or owner, or where the agent or barkeeper assumes control, although only temporary, over the premises.¹⁸ Acting, however, as a mere messenger in carrying the liquor to the buyer and carrying back to the seller the money for its sale is not an offense in the messenger;¹⁹ but if he carries it into a prohibition territory, knowing or having good reason to know that the sale is in violation of the statute of that territory, he

¹¹ State v. Stucker, 33 Iowa, 395.

¹² State v. Sullivan, 83 Me. 417;
22 Atl. 381.

¹³ Commonwealth v. Dowling, 114 Mass. 259; Commonwealth v. Hadley, 11 Met. 66; Commonwealth v. Kimball, 105 Mass. 465; Commonwealth v. Maroney, 105 Mass. 467; State v. Hoxsie, 15 R. I. 1; 22 Atl. 1059; 2 Am. St. 838.

¹⁴ Commonwealth v. Burke, 114 Mass. 261; People v. Rice, 103 Mich. 350; 61 N. W. 540; State v. McGuire, 64 N. H. 529; 15 Atl. 213.

¹⁵ State v. McGuire, 64 N. H. 529; 15 Atl. 213.

¹⁶ Janks v. State, 29 Tex. App. 233; 15 S. W. 815.

The presumption is that the licensee is the owner of the premises, but it may be shown he is only the agent. Huffman v. Walterhouse, 19 Ont. App. 186.

¹⁷ Commonwealth v. Galligan, 144 Mass. 171; 10 N. E. 788; State v. Russell (Mo. App.), 73 S. W. 297; Casey v. State (Tex. Cr. App.), 67 S. W. 415.

¹⁸ Commonwealth v. Brady, 147 Mass. 583; 18 N. E. 568; Commonwealth v. Sinclair, 138 Mass. 493; Barnes v. People (Mich.), 71 N. W. 504.

¹⁹ Commonwealth v. Williams, 4 Allen, 587. But see Burnett v. State, 42 Tex. Cr. App. 600; 62 S. W. 1063.

is liable to the penalty of the statute.²⁰ An employe may also by his conduct put himself without the protection of his master's license, although the sale was ostensibly made under its provisions. Thus, where an employe, in direct violation of his master's directions, made a sale, it was held that he could not set up his master's license as a defense, because he had no authority from his master to make the sale, having been deprived of his general power to sell in that particular instance by specific instructions not to make the sale. In law, the sale was the employe's and not the employer's.²¹ If a corporation is regularly engaged in unlawfully keeping liquors, then its president (and perhaps its directors) is criminally liable, and cannot avoid liability because he acts merely as its agent.²²

Sec. 821. Joint or several liability of principal and agent.

If an agent or servant aids his principal or master in unlawfully keeping a saloon open, both are liable, and while the principal might be convicted because his servant with his authority kept the saloon open, he cannot be convicted more than once for the keeping it open on any one day, even though two or more servants jointly kept it open. He can be punished only once for their joint illegal act. And the conviction of the master is no bar to a conviction of the servant, or *vice versa*. "All engaged in the selling of liquor in an open saloon on an interdicted day are made principals by the law, and the courts are not concerned with, and will not inquire into, the question of principal or agent, and all may be punished for the viola-

²⁰ Shuster v. State (N. J. L.), 41 Atl. 701; State v. Delamater, 20 S. D. 23; 104 N. W. 537; State v. Clow (Mo. App.), 110 S. W. 632; State v. Russell, Penne. (Del.), 69 Atl. 839.

²¹ Butler v. Augusta, 100 Ga. 370; 28 S. E. 169.

If the charge is that the defendant of a certain named person sold the liquor, then the conviction of

that person of making the same sale is admissible to show that the business in which the defendant was engaged belonged to the principal. Bradley v. State (Tex. Cr. App.), 75 S. W. 32. (See this case also as to what is sufficient proof that defendant was the agent.)

²² State v. Collins, 28 R. I. 439; 67 Atl. 796.

tion of the statute if proceeded against and convicted. Nor will it matter who opened the door. Those who are selling behind the bar, or waiting upon customers in any part of the saloon, are equally guilty of keeping it open. There is no injustice in this holding. The respondent was not obliged to be in the saloon on that day, and must be considered to have known the law, and that his acts were unlawful." "One conviction would be a bar to any other for the same offense upon the same day. But this does not preclude the arrest and conviction of each of his three clerks for the same offense, for a transaction in which they aided, and are made principals by the statute. Any number of persons concerned therein may be convicted of the same offense if their acts in law made them principals, and the conviction of one is no bar to the conviction of the others."²³ So both the principal and agent are equally guilty where the latter has unlawful possession, by the authority of the former, of intoxicating liquors;²⁴ and if the principal give into the control of his agent his business, and the latter violate the law in the conduct of it, both are equally liable.²⁵ "If one procure the spirits for the purpose of retailing, and hire another to attend to the bar as his servant, and he retails, both are guilty," and they may be prosecuted jointly.²⁶

²³ *People v. Ackerman*, 80 Mich. 588; 45 N. W. 367; *Thompson v. State*, 5 Humph. 138; *French v. People*, 3 Park. Cr. Cas. 114. They may be indicted as principals. *Janks v. State*, 29 Tex. App. 233; 15 S. W. 815; *Bradley v. State* (Tex. Cr. App.), 75 S. W. 32; *Webster v. State*, 110 Tenn. 491; 82 S. W. 179; *Webster v. State* (Tenn.), 75 S. W. 1020.

²⁴ *Menken v. Atlanta*, 78 Ga. 668; 2 S. E. 559.

²⁵ *Commonwealth v. Merriam*, 148 Mass. 425; 19 N. E. 405.

²⁶ *State v. Caswell*, 2 Humph. 399; *State v. Wadsworth*, 30 Conn. 55; *Commonwealth v. Major*, 6 Dana. 293.

In New Brunswick it is held that both the agent and principal are liable for the former's illegal sale, but they can not be prosecuted jointly. *Ex parte Kelly*, 32 N. B. 261; and in Canada that both cannot be convicted on proof of only one sale. *Rex v. Boomer* [1908], 15 Ont. App. 321; and the same is held in South Africa. *Queen v. Nokitshini*, 13 Juta 413.

If the defendant be indicted as agent of B., the record of B.'s conviction is admissible to show that such defendant was engaged in B.'s business. *Bradley v. State* (Tex. Cr. App.), 75 S. W. 32.

Sec. 822. Sale by agents in local option territory.

If a liquor dealer send his agent into local option territory, or into a territory where the sale of intoxicating liquor is interdicted, to solicit orders, and these orders he fills, the statutes usually make the dealer liable for a sale of liquor at a place where its sale is prohibited.²⁷ And the statutes sometimes even go so far as to make the agent liable who merely takes the order and transmits it to his principal, where the latter accepts it and ships the liquor there, though the price is payable at the point of shipment outside of the territory.²⁸ Where an agent solicited orders in a town, forwarded an order to his principal in another town and upon it his principal shipped the liquors so ordered, which the agent received, delivered and collected the price therefor, it was held that he had sold the liquor in such town and was liable.²⁹ If the principal refuse to sell the liquor on credit, and requires the agent to return the purchase price or the liquor, the agent taking the order does not violate the law making the seller liable by reason of the fact that he received the purchase price from the vendee and delivered the liquor to him.³⁰ Where a statute required an agent selling or offering for sale liquor in any county of the State to have a license issued for such county to make such sales of intoxicating liquors therein, it was held not only constitutional as to non-resident agents but also that the statute forbade the soliciting of an order within the State conditioned that it was to be forwarded to his principal and

²⁷ *State v. McAdams*, 106 La. 720; 31 So. 187; *Oldham v. State*, 52 Tex. Cr. App. 516; 108 S. W. 667; *Goad v. State*, 52 Tex. Cr. App. 444; 108 S. W. 680; *Schwulst v. State*, 52 Tex. Cr. App. 426; 108 S. W. 698; *Stovall v. State* (Tex. Cr. App.), 97 S. W. 92; *Green v. State*, 54 Tex. Cr. App. 3; 111 S. W. 933; *Rose v. State*, 4 Ga. App. 588; 62 S. E. 117; *Taylor v. State* (Tex. Cr. App.), 77 S. W. 221.

²⁸ *Bogel v. State* (Tex. Cr. App.), 55 S. W. 830; *Doores v. Commonwealth* (Ky.), 76 S. W. 2; 25 Ky. L. Rep. 459; *Ingram v. State*, 49 Tex. Cr. App. 117; 90 S. W. 1098.

²⁹ *Popel v. Monmouth*, 81 Ill. App. 512; see *Barnes v. People*, 113 Mich. 213; 71 N. W. 504; *Wolfe v. State*, 38 Tex. Cr. Rep. 537.

³⁰ *Cunningham v. State*, 105 Ga. 676; 31 S. E. 585.

the liquor delivered to the purchaser in another State on board the cars.³¹

Sec. 823. Soliciting in interdicted territory.

In some States mere solicitation of orders for intoxicating liquor is made an offense. Thus, a statute of Georgia made a person liable who should "solicit personally or by agent" the sale of intoxicating liquor in a prohibition county. These words were held not to be restricted to a personal solicitation only, but covered a solicitation by agent, and one soliciting the order in person or soliciting it by agent was equally liable in the county where the soliciting was made. It was further held that the statute covered both an oral and a written solicitation.³²

Sec. 824. Agent for purchaser participating in illegal sale.

One who acts merely as the agent of the purchaser in procuring intoxicating liquor cannot be convicted of selling the liquor, the sale being illegal.³³ But a physician who assists one to purchase liquor for himself, by giving him an illegal prescription, thereby becomes an accomplice of the seller and is guilty of assisting or making the sale.³⁴ Where the

³¹ *State v. Delamater*, 20 S. D. 23; 104 N. W. 537.

³² *Rose v. State*, 4 Ga. App. 588; 62 S. E. 117; *Silver v. State*, 105 Ga. 838; 32 S. E. 22.

³³ *Maples v. State*, 130 Ala. 121; 30 So. 428; *Bonds v. State*, 130 Ala. 117; 30 So. 427; *Dubois v. State*, 87 Ala. 101; 6 So. 381; *Campbell v. State*, 79 Ala. 271; *Maxwell v. State*, 140 Ala. 131; 37 So. 266; *Young v. State*, 58 Ala. 358; *Morgan v. State*, 81 Ala. 72; 1 So. 472; *Hiers v. State* (Fla.), 41 So. 881; *Goode v. State*, 39 So. 461; *Anderson v. State*, 32 Fla. 242; 13 So. 435; *Bryant v. State*, 82 Ala. 51; 2 So. 670; *Jones v. State*, 100 Ga. 579; 28 S. E. 396; *Evans*

v. State (Ga.), 29 S. E. 40; *Phillips v. State* (Tex. Cr. App.), 40 S. W. 270; *Williams v. State*, 107 Ga. 693; 33 S. E. 641; *Harris v. State*, 49 Tex. Cr. App. 233; 91 S. W. 590; *Black v. State*, 112 Ga. 29; 37 S. E. 108; *Rector v. State* (Tex. Cr. App.), 90 S. W. 41; *Taylor v. State*, 68 Ark. 468; 60 S. W. 33; *Carter v. State* (Tex. Cr. App.), 40 S. W. 267; *Dean v. State*, 49 Tex. Cr. App. 249; 92 S. W. 38; *Campbell v. State*, 37 Tex. Cr. App. 572; 40 S. W. 282; *Reed v. State* (Tex. Cr. App.), 44 S. W. 1093.

³⁴ *McLain v. State*, 43 Tex. Cr. App. 213; 64 S. W. 865. See *Bonds v. State*, 130 Ala. 117; 30 So. 427.

prosecutor gave the defendant money, requesting him to get him some whisky, and the defendant obtained it from a third person, out of an express office, to whom it had been shipped C. O. D., it was held that he was not guilty of having sold the whisky to the prosecutor.³⁵ Where the evidence showed that the witness gave the defendant, who kept a cold storage warehouse, money to buy whisky for him, which he did and put it in the warehouse for the witness who sent for it whenever he wanted a drink, it was held that there was no sale by the defendant, although the witness paid him forty cents for storage or his trouble.³⁶ Even though the agent advance part of the purchase money, or all of it, he is not guilty of selling liquor illegally.³⁷ But if the transaction is a mere subterfuge

For additional authorities upon the first proposition stated in this section, see *Harris v. State*, 47 Tex. Cr. App. 588; 85 S. W. 284; *Oxford v. State*, 49 Tex. Cr. App. 321; 94 S. W. 463; *Treadway v. State*, 42 Tex. Cr. App. 466; 62 S. W. 574; *Becker v. State* (Tex. Cr. App.), 50 S. W. 949; *Choate v. State*, 47 Tex. Cr. App. 297; 83 S. W. 377; *Silver v. State*, 105 Ga. 838; 32 S. E. 22; *Hanna v. State*, 48 Tex. Cr. App. 269; 87 S. W. 702; *Holley v. State*, 46 Tex. Cr. App. 324; 81 S. W. 957; *Gaskins v. State*, 127 Ga. 51; 55 S. E. 1045; *Springfield v. State*, 125 Ga. 281; 54 S. E. 172; *Gee v. State* (Tex. Cr. App.), 89 S. W. 1078; *Golightly v. State*, 49 Tex. Cr. App. 44; 90 S. W. 26; *Washington v. State* (Tex. Cr. App.), 85 S. W. 801; *Bills v. State* (Tex. Cr. App.), 86 S. W. 1012; *Banks v. State*, 136 Ala. 106; 34 So. 350; *Penner v. Commonwealth*, 111 Ky. 604; 64 S. W. 435; 23 Ky. L. Rep. 774; *Baker v. Commonwealth* (Ky.), 64 S. W. 657; 23 Ky. L. Rep. 898; *Leak v. Commonwealth* (Ky.), 64 S. W.

521; 23 Ky. L. Rep. 932; *Winslow v. State* (Tex. Cr. App.), 98 S. W. 241; *Reynolds v. State*, 52 Fla. 409; 42 So. 373; *State v. Mosier*, 25 Conn. 40; *Hertzler v. Geigley*, 196 Pa. Cr. St. 419; 46 Atl. 366; *Brashears v. Commonwealth* (Ky.), 57 S. W. 475; *Bogel v. State*, 42 Tex. Cr. App. 389; 55 S. W. 830; *Skidmore v. Commonwealth* (Ky.), 57 S. W. 468; 22 Ky. L. Rep. 409; *Dupree v. State* (Tex. Cr. App.), 91 S. W. 578; *Smart v. State*, 49 Tex. Cr. App. 373; 92 S. W. 810; *Short v. State*, 49 Tex. Cr. App. 244; 91 S. W. 1087; *Givens v. State*, 49 Tex. Cr. App. 267; 91 S. W. 1090.

³⁵ *Short v. State*, 49 Tex. Cr. App. 244; 91 S. W. 1087; *Givens v. State*, 49 Tex. Cr. App. 267; 91 S. W. 1090, 1091; *Bills v. State* (Tex. Cr. App.), 86 S. W. 1012; *Treadway v. State*, 42 Tex. Cr. App. 466; 62 S. W. 574.

³⁶ *Dupree v. State* (Tex. Cr. App.), 91 S. W. 578.

³⁷ *Choate v. State*, 47 Tex. Cr. App. 297; 83 S. W. 377; *Reed v. State* (Tex. Cr. App.), 44 S. W. 1093.

to cover up an actual sale, then it will not avail the agent in his defense.³⁸ It is a question for the jury whether or not the accused was an agent for the purchaser or was himself the seller or an agent for the vendor.³⁹ But if the defendant does not claim that he was not acting as agent of the purchaser, or if the undisputed facts show he was not such agent, the court need not instruct upon the question of agency.⁴⁰ The defendant has the burden to show that he made the sale as agent of the purchaser, if he desires to avail himself of that defense.⁴¹ In Alabama, and perhaps in other States the person acting as agent of the purchaser is equally guilty with the purchaser, made so by statute.⁴² But such a statute does not cover an instance where a person purchases liquor with money furnished in equal parts by himself and another, and then they divide it equally between them.⁴³ Whether or not the purchase was by the agent for his own benefit or for an alleged principal is a question for the jury, where the alleged principal receives the liquor.⁴⁴

³⁸ *Silver v. State*, 105 Ga. 838; 32 S. E. 22; *Gaskins v. State*, 127 Ga. 51; 55 S. E. 1045; *Penner v. Commonwealth*, 111 Ky. 604; 64 S. W. 435; 23 Ky. L. Rep. 774; *State v. Mosier*, 25 Conn. 40.

³⁹ *Golightly v. State*, 49 Tex. Cr. App. 44; 90 S. W. 26; *Leak v. Commonwealth (Ky.)*, 64 S. W. 521; 23 Ky. L. Rep. 932; *Baker v. Commonwealth (Ky.)*, 64 S. W. 657; 23 Ky. L. Rep. 898; *Reynolds v. State*, 52 Fla. 409; 42 So. 373; *Hertzler v. Geigley*, 196 Pa. St. 419; 46 Atl. 366; *Skidmore v. Commonwealth (Ky.)*, 57 S. W. 468; *Smart v. State*, 49 Tex. Cr. App. 373; 92 S. W. 810.

⁴⁰ *Springfield v. State*, 125 Ga. 281; 54 S. E. 172; *Holley v. State*, 46 Tex. Cr. App. 324; 81 S. W. 957; *Hanna v. State (Tex. Cr. App.)*, 87 S. W. 702; *Harris v. State (Tex. Cr. App.)*, 85 S. W.

284, 1198; *Gee v. State (Tex. Cr. App.)*, 89 S. W. 1078.

⁴¹ *State v. Mosier*, 25 Conn. 40.

⁴² Alabama Acts, 1907, p. 366; *Phillips v. State (Ala.)*, 47 So. 245; *Wortham v. State*, 80 Miss. 205; 32 So. 50.

⁴³ *Ball v. Commonwealth (Ky.)*, 91 S. W. 1123; 28 Ky. L. Rep. 1344; *Dean v. State*, 49 Tex. Cr. App. 249; 92 S. W. 38.

Where the defendant by request purchased three pint bottles of whisky with the money given him, and he gave the person making the request two of the pints and kept one, the transaction was held not to be a sale as between such person and the defendant. *Reed v. State (Tex. Cr. App.)*, 44 S. W. 1093.

⁴⁴ *People v. Jorneau*, 147 Mich. 520; 111 N. W. 95; 13 Det. L. N. 1115.

CHAPTER XXVII.

ADULTERATION—INSPECTION.

ART. I. STATE DECISIONS

ART. II. PURE FOOD AND DRUG ACT.

ARTICLE I.—STATE DECISIONS.

SECTION.

825. Constitutionality of statute
forbidding adulteration—
Inspection.

826. Offense of selling adulterated liquors.

SECTION.

827. Inspection.

828. Filing affidavit and giving
bond liquors are pure.

Sec. 825. Constitutionality of statute forbidding adulteration—Inspection.

It is no longer an open question that statutes forbidding the adulteration of intoxicating liquors are constitutional. Statutes requiring them to be inspected are valid. Such statutes are constitutional even as to liquors in existence when it was enacted, and which requires all adulterated liquors to be labeled as such, and forbids their sale without such labels, although thereby the owner is not enabled to sell them as unadulterated liquors, as he might have fraudulently done before the enactment of the statute; for no one has a right to object to the validity of a statute on the ground that he is thereby deprived of the opportunity to reap a benefit through misrepresentation.¹ Statutes requiring liquors to be inspected, providing inspectors, and for a system of inspection, are valid, and a statute requiring the appointment of a suitable person

¹ See *Ex parte Kohler*, 74 Cal. State, 4 Baxt. 289; *State v. Bixman*, 162 Mo. 1; 62 S. W. 828.

as inspector for each "village or neighborhood" is not void on the ground that it is too indefinite to be enforced.²

Sec. 826. Offense of selling adulterated liquors.

For a retailer or dealer to mix good beer with an inferior quality of beer is a violation of a statute forbidding a brewer to "dilute beer or add any matter or thing thereto."³ It is not necessary to prove that the vendor knew the liquor was adulterated in a prosecution for selling adulterated liquor,⁴ but the vendor's personal innocence is a fact that may be taken into consideration in mitigation of his punishment.⁵ And the master is liable, though his servant in selling adulterated liquors acted contrary to his orders.⁶ It is no defense that the accused had a United States revenue license and manufactured or sold the liquor under it.⁷ It is immaterial, if the liquor is

² State v. Meek, 26 Wash. 405; 67 Pac. 76. The word "village" was construed to cover a "city" where it had become a city. Pabst Brewing Co. v. Crenshaw, 120 Fed. 144.

A statute prohibiting the manufacture of beer or malt liquors from "any substance, material or chemical, other than pure hops, pure barley, malt or wholesome yeast or rice" is not void for inaccuracy in the failure to specify a proper material. State v. Bixman, 162 Mo. 1; 62 S. W. 828.

An early Missouri statute (1860-61, p. 93, par. 4) applied to all persons selling liquors, without regard to the quantity sold. State v. Hayes, 38 Mo. 367.

Adulterated and misbranded liquor brought within a State is not protected by the Interstate Commerce Clause, the Pure Food and Drug Act of 1906 having removed it from its protection. State v. Intoxicating Liquors, 71 Atl. (Me.) 758.

³ Crofts v. Taylor, 19 Q. B. Div. 524; 51 J. P. 782; 56 L. J. M. C. 137; 57 L. T. 310; 36 W. R. 47.

⁴ Betts v. Armstead, 20 Q. B. Div. 771; 52 J. P. 471; 51 L. J. M. C. 109; 58 L. T. 811; 38 W. R. 720; Pain v. Boughtwood, 24 Q. B. Div. 353; 55 J. P. 469; State v. Stanton, 37 Conn. 421.

⁵ Parker v. Alder [1899], 1 Q. B. Div. 23; 68 L. J. Q. B. 7; 62 J. P. 772; 47 W. R. 142; 79 L. T. 381; 15 T. L. R. 3; 19 Cox C. C. 191.

⁶ Hotchins v. Hindmarsh [1891], 2 Q. B. 181; 55 J. P. 775; 65 L. T. 159; Brown v. Foot, 56 J. P. 581; 61 L. J. M. C. 110; 66 L. T. 649; 17 Cox C. C. 509; Kearly v. Tyler, 56 J. P. 72; 65 L. T. 261; 60 L. J. M. C. 159; Dyke v. Gower [1892], 1 Q. B. 220; 56 J. P. 168; 61 L. J. M. C. 70; 65 L. T. 760.

⁷ State v. Mieyer, 94 Mo. App. 201; 67 S. W. 933.

adulterated, that it is not injurious to health.⁸ In charging a sale of adulterated liquors it is not necessary to give the name of the purchaser.⁹ The sale of whisky under the Ohio statute is an offense whether sold as a beverage or a commodity.¹⁰

Sec. 827. Inspection.

In a number of States there are statutes which require liquors to be inspected. These statutes do not supersede the statutes forbidding adulteration, and the owner of adulterated liquor selling it cannot escape on the plea that it had been inspected by an officer of the State and labeled as unadulterated when it is in fact adulterated.¹¹ Under the Missouri statute the inspector may not only inspect and label the finished product after it is bottled or barreled, but may go to the brewery and take samples of the malt and of the beer in the vats in the process of fermentation, or he may open sealed packages.¹² A court of equity has no power to enjoin the inspection of liquor under a statute for whose violation a fine is imposed, even where it is alleged that the inspector's label will cast a cloud on the title of the plaintiff's property and business.¹³ Where a statute requires beer to be inspected and labeled, every sale of an unlabeled bottle of beer is a violation of the statute.¹⁴ A statute which guarantees the

⁸ *Commonwealth v. Kevin*, 18 Pa. Super. Ct. 414.

As to Missouri statute being in force, see *State v. Summers*, 142 Mo. 586; 44 S. W. 797.

⁹ *Lenthall v. Smith*, 15 N. S. W. L. R. 277.

Under the English statute if the vendor tell the purchaser the liquors have been adulterated before he purchases them, no offense is committed. *Gage v. Elsey*, 52 L. J. M. C. 44; 10 Q. B. Div. 518; 48 L. T. 226; 31 W. R. 500; 47 J. P. 391.

¹⁰ *State v. Hutchinson*, 56 Ohio St. 82; 46 N. E. 71. Under this statute whisky is a drug.

¹¹ *Phoenix Brewing Co. v. Rumbarger*, 181 Pa. St. 251; 37 Atl. 340.

Evidence under an early Ohio statute for selling liquor not inspected. *Cheadle v. State*, 4 Ohio St. 477.

¹² *State v. Bixman*, 162 Mo. 1; 62 S. W. 828.

¹³ *State v. Wood*, 155 Mo. 425; 56 S. W. 474; 48 L. R. A. 596.

As to inspector's fees, see *Catherwood v. Collins*, 12 Wright (Pa.), 480.

¹⁴ *State v. Broeder*, 90 Mo. App. 169.

right of a manufacturer of domestic wines to sell in quantities not less than one quart, where the grapes from which it is manufactured are grown on his own land, is not violated by an ordinance requiring the inspection of all domestic wines sold in the city and fixing fees for such inspection.¹⁵

Sec. 828. Filing affidavit and giving bond liquors are pure.

In one or two States statutes are in force requiring a vendor of liquors to file an affidavit that liquors he shall sell are pure and to also furnish a bond against their adulteration. These statutes apply to a physician's prescription,¹⁶ even though the statute permits physicians to compound medicines or preparations for mechanical purposes.¹⁷ Where the statute requires the vendor not to "mix or adulterate liquor with any substance whatever," it is not a compliance with it to take an oath not to "mix or adulterate with any poisonous substance whatever."¹⁸

¹⁵ *Stephens v. Henderson*, 120 Ga. 218; 47 S. E. 498.

¹⁶ *Newman v. State*, 7 Lea, 617; *State v. Summers*, 142 Mo. 586; 44 S. W. 797.

Contra, *State v. Hughes*, 35 Mo. App. 515.

¹⁷ *State v. Ferguson*, 72 Mo. 297.

¹⁸ *Hall v. State*, 9 Lea, 574.

As to repeal of such a statute by one requiring inspection, see *State v. Martin*, 3 Heisk. 487.

Liquor sold before an inspector has been appointed need not be inspected, it is said. *Smith v. Kibbee*, 9 Ohio St. 563.

ARTICLE II.—PURE FOOD AND DRUG ACT.

SECTION.	SECTION.
829. United States Pure Food and Drug Act of 1906.	838. Mixtures or compounds with distinctive names.
830. What drugs and foods covered by Act—Statute.	839. Substances named in drugs or foods.
831. "Drug" and "Food" defined.	840. Statement of weight or measure.
832. Adulteration and misbranding—Statute.	841. Labeling wine.
833. Adulteration of drugs defined—Statute.	842. Labeling whisky.
834. Adulteration of confectionery defined—Statute.	843. Misbranded drugs defined.
835. Adulteration of food defined—Statute.	844. Misbranded food defined—Adulteration.
836. Requisites of brand—Approval.	845. Misbranding.
837. Name and address of manufacturer.	846. Guaranteed goods.
	847. Exports and imports of foods and drugs.
	848. Original unbroken packages.

Sec. 829. United States Pure Food and Drug Act of 1906.

On June 30, 1906, Congress enacted what is known as "The Pure Food and Drugs Act,"¹⁹ and under this act the Secretary of Agriculture has promulgated rules and regulations to be followed by those who come within its provisions. The act itself is set forth in an appendix to this work.²⁰

Sec. 830. What drugs and foods covered by act—Statute.

The statute is limited to articles of interstate commerce or to articles in the Territories, District of Columbia or insular possessions. Thus, it is enacted: "Any article of food, drug, or liquor that is adulterated or misbranded within the meaning of this act, and is being transported from one State, Territory, district, or insular possession to another for sale, or, having been transported, remains unloaded, unsold, or in original packages or if it be sold or offered for sale in the District

¹⁹ 34th Stat. at Large, p. 768; U. S. Comp. St. Supp. 1907, p. 928.

²⁰ Marking whisky under the Illi-

nois Act, and validity of Act. Woolner & Co. v. Remnick, 170 Fed. 662.

of Columbia or the Territories, or insular possessions of the United States, or if it be imported from a foreign country for sale, or if it is intended for export to a foreign country, shall be liable to be proceeded against in any district court of the United States within the district where the same is found, and seized for confiscation by a process of libel for condemnation. And if such article is condemned as being adulterated or misbranded, or of a poisonous or deleterious character, within the meaning of this act, the same shall be disposed of by destruction or sale, as the said court may direct, and the proceeds thereof, if sold, less the legal costs and charges, shall be paid into the treasury of the United States, but such goods shall not be sold in any jurisdiction contrary to the provisions of this act or the laws of that jurisdiction: *Provided, however,* That upon the payment of the costs of such libel proceedings and the execution and delivery of a good and sufficient bond to the effect that such articles shall not be sold or otherwise disposed of contrary to the provisions of this act, or the laws of any State, Territory, district, or insular possession, the court may by order direct that such articles be delivered to the owner thereof. The proceedings of such libel cases shall conform, as near as may be, to the proceedings in admiralty, except that either party may demand trial by jury of any issue of fact joined in any such case, and all such proceedings shall be at the suit of and in the name of the United States.”²¹

Sec. 831. “Drug” and “Food” defined.

By the sixth section of the act the term “drug,” as used in it, “shall include all medicines and preparations recognized in the United States Pharmacopœia or National Formulary

²¹ Section 10. According to the rules and regulations promulgated April 28, 1909, by the Secretary of Agriculture, “The terms ‘original unbroken package’ as used in this Act is the original package, carton, case, can, box, barrel, bottle, phial, or other receptacle put up by the manufac-

turer, to which the label is attached, or which may be suitable for the attachment of a label, making one complete package of the food or drug article. The original package contemplated includes both the wholesale and the retail package.”

for internal and external use, and any substance or mixture of substances intended to be used for the cure, mitigation, or prevention of disease of either man or other animals. The term 'food,' as used herein, shall include all articles used for food, drink, confectionery, or condiment by man or other animals, whether simple, mixed or compound."

Sec. 832. Adulteration and misbranding—Statute.

In the first section of the Pure Food and Drugs Act ²² it is provided, "That it shall be unlawful for any person ²³ to manufacture within any Territory or District of Columbia any article of food or drug which is adulterated or misbranded, within the meaning of this act, and any person who shall violate any of the provisions of this section shall be guilty of a misdemeanor." The second section provides, "That the introduction into any State or Territory or the District of Columbia from any other State or Territory or the District of Columbia, or from any foreign country, or shipment to any foreign country of any article of food or drugs which is adulterated or misbranded, within the meaning of this act, is hereby prohibited, and any person who shall ship or deliver for shipment from any State or Territory or District of Columbia to any other State or Territory or the District of Columbia, or to a foreign country, or who shall receive in any State or Territory or the District of Columbia from any other State or Territory or the District of Columbia, or foreign country, and having so received, shall deliver, in original unbroken packages, for pay or otherwise, or offer to deliver to any other person, any such article so adulterated or misbranded within the meaning of this act, or any person who shall sell or offer for sale in the District of Columbia or the Territories of the United States any such adulterated or misbranded food or drugs, or export or offer to export the same to any foreign country, shall be guilty of a misdemeanor." This section in a proviso declares,

²² U. S. Stat. at Large, p. 768.

²³ By section 12 of the act the word "person" as used in the act "shall be construed to import both

the plural and singular, as the case demands, and shall include corporations, companies, societies and associations."

“That no article shall be deemed misbranded or adulterated within the provisions of this act when intended for export to any foreign country and prepared or packed according to the specifications or directions of the foreign purchaser when no substance is used in the preparation or packing thereof in conflict with the laws of the foreign country to which said article is intended to be shipped; but if said article shall be in fact sold or offered for sale for domestic use or consumption, then this proviso shall not exempt said article from the operation of any of the provisions of this act.”²⁴

Sec. 833. Adulteration of drugs defined—Statute.

In section seven it is declared, “That for the purposes of this act an article shall be deemed to be adulterated, in the case of drugs: *First*. If, when a drug is sold under or by a name recognized in the United States Pharmacopœia or National Formulary, it differs from the standard of strength, quality, or purity, as determined by the test laid down in the United States Pharmacopœia or National Formulary official at the time of investigation: *Provided*, That no drug defined in the United States Pharmacopœia or National Formulary shall be deemed to be adulterated under this provision if the standard of strength, quality, or purity be plainly stated upon the bottle, box, or other container thereof, although the standard may differ from that determined by the test laid down in the United States Pharmacopœia or National Formulary. *Second*. If its strength or purity fall below the professed standard or quality under which it is sold.”²⁵

²⁴ In Maine it is held that this statute renders liquor that has been misbranded subject to the police power of the State immediately on its arrival within the boundaries of a State; that it is removed from the protection of the Interstate Commerce clause of the Constitution, and therefore liquor brought into the State can be seized before it is delivered to the consignee. *State v. Intoxicating Liquors* (Me.), 71 Atl. 758.

²⁵ Section 7. “(a) A drug bearing the name recognized in the United States Pharmacopœia, without any further statement respecting its character, shall be required to conform in strength, quality and purity

Sec. 834. Adulteration of confectionery defined—Statute.

The statute provides that, "In case of confectionery if it contain terra alba, barytes, talc, chrome yellow, or other mineral substance or poisonous color or flavor, or other ingredient deleterious or detrimental to health, or any vinous, malt, or spirituous liquor or compound or narcotic," it shall be deemed adulterated.²⁶

Sec. 835. Adulteration of food defined—Statute.

Any food is declared by the statute to be adulterated, within its meaning: "*First*. If any substance has been mixed and packed with it so as to reduce or lower or injuriously affect its

to the standards prescribed or indicated for a drug of the same name recognized in the United States Pharmacopœia or National Formulary, official at the time.

"(b) A drug bearing a name recognized in the United States Pharmacopœia or National Formulary, and branded to show a different standard of strength, quality or purity, shall not be regarded as adulterated if it conforms to its declared standard."

Adulterated liquors brought from another State is not protected by the Interstate Clause, and may be seized before its delivery to the consignee. *State v. Intoxicating Liquors*, 104 Me. 502; 71 Atl. 758.

²⁶Section 7. Under this head the following rules have been adopted:

"(a) Mineral substances of all kinds (except as provided in Regulation 15) are specifically forbidden in confectionery whether they be poisonous or not.

"(b) Only harmless colors or flavors shall be added to confectionery.

"(c) The term 'narcotic drugs' includes all the drugs mentioned in section 8, Food and Drugs Act, June 30, 1906, relating to foods, their derivatives and preparations, and all other drugs of a narcotic nature."

Regulation 15 directs the Secretary of Agriculture to examine into the wholesomeness of colors, preservations, and other substances which are added to foods, and determine from chemical or other examination the names of these substantives which are permitted or inhibited in food products, and shall also determine from time to time the principles which shall guide the use of colors, preservatives, and other substantives added to foods. These findings are to be embodied in rules, to be approved by him, the Secretary of the Treasury and the Secretary of Commerce and Labor. Benzoate of soda mixed with food is permitted, but each container or package must be plainly labeled to show the presence and amount of benzoate of soda.

quality or strength. *Second.* If any substance has been substituted wholly or in part for the article. *Third.* If any valuable constituent of the article has been wholly or in part abstracted. *Fourth.* If it be mixed, colored, powdered, coated, or stained in a manner whereby damage or inferiority is concealed. *Fifth.* If it contain any added poisonous or other added deleterious ingredient which may render such article injurious to health; *Provided,* That when in the preparation of food products for shipment they are preserved by any external application applied in such manner that the preservative is necessarily removed mechanically, or by maceration of water, or otherwise, and directions for the removal of said preservative shall be printed on the covering or package, the provisions of this act shall be construed as applying only when said products are ready for consumption. *Sixth.* If it consists in whole or in part of a filthy, decomposed, or putrid animal or vegetable substance, or any portion of an animal unfit for food, whether manufactured or not, or if it is the product of a diseased animal, or one that has died otherwise than by slaughter.²⁷

²⁷ In New Orleans several hundred barrels of wine, under various names, were seized. An analysis showed that some of the wine consisted of a fermented solution of commercial dextrose artificially colored with a dye, preserved with benzoic acid; another kind consisted of commercial dextrose and sucrose, artificially sweetened with saccharine preserved with benzoic acid; a port wine consisted of a fermented solution of commercial dextrose and cane sugar, artificially colored with a coal-dye, sweetened with saccharine, having only 10.36 per cent. of alcohol, a quantity much below that in true port wine; and a fourth consisted of a fermented solution of commercial dextrose or starch sugar, artificially colored with a coal-dye and preserved with benzoic acid.

The ruling of the Department of Agriculture is that "wine is the product made by the normal alcoholic fermentation of the juice of sound grapes, and the usual cellar treatment, and contains not less than seven nor more than sixteen per cent. of alcohol, by volume, and in one hundred cubic centimeters not more than one-tenth gram of sodium chloride, nor more than two-tenths gram of potassium sulphate, and red wine is wine containing the red coloring matter of the skins of grapes." The entire number of barrels seized were condemned. Notice of Judgment No. 83, Department of Agriculture, June 28, 1909.

Sec. 836. Requisites of brand—Approval.

The Secretary of Agriculture will not undertake to approve labels, because the Pure Food and Drugs Act does not authorize him or any agent of the Department to do so, and any printed matter upon a label implying that the Department of Agriculture has approved it, is without warrant.²⁸ "The plain and manifest object of the statute under consideration is to protect purchasers and consumers of drugs and foodstuffs from fraud and imposition in the purchase or consumption of such articles under false representation, and to insure that the commodities are such as they are represented to be."²⁹ The law was enacted not to protect experts especially, not to protect scientific men who know the meaning and value of drugs and food, but for the purpose of protecting ordinary citizens, and in determining the meaning of words used upon cartons, bottles and circulars, they are to be taken in the way that an ordinary, plain, common citizen, without scientific knowledge, would understand them if they were put before him. And the jury or court trying a case and passing upon an instance of

In Buffalo whisky marked "Canadian Whisky" was seized. A chemical analysis of it showed the following results:

Proof	85.8
Grams per 100 liters of 100 proof alcohol:	
Total solids	291.9
Acids	9.8
Esters	12.1
Aldehydes	1.6
Furfural	None.
Fusel oil	16.0
Total color (degrees, brewer's scale)	19.8
Color insoluble in water (per cent.)	0.0
Color soluble in ether (per cent.)	0.0
Color insoluble in amyl alcohol (per cent.)	73.0

These results showed that all of the color present was artificial and that the spirit was of the grade known as commercial alcohol.

The whisky was condemned. Notice of Judgment No. 15, Department of Agriculture, August 27, 1908.

²⁸ Food Inspection Decision No. 41, rendered October 25, 1906.

²⁹ *United States v. Sixty-eight Cases of Syrup*, 172 Fed. 781. In this case a mixture of refined cane sugar flavored with an extract of maplewood was held properly designated by the brand "Western Reserve Ohio Blended Maple Syrup."

alleged misbranding have a right to consider how an ordinary citizen would, in taking up the labeled article and seeing the words upon it, understand them. If the words would mislead him, or have a tendency to mislead him, then the law has been violated. If there be nothing in the words or terms in the way in which they are used that would mislead an ordinary citizen, then there is no violation of the statute. If the statement on the label be untrue, as if it does not state the exact percentage of each ingredient of the bottle or the like, or if the amount of the liquid in the bottle be falsely stated, as that it contains a quart when it contains less, then the statute has been violated. But though the legend on the label be not strictly accurate, yet if it does not naturally and reasonably deceive or mislead or tend to deceive or mislead the public, no offense is committed.³⁰

Sec. 837. Name and address of manufacturer.

By Regulation 18: "(a) The name of the manufacturer or producer, or the place where manufactured, except in cases of mixtures and compounds having a distinctive name, need not be given upon the label, but if given, must be the true name and the true place. The words 'packed for ——,' 'distributed by ——,' or some equivalent phrase, shall be added to the label in case the name which appears upon the label is not that of the actual manufacturer or producer, or the name of the place not the actual place of manufacture or production. (b) When a person, firm or corporation actually manufactures or produces an article of food or drug in one or more places, the actual place of manufacture or production of each particular package need not be stated on the label except when, in the opinion of the Secretary of Agriculture, the mention of any such place, to the exclusion of others, misleads the public."³¹

³⁰ United States *v.* Harper, reported in Notice of Judgment No. 25, issued by the Department of Agriculture October 14, 1908.

³¹ "Food mixtures and compounds having 'distinctive names' must in all cases bear the name of the place of manufacture. No drug products, whether simple, mixed or compounded, with or without 'distinctive names,' are required to bear the name of the manufacturer or producer, or the place where manufactured or produced, except when sold under proper name brands, *i. e.*, brands in which both the given name and

Sec. 838. Mixtures or compounds with distinctive names.

“(a) The terms ‘mixtures’ and ‘compounds are interchangeable and indicate the results of putting together two or more food products.

the surname are used. All food and drug products sold under such proper name brands should bear the name of the manufacturer or producer and the place of manufacture or production. In all cases where the name of party or place is stated upon the label such name must be the true name of the actual manufacturer, producer, or packer and the true name of the place where the article was manufactured, produced, or packed.

“If, for trade reasons, when not required by law, a name or place be given upon the label of foods or drugs manufactured or packed for any person, firm, or corporation by another person, firm, or corporation, one of two forms of labels is allowed, viz.:

“(a) The name of the actual manufacturer or packer and the place where the goods were actually manufactured or packed may be given, or

“(b) The name of the person, firm or corporation for whom the goods are manufactured or packed or by whom they are distributed may be given, if preceded by the words ‘Prepared for,’ ‘Manufactured for,’ ‘Distributed by,’ etc. The phrase ‘Sold by’ is not satisfactory. The approved phrase shall be set in type not smaller than eight point (brevier) caps.

“This rule holds even if the formula or prescription be furnished or owned by the parties for whom the goods are manufactured or packed.” Food Inspection Decision No. 68, Department of Agriculture, April 18, 1907.

“Regulation 18 provides that if the name of the manufacturer and the place of manufacture be given, they must be the true name and the true place. It would appear, therefore, that the use of a fictitious name in such a manner that it would be understood to be the name of the manufacturer would be clearly a violation of Regulation 18. It is apparent that the provisions of Regulation 18 will not be fulfilled by the nominal incorporation of a fictitious firm. The regulations require that goods must be actually manufactured by the firm represented on the label as the manufacturer.

“When a proper name, other than that of the manufacturer, is placed upon a label it must not be used in the possessive. For instance,

CHARLES GASTON’S

OLIVE OIL.

BORDEAUX.

can be properly used only on an oil manufactured by Charles Gaston at Bordeaux. The same is true if the designation

GASTON’S

OLIVE OIL.

BORDEAUX.

be employed.

“(b) These mixtures or compounds shall not be imitations of other articles, whether simple, mixed or compound, or offered for sale under the name of other articles. They shall bear a distinctive name and the name of the place where the mixture or compound has been manufactured or produced.

“(c) If the name of the place be one which is found in different States, Territories, or countries, the name of the State, Territory or country, as well as the name of the place, must be stated.”³²

Sec. 839. Substances named in drugs or foods.

“(a) The term ‘alcohol’ is defined to mean common or ethyl alcohol. No other kind of alcohol is permissible in the manufacture of drugs except as specified in the United States Pharmacopœia or National Formulary.

“(b) The words alcohol, morphine, opium, etc., and the quantities and proportions thereof, shall be printed in letters corresponding in size with those prescribed in Regulation 17, paragraph (c).

“(c) A drug, or food product except in respect of alcohol,

“On the other hand, the word ‘Gaston’ might be used in an adjective sense, and not in the possessive case as qualifying the words ‘olive oil,’ in a manner that would indicate that it represented a brand and not a manufacturer, as

GASTON OLIVE OIL.

Or

OLIVE OIL, GASTON BRAND.

In such case, however, neither given name nor initials should be employed. The word ‘Gaston’ should be in the same type as ‘olive oil’ and in equal prominence, thus forming a part of the label.

“The phrase ‘Olive oil, Charles Gaston Brand,’ may be used in which case the name of the actual manufacturer should appear, in order that no false indication of the name of the person or firm manufacturing the product may be given.” Food Inspection Decision, Department of Agriculture, February 21, 1907.

To label Arkansas apples “Tepee Apples; Packed by C. H. Godfrey & Son, Benton Harbor and Watervliet, Mich.,” when they are packed in Arkansas is a violation of the statute. Notice of Judgment No. 36, Department of Agriculture, January 11, 1909.

³² Regulation 27.

is misbranded in case it fails to bear a statement on the label of the quantity or proportion of any alcohol, morphine, opium, heroin, cocaine, alpha or beta eucaine, chloroform, cannabis indica, chloral hydrate, or acetanilide, or any derivative or preparation of any such substances contained therein.

“(d) A statement of the maximum quantity or proportion of any such substances present will meet the requirements, provided the maximum stated does not vary materially from the average quantity or proportion.

“(e) In case the actual quantity or proportion is stated it shall be the average quantity or proportion with the variations noted in Regulation 29.”³³

³³ The substance of Regulation 17 is given in the section entitled “Misbranding,” and paragraph (c) relates to the size of the letters to be used. Regulation 29 is the section on “Statement of Weight or Measure.”

Chemical formula cannot be used as a substitute for the usual name.

“One of the objects of the law is to inform the consumer of the presence of certain drugs in medicines, and the above terms do not give the average person any idea as to the presence or absence of such drugs. In enumerating the ingredients, the quantity or proportion of which is required to be given upon the principal label of any medicinal preparation in which such ingredients may be present, the act uses only common names, and the permission to use any but such common names for any ingredients required to be declared upon the label is neither expressed nor implied in any part of the law.

“The term used for acetanilide is ‘acetanilide,’ and not phenylacetamide. No reference is made to the use of the chemical formula in designating the presence of chemicals. The words ‘choral hydrate’ appear in the act, but not the chemical name trichlorethidene glycol. It can readily be seen that if the act were not closely adhered to in this connection there would soon be such a confusion and multiplicity of names and phrases that one of the objects of the act would be defeated.

“The names to be employed in stating the quantity or proportion of the ingredients required by the act to appear on the label of all medicinal preparations containing same are—

“First. Those used in the law for the articles enumerated; example, ‘alcohol,’ not ‘spiritus rectificatus.’

“Second. In the case of derivatives: (a) The name of the parent substance used in the act should constitute part of the name; example, ‘choral acetone,’ not ‘trichlorethidene dimethyl ketone.’ (b) The trade

Sec. 840. Statement of weight or measure.

“(a) A statement of the weight or measure of the food contained in a package is not required. If any such statement is printed, it shall be a plain and correct statement of the average net weight or volume, either on or immediately above or below the principal label, and of the size of letters specified in Regulation 17.

“(b) A reasonable variation from the stated weight for individual packages is permissible, provided this variation is as often above as below the weight of volume stated. This variation shall be determined by the inspector from the changes in the humidity of the atmosphere, from the exposure of the package to evaporation or to absorption of water, and the reasonable variations which attend the filling and weighing or measuring of a package.”³⁴

“In the case of alcohol the expression ‘quantity’ or ‘proportion’ shall mean the average percentage by volume in the finished product. In the case of the other ingredients required to be named upon the label, the expression ‘quantity’ or ‘proportion’ shall mean grains or minims per ounce or fluid ounce, and also, if desired, the metric equivalents therefor, or milligrams per gram or per cubic centimeter, or grams or cubic centimeters per kilogram or per liter; provided that these articles shall not be deemed misbranded if the maximum of

name, accompanied in parentheses by the name of the parent substance; example, ‘dionine (morphine derivative).’

“Third. Names of preparations containing the name of some ingredient used in the act. In such cases the name used in the act should constitute the first portion of the name of the preparation.

“Fourth. Common names (such as laudanum, Dover’s powder, etc.) of preparations containing an ingredient enumerated in the law, provided such name or names are accompanied in parentheses by some such phrase as ‘preparation of opium’ or ‘opium preparation,’ followed by the number of minims or grains, as specified in the regulations; for instance, ‘laudanum (preparation of opium), 40 minims per ounce.’”
Food Inspection Decision No. 56, Department of Agriculture.

³⁴ Regulation 29. The substance of regulation 17 is given in the section entitled “Misbranding.”

quantity or proportion be stated, as required in Regulation 28 (d).''³⁵

Sec. 841. Labeling wine.

Concerning the labeling of wine, the following decision was rendered by the Board of Food and Drug Inspection, known as No. 109, on August 21, 1909:

"After giving full consideration to the data submitted, the Board is of the opinion that the term 'wine' without modification is an appropriate name solely for the product made from the normal alcoholic fermentation of the juice of sound ripe grapes, without addition or abstraction, either prior or subsequent to fermentation, except as such may occur in the usual cellar treatment for clarifying and aging. The addition of water or sugar, or both, to the must prior to fermentation is considered improper, and a product so treated should not be called 'wine' without further characterizing it. A fermented beverage prepared from grape must by addition of sugar would properly be called a 'sugar wine' or the product may be labeled in such a fashion as to clearly indicate that it is not made from the untreated grape must, but with the addition of sugar. The consumer is, under the Food and Drugs Act, entitled to know the character of the product he buys.

"Evidence was offered on the preparation of 'wine' from the marc. In these cases it appeared customary to add both water and sugar to the marc and sometimes to use saccharin, coloring matter, preservatives, etc., to make a salable article.

"In the opinion of the Board no beverage can be made from the marc of grapes which is entitled to be called 'wine' however further characterized, unless it be by the word 'imitation.' The words 'Pomace Wine' are not satisfactory, since the product is not a wine in any sense, but only an 'imitation wine' and should be so labeled." ³⁶

³⁵ Regulation 30. Regulation is given in the section entitled "Substances named in drugs and foods."

There are numbers of unreported decisions made wherein canned goods have been condemned because the cans fell two or three ounces short of the representations made on the labels. See section on "Misbranding."

³⁶ On June 26, 1909, the Committee on Food Standards, Association of Official Agricultural Chemists, reported as follows concerning wines:

Sec. 842. Labeling whisky.

Controversies have arisen over the labeling of whiskies, and to such an extent that the matter was referred to Presi-

"1. *Wine* is the product made by the normal alcoholic fermentation of the juice of sound, ripe grapes, and the usual cellar treatment, and contains not less than seven (7) nor more than sixteen (16) per cent. of alcohol, by volume, and in one hundred (100) cubic centimeters (20° C.) not more than one-tenth (0.1) gram of sodium chloride nor more than two-tenths (0.2) gram of potassium sulphate; and for red wine not more than fourteen-hundredths (0.14) gram, and for white wine not more than twelve-hundredths (0.12) gram of volatile acids produced by fermentation and calculated as acetic acid. *Red wine* is wine containing the red coloring matter of the skins of grapes. *White wine* is wine made from white grapes or the expressed fresh juice of other grapes.

"2. *Dry wine* is wine in which the fermentation of the sugars is practically complete and which contains, in one hundred (100) cubic centimeters (20° C.) less than one (1) gram of sugars, and for dry red wine less than sixteen-hundredths (0.16) gram of grape ash and not less than one and six-tenths (1.6) grams of grape solids, and for dry white wine not less than thirteen-hundredths (0.13) gram of grape ash and not less than one and four-tenths (1.4) grams of sugar-free grape solids.

"3. *Fortified dry wine* is dry wine to which brandy has been added, but which conforms in all other particulars to the standard of dry wine.

"4. *Sweet wine* is wine in which the alcoholic fermentation has been arrested, and which contains, in one hundred (100) cubic centimeters (20° C.), not less than one (1) gram of sugars, and for sweet red wine not less than sixteen-hundredths (0.16) gram of grape ash, and for sweet white wine not less than thirteen-hundredths (0.13) gram of grape ash.

"5. *Fortified sweet wine* is sweet wine to which wine spirits have been added. By act of Congress, 'sweet wine' used for making fortified sweet wine and 'wine spirits' used for such fortification are defined as follows (Sec. 43, Act of October 1, 1890, 26 Stat., 567, as amended by Section 68, Act of August 27, 1894, 28 Stat., 509, and further amended by Act of Congress approved June 7, 1906): 'That the wine spirits mentioned in Section 42 of this Act is the product resulting from the distillation of fermented grape juice to which water may have been added prior to, during, or after fermentation, for the sole purpose of facilitating the fermentation and economical distillation thereof, and shall be held to include the products from grapes or their residues, commonly known as grape brandy; and the pure sweet wine, which may be fortified free of tax, as provided in said section, is fermented grape

dent Taft, who made a thorough examination of the whole question, and on December 27, 1909, rendered a written opinion on the question involved, taking somewhat a different view from that of the Secretary of Agriculture and the Solicitor

juice only, and shall contain no other substance whatever introduced before, at the time of, or after fermentation, except as herein expressly provided; and such sweet wine shall contain not less than four per centum of saccharine matter, which saccharine strength may be determined by testing with Balling's saccharometer or must scale, such sweet wine, after the evaporation of the spirits contained therein, and restoring the sample tested to original volume by addition of water: *Provided*, That the addition of pure boiled or condensed grape must or pure crystallized cane or beet sugar or pure anhydrous sugar to the pure grape juice aforesaid, or the fermented product of such grape juice prior to the fortification provided by this Act for the sole purpose of perfecting sweet wine according to commercial standard, or the addition of water in such quantities only as may be necessary in the mechanical operation of grape conveyers, crushers, and pipes leading to fermenting tanks, shall not be excluded by the definition of pure sweet wine aforesaid: *Provided, however*, That the cane or beet sugar, or pure anhydrous sugar, or water, so used shall not in either case be in excess of ten (10) per centum of the weight of the wine to be fortified under this Act: *And provided further*, That the addition of water herein authorized shall be under such regulations and limitations as the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, may from time to time prescribe; but in no case shall such wines to which water has been added be eligible for fortification under the provisions of this Act where the same, after fermentation and before fortification, have an alcoholic strength of less than five per centum of their volume.'

"6. *Sparkling wine* is wine in which the after part of the fermentation is completed in the bottle, the sediment being disgorged and its place supplied by wine or sugar liquor, and which contains in one hundred (100) cubic centimeters (20° C.), not less than twelve-hundredths (0.12) gram of grape ash.

"7. *Modified wine, ameliorated wine, corrected wine*, is the product made by the alcoholic fermentation, with the usual cellar treatment, of a mixture of the juice of sound, ripe grapes with sugar (sucrose), or a syrup containing not less than sixty-five (65) per cent. of sugar (sucrose), and in quantity not more than enough to raise the alcoholic strength after fermentation, to eleven (11) per cent. by volume.

"8. *Raisin wine* is the product made by the alcoholic fermentation of an infusion of dried or evaporated grapes, or of a mixture of such infusion or of raisins with grape juice."

General. According to his suggestion "whisky" should be branded so as to "indicate just what kind of whisky the package contains. Thus, straight whisky may be branded as such and may be accompanied by the legend 'aged in wood.' Whisky made from rectified, redistilled or neutral spirits may be branded as whisky made from rectified, redistilled, or neutral spirits, as the case may be." "The term 'straight whisky' is well understood in the trade and well understood by consumers," he continues. "There is no reason, therefore, why those who make straight whisky may not have the brand upon their barrels of straight whisky, with further descriptive brands as 'Bourbon' or 'rye' whisky, as to the composition of the grain used may justify, and they may properly add, if they choose, that it is aged in the wood." He also suggested that "rectified," "redistilled," or "neutral" spirits or whiskies should be so labeled. Where straight whisky and whisky made from neutral spirits are mixed, he considered it proper to call them a "blend" of straight whisky and whisky made from neutral spirits. Neutral spirits made from molasses and reduceable to palatable strength could not be labeled whisky, but should be labeled "rum." These suggestions were adopted by the Secretary of Agriculture, and on April 25, 1910, he issued regulations concerning the branding of whisky in conformity therewith.³⁷

³⁷ We give President Taft's decision in full:

"By the Pure Food Act of June 30, 1906, Congress forbade the introduction into interstate and foreign commerce of adulterated or misbranded drugs or articles of food, with two objects, one to preserve the health of the people, and the other to prevent their being deceived by label or brand as to the real character of drugs or articles of food offered for sale. Within the definitions of the act potable liquors are articles of food. An important controversy has arisen in the execution and the application of the act as to whether the branding of certain potable liquors with the name 'whisky' is a misbranding within the act. All distilled spirits pay, under the internal revenue laws, a heavy tax. The tax is measured by a certain rate per proof gallon. Theoretically pure ethyl alcohol is 200° proof. A proof gallon of distilled spirits is half water and half alcohol, or a gallon of 100° proof. Potable strength varies from 90° to 102° or 103°. Distilled spirits are manufactured under the close supervision of revenue officers, and the brands which are

Sec. 843. Misbranded drugs defined.

Section eight of the statute provides: "That the term 'misbranded,' as used herein, shall apply to all drugs, * * *

placed upon the packages containing the spirits after manufacture are placed there under regulations of the Internal Revenue Bureau. It is, of course, of the highest importance that the internal revenue law and the pure food law should be enforced in such a way as to accomplish the purposes of both.

"In Internal Revenue Order No. 723 (April, 1907) directions were given as to how certain distilled spirits should be branded. The effect of this order was to deny the right to the use of the brand 'whisky' to any distilled liquor except that which is known to the trade as 'straight whisky' and to require the branding of several kinds of liquors distilled from grain as 'imitation whisky.' The pure food act does not mention the term 'whisky;' it does not authorize any officers to fix a standard in respect to any article of food or liquor. It therefore leaves the question of what liquor may be properly branded as whisky to those who have to execute the pure food law and the internal revenue law, subject, of course, to a review of the correctness of their action by courts whenever a case between parties litigant, properly within the jurisdiction of such courts shall arise. Attorney-General Bonaparte was asked to pass upon the question of what properly might be included under the brand of whisky within the pure food law, and rendered two decisions in which he in effect limited the proper use of the brand to what is known in the trade as 'straight' whisky. So far as appears from Mr. Bonaparte's opinions, he accepted a definition of whisky from a dictionary or encyclopedia, and, in forming and expressing his opinion, he had not the benefit of any evidence as to the meaning or scope of the term acquired from manufacturers, dealers, or consumers in the trade. Internal Revenue Order 723 was founded on Mr. Bonaparte's opinions.

"A petition was filed in April last by a large number of distillers whose interests were affected, asking that the issue passed upon by Mr. Bonaparte and confirmed by Mr. Roosevelt in Internal Revenue Order No. 723 be reheard on the ground that the meaning of the term 'whisky' is one of fact, and is to be properly determined only after consideration of competent evidence drawn from those familiar with the trade in which liquors are manufactured and sold. The rehearing was granted, and the matter was referred to Hon. Lloyd Bowers, Solicitor-General, to determine upon evidence to be submitted by all parties in interest:

"1. What was the article called 'whisky' as known (1) to the manufacturers, (2) to the trade, and (3) to the consumers at and prior to the date of the passage of the pure food law?

"2. What did the term 'whisky' include?

the package or label of which shall bear any statement, design, or device regarding such article, or the ingredients or

"3. Was there included in the term 'whisky' any maximum or minimum of congeneric substances as necessary in order that distilled spirits should be properly designated whisky?

"4. Was there any abuse in the application of the term 'whisky' to articles not properly falling within the definition of that term at and prior to the passage of the pure food law, which it was the intention of Congress to correct by the provisions of that act?

"5. Is the term 'whisky' as a drug applicable to a different product than whisky as a beverage? If so, in what particulars?

"A very full hearing was had before the Solicitor-General and a large amount of evidence was taken, making a record of more than 1,200 printed pages. The answers of the Solicitor-General to the questions were detailed and exact. I shall not set them out. It is sufficient to say that he found from the evidence that whisky, as a term of the trade for many years, included much more than 'straight' whisky; that it included 'rectified' whisky, 'redistilled' whisky, and all distillates of grain reduced by water to potable strength and containing a sufficient trace of fusel oil or the congeneric substances accompanying grain distillation to give a distinctive whisky flavor to the liquor; and this whether or not colored by burnt sugar or other harmless flavoring and coloring matter. But he excluded from the proper meaning and scope of the term 'whisky' that product of continuous distillation called 'neutral spirits,' though reduced to potable strength and colored and flavored by burnt sugar, on the ground that in such product there was not enough of the fusel oil or congeneric substances to give to the liquor the distinctive flavor of whisky. He found further that the mixture of neutral spirits with whisky, if a sufficient quantity of fusel oil or congeneric substances remained to retain the whisky flavor, was not an adulteration and did not make it other than whisky.

"Exceptions were taken by all parties to these findings of the Solicitor-General, and the whole record of the evidence has been brought before me for consideration and decision. I invited the Attorney-General and the Secretary of Agriculture to sit with me and hear the arguments. Because of the importance of the case, I have thought it necessary to read with care the entire evidence adduced. The Solicitor-General has rendered an opinion to justify his findings of great ability and acumen; and I reach a somewhat different conclusion from him with much reluctance. But I am led to do so by a very clear conviction as to what the evidence shows.

"Whisky for more than one hundred years has been the most general and comprehensive term applied to liquor distilled from grain. It is derived from the Irish word 'Usquebaugh,' and for more than a century

substances contained therein which shall be false or misleading in any particular or to any * * * drug product which is

has been used in Ireland, Scotland, England and in this country to mean ardent spirits distilled from grain reduced to potable strength. Its flavor and color have varied with the changes in the process of its manufacture in the United States, Ireland, Scotland and England, and have been varied by the introduction into it of fruit juice and burnt sugar and other substances. It was manufactured originally in what was called a 'pot still' by the distillation of wort or beer fermented from grain. It was composed of about equal parts of water and ethyl alcohol and certain substances now called congeneric substances which united were known as fusel oil; and when the distillate was first produced, the so-called fusel oil gave to the liquor a very disagreeable odor and a very raw taste. The efforts of those engaged in the manufacture were directed toward the reduction of the amount of fusel oil in the product and toward the elimination of the disagreeable odor and taste produced by it. This was effected for a great many years by passing the distilled spirit through leaching tubs of charcoal, which tended to purify it and reduce the amount of fusel oil, and subsequently rectification was followed by another step—i. e., redistillation—and at all times by the introduction of fruit essences or burnt sugar. Burnt sugar is used in Scotch whisky as well as in American whisky, though not to the same extent or in the same proportion. Between 1850 and 1860 in this country a very large and profitable business began in certain well-known brands of whisky, which were purified by leaching tubs and were colored and flavored by the use of caramel or burnt sugar. Though there was some American white whisky, the conventional amber or brown color and whisky flavor in America was that produced by a mixture of the raw whisky with its fusel oil reduced as much as possible, and of burnt sugar or caramel.

"Some time during the Civil War it was discovered that if raw whisky, as it came from the still, unrectified and without redistillation, and thus containing from one-half to one-sixth of one per cent. of fusel oil, was kept in oak barrels, the inside of the staves of which were charred, the tannic acid of the charred oak which found its way from the wood into the distilled spirits would color the raw white whisky to the conventional color of American whisky, and after some years would eliminate altogether the raw taste and the bad odor given the liquor by the fusel oil and would leave a smooth, delicate aroma, making the whisky exceedingly palatable without the use of any additional flavoring or coloring. The whisky thus made by one distillation and by ageing in charred oak barrels came to be known as 'straight' whisky, and to those who were good judges came to be regarded as the best and purest whisky.

falsely branded as to the State, Territory or country in which it is manufactured or produced. That for the purposes of this

“Meantime the other and shorter method of making whisky grew greatly in its use, and the amount of distilled spirits made from grain either by rectifying or by redistilling, which were reduced to potable strength and given a conventional flavor of whisky by the use of burnt sugar and other essences, far exceeded that of the so-called ‘straight whiskies;’ and as according to this method a potable, pleasant beverage could be made in a short time without the ageing in wood and without the loss of interest on the capital involved in holding the product for two or three years while it acquired color and flavor, it could be sold, of course, much cheaper. It was made originally by distilling a product at a proof of from 140° to 160°, called ‘high wines,’ by taking these high wines to a rectifying house and there passing them through leaching tubs to reduce as far as possible the fusel oil, and then coloring and flavoring the whisky with burnt sugar; or by another step of purification, which was a redistillation of the high wines, reducing the fusel oil still further, and then the coloring and flavoring by caramel. The product of this system was known as ‘finished whisky;’ whereas the raw spirits delivered were known as ‘high wines.’

Subsequently, about 1872 or a little later, a patent still came into use by which it was possible through one process of continuous distillation to clarify the spirits somewhat more completely of the fusel oil than the old system of rectifying by leaching tubs, or even by redistillation as a separate step; and the result of this continuous distillation was the production of what was known, and is known now, as ‘neutral spirits,’ at a proof varying from 160° to 188°. They still had a small trace of the congeneric substances that go to make up what is known as ‘fusel oil,’ but not enough substantially to affect the flavor. The rectifiers, who pay a tax as such under the internal revenue law, then began to use neutral spirits as they had used high wines before, to color them with burnt sugar, and to offer them as whisky. The difference between the whisky made from high wines and the whisky made from neutral spirits was the difference in the traces of fusel oil, being less in the latter than in the former, but, so far as I am able to determine from the evidence, there was only a difference in slight degree. The importance of the fusel oil in the product ready for the drinker can be judged by the fact that it varies in straight whisky from one-half of one per cent. to one-sixth of one per cent., but that in rectified and redistilled whisky it is considerably less, and in the presence of burnt sugar it can hardly be perceptible to the taste.

“All these products—straight whisky, rectified spirits whisky, redistilled spirits whisky and neutral spirits whisky—when reduced by water to a hundred proof or less and sold upon the market as beverages,

act an article shall also be deemed to be misbranded: In case of drugs: *First*—If it be an imitation of or offered for sale

were known to the trade and to the customers as 'whiskies;' the difference between straight whisky and the neutral spirits whisky, which now constitutes and for thirty years last passed has constituted, perhaps, 75 per cent. of all the whisky sold, was well understood, and the difference between the two was seen in the difference in price which each commanded in the market.

"It was supposed for a long time that by the ageing of straight whisky in the charred wood a chemical change took place which rid the liquor of the fusel oil and thus destroyed the unpleasant taste and odor. It now appears by chemical analysis that this is untrue; that the effect of the ageing is only to dissipate the odor, and to modify the raw, unpleasant flavor, but to leave the fusel oil still in the straight whisky. Fusel oil is known to be poisonous and injurious. In the small quantity in the straight whisky it probably does no harm. But however this may be, it is certain that in the whisky made of neutral spirits there is less fusel oil and less of the poison arising therefrom than there is in the straight whisky. The question, therefore, is not here one of health. It is only one of correct branding to prevent deceit of the public as to what it is buying.

"After an examination of all the evidence, it seems to me overwhelmingly established that for a hundred years the term 'whisky' in the trade and among the customers has included all potable liquor distilled from grain; that the straight whisky is, as compared with the whisky made by rectification or redistillation and flavoring and coloring matter, a subsequent improvement, and that therefore it is a perversion of the Pure Food Act to attempt now to limit the meaning of the term 'whisky' to that which modern manufacture and taste have made the most desirable variety.

"Exactly the same question has arisen in England and has been determined by a Royal Commission of eminent lawyers and scientific men in the same way. That Commission held, after a full investigation, that neutral, or velvet spirits, as they are there more frequently called, made by a patent still from grain was whisky when reduced to potable strength. The same conclusion is shown to have been in the mind of Congress in 1882 when a question arose in the House of Representatives, as between the method of taxation of straight whisky and of that liquor which was the product of continuous distillation. Both were denominated whisky in the discussion. Congress legislated with reference to the distinction between the two in the method of manufacture and preparation for use as a beverage, which was admitted on all sides to exist, but no question was made as to the proper application of the term 'whisky' to both kinds of liquor.

under the name of another article. *Second*—If the contents of the package as originally put up shall have been removed,

“With deference to the very able consideration of this question made by Doctor Wiley and other distinguished chemists, I think the fundamental error in all conclusions differing from this is one of fact as to what the name of whisky actually has included for the last hundred years; and while Mr. Bowers, the Solicitor-General, greatly enlarged in his definition the character and scope of the term ‘whisky’ beyond theirs, he fell into what seems to me to be the error of making too nice a distinction in reference to the amount of congeneric substances or traces of fusel oil required to constitute whisky for practical purposes when the flavor and color of all whiskies but straight whiskies have been chiefly that of ethyl alcohol and burnt sugar. If high wines at from 140° to 160° when reduced to potable strength and containing a very small quantity of fusel oil and flavored by burnt sugar are whisky, as he has found, then the mere improvement in the process by continuous distillation so as to give a product of from 160° to 188° proof and still further to reduce its fusel oil, is to not change its whole nature or to make what was genuine ‘whisky’ ‘imitation whisky,’ because of a slightly reduced trace of one ingredient. The distinction is too impracticable, in my judgment, for the execution of the law. It may be that the public were not fully or exactly advised as to the change in the process when it was made, but the change in the process was slight and effected economy in the production rather than the flavor of the product; and if the public detected no difference in flavor in the product of the improved process, as they did not, but continued for forty years to regard it as the same, there was no deceit in continuing to call whisky that which was thus merely improved in its manufacture without substantial change of composition or flavor.

“It is undoubtedly true that the liquor trade has been disgracefully full of frauds upon the public by false labels; but these frauds did not consist in palming off something which was not whisky as whisky, but in palming one kind of whisky as another and better kind of whisky. Whisky made of rectified or redistilled or neutral spirits and given a color and flavor by burnt sugar, made in a few days, was often branded as Bourbon or Rye straight whisky. The way to remedy this evil is not to attempt to change the meaning and scope of the term ‘whisky,’ accorded to it for one hundred years, and narrow it to include only straight whisky; and there is nothing in the Pure Food Law that warrants the inference of such an intention by Congress. The way to do it is to require a branding in connection with the use of the term ‘whisky’ which will indicate just what kind of whisky the package contains. Thus, straight whiskies may be branded as such as may be accompanied by the legend ‘aged in wood.’ Whisky made from rectified, redistilled,

in whole or in part, and other contents shall have been placed in such package, or if the package fail to bear a statement

or neutral spirits may be branded as whisky made from rectified, redistilled or neutral spirits, as the case may be.

"With this result, the question arises what ought the order to be so that the purpose of the Pure Food Law can be carried out. The term 'straight whisky' is well understood in the trade and well understood by consumers. There is no reason, therefore, why those who make straight whisky may not have the brand upon their barrels of straight whisky, with further descriptive terms as 'Bourbon' or 'Rye' whisky, as the composition of the grain used may justify, and they may properly add, if they choose, that it is aged in the wood.

"Those may make whisky of 'rectified,' 'redistilled' or 'neutral' spirits cannot complain if, in order to prevent further frauds, they are required to use a brand which shall show exactly the kind of whisky they are selling. For that reason it seems to me fair to require them to brand their product as 'whisky made from rectified spirits,' or 'whisky made from redistilled spirits,' or 'whisky made from neutral spirits,' as the case may be; and if aged in the wood, as sometimes is the case with this class of whiskies, they may add this fact.

"A great deal of the liquor sold is a mixture of straight whisky with whisky made from neutral spirits. Now, the question is whether this ought to be regarded as a compound or a blend. The Pure Food Law provides that 'in the case of articles labeled, branded or tagged so as to plainly indicate that they are compounds, imitations or blends,' the term 'blend' shall be construed to mean a mixture of like substances, not excluding harmless coloring or flavoring ingredients used for the purpose of coloring and flavoring only. It seems to me that straight whisky and whisky made from neutral spirits, each with more than ninety-nine and a half per cent. ethyl alcohol and water, and with less than half of one per cent. of fusel oil, are clearly a mixture of like substances, and that while the latter may have and often does have burnt sugar or caramel to flavor and color it, such coloring and flavoring ingredients may be regarded as for flavoring and coloring only, because the use of burnt sugar to color and flavor spirits as whisky is much older than the coloring and flavoring by the tannin of the charred bark. Therefore, where straight whisky and whisky made from neutral spirits are mixed, it is proper to call them a blend of straight whisky and whisky made from neutral spirits. This is also in accord with the decision of the British Royal Commission in the case which I have cited upon a similar issue.

"Canadian Club whisky is a blend of whisky made from neutral spirits and of straight whisky aged in the wood, and its owners and vendors are entitled to brand it as such.

on the label of the quantity or proportion of alcohol, morphine, opium, cocaine, heroin, alpha or beta eucaine, chloroform, cannabis indica, chloral hydrate, or any derivation or preparation of any such substances contained therein."

"Neutral spirits made from molasses and reduced to potable strength has sometimes been called whisky, but not for a sufficient length of time or under circumstances justifying the conclusion that it is a proper trade name. The distillate from molasses used for drinking has commonly been known as rum. The use of whisky for it is a misbranding.

"There are other kinds of liquor in respect to which a decision is invoked, but it is thought that the principles above stated, and the directions above given in specific cases, will furnish a clear precedent for all other cases.

"By such an order as this decision indicates the public will be made to know exactly the kind of whisky they buy and drink. If they desire straight whisky, then they can secure it by purchasing what is branded 'straight whisky.' If they are willing to drink whisky made of neutral spirits, then they can buy it under a brand showing it; and if they are content with a blend of flavors made by the mixture of straight whisky and whisky made of neutral spirits, the brand of the blend upon the package will enable them to buy and drink that which they desire. This was the intent of the act. It injures no man's lawful business, because it only insists upon the statement of the truth in the label. If those who manufacture whisky made of neutral spirits, and wish to call it 'whisky' without explanatory phrase, complain because the addition of 'neutral spirits' in the label takes away some of their trade, they are without a just ground because they lose their trade merely from a statement of the fact. The straight whisky men are relieved from all future attempt to pass off neutral spirits whisky as straight whisky. More than this, if straight whisky or any other kind of whisky is aged in the wood, the fact may be branded on the package, and this claim to public favor may truthfully be put forth. Thus the purpose of the Pure Food Law is fully accomplished in respect of misbranding and truthful branding.

"This opinion will be certified to the Secretary of the Treasury, the Secretary of Agriculture, and the Secretary of Commerce and Labor to prepare the regulation in accordance herewith, under the Pure Food Law; and to the Secretary of the Treasury and the Commissioner of Internal Revenue to prepare the proper regulation under the Internal Revenue Law."

WILLIAM H. TAFT.

THE WHITE HOUSE, December 27, 1909.

Sec. 844. Misbranded food defined—Adulteration.

Section eight of the statute provides: "That the term 'misbranded,' as used herein, shall apply to all * * * articles of food, or articles which enter into the composition of food, the package or label of which shall bear any statement, design or device regarding such article, or the ingredients or substances contained therein, which shall be false or misleading in any particular, and to any food * * * product which is falsely branded as to the State, Territory or country in which it is manufactured or produced. In the case of food: *First*—If it be an imitation of or offered for sale under the distinctive name of another article. *Second*—If it be labeled or branded so as to deceive or mislead the purchaser, or purport to be a foreign product when not so, or the contents of the package, as originally put up, shall have been removed in whole or in part, and other contents shall have been placed in such package, or if it fail to bear a statement on the label of the quantity or proportion of any morphine, opium, cocaine, heroin, alpha or beta eucaine, chloroform, cannabis indica, chloral hydrate, or acetanilide, or any derivation or preparation of any such substance contained therein. *Third*—If in package form, and the contents are stated in terms of weight or measure, they are not plainly and correctly stated on the outside of the package. *Fourth*—If the package containing it or its label shall bear any statement, design or device regarding the ingredients or the substances contained therein, which statement, design or device shall be false or misleading in any particular: Provided, That an article of food which does not contain any added poisonous or deleterious ingredients shall not be deemed to be adulterated or misbranded in the following cases: *First*—In the case of mixtures or compounds which may be now or from time to time hereafter known as articles of food, under their own distinctive names, and not an imitation of or offered for sale under the distinctive name of another article, if the name be accompanied on the same label or brand with a statement of the place where said article has been manufactured or produced. *Second*—In the case of articles labeled, branded or tagged so as to plainly indicate

that they are compounds, imitations or blends, and the word 'compound,' 'imitation' or 'blend,' as the case may be, is plainly stated on the package in which it is offered for sale: Provided, That the term blend as used herein shall be construed to mean a mixture of like substances, not including harmless coloring or flavoring ingredients used for the purpose of coloring and flavoring only: And provided, further, That nothing in this act shall be construed as requiring or compelling proprietors or manufacturers of proprietary foods which contain no unwholesome added ingredient to disclose their trade formulas, except in so far as the provision of this act may require to secure freedom from adulteration or misbranding."

Sec. 845. Misbranding.

According to the rules and Regulation No. 17 of the Department of Agriculture the term "label," as used in section eight of the statute, "applies to any printed, pictorial or other matter upon or attached to any package of a food or drug product, or any container thereof subject to the provisions" of the act. It must contain "the name of the place of manufacture in the case of food compounds or mixtures sold under a distinctive name; statements which show that the articles are compounds, mixtures or blends; the words 'compound,' 'mixture' or 'blend,' and words designating substances or their derivatives and proportions required to be named in the case of food and drugs." All this information must appear upon the principal label, and must have no intervening description or explanatory reading matter. If the name of the manufacturer and place of manufacture be given, they must also appear upon the principal label. In conjunction with the name of the substance must be placed such phrases, when that is true, as "artificially colored," "colored with sulphate of copper," or any other descriptive phrase necessary to be announced must be conspicuously displayed. Other matters elsewhere on the label may appear, in the discretion of the manufacturer. If the contents be stated in terms of weight or measure, the statement must appear upon the principal

label, and must be couched in plain terms. If the principal label is in a foreign language, all information required by law and the rules and regulations of the department must appear in English. But additional labels, in other languages may be used, but none of them more prominent than the principal label, and such other labels must bear the information required by law, but not necessarily in English. The size of the type used to declare the information required must not be smaller than eight point (brevier) capitals; but if the size of the package will not admit the use of that size of type, the size may be reduced proportionately. Descriptive matter upon the label must be free from any statement, design, or device regarding the article or the ingredients or substances contained therein, or quality thereof, or place of origin, which is false or misleading in any way. "The term 'design' or 'device' applies to pictorial matters of every description, and to abbreviations, characters or signs for weights, measures or names of substances." If an article contain more than one food product or active medicinal agent, it is misbranded if named after a single constituent. The name of drugs employed in the United States Pharmacopœia or National Formulary must be used. The use of any false or misleading statement, design, or device appearing on any part of the label is not permitted, notwithstanding the opinion of any expert or other person. No food or drug product can be sold or offered for sale if it has no label upon the package or no descriptive matter whatever connected with it, either by design, device, or otherwise, if the product be an imitation of or offered for sale under a name of another article.³⁸ Packages which are adulterated are not entitled to enter into interstate commerce, although correctly branded as to character of contents, place of manufacture or otherwise.³⁹ A compound shall be deemed misbranded if the label be incomplete as to the names of the required ingredients. A simple product does not require any further statement than the name or distinctive name thereof," such as is in common use in the English language, or, if a drug, by any name recognized in the United States Pharmacopœia or National Formulary.⁴⁰

³⁸ Regulation 22.

³⁹ Regulation 23.

⁴⁰ Regulation 24.

“When a substance of a recognized quality commonly used in the preparation of food or drug product is replaced by another substance not injurious or deleterious to health, the name of the substituted substance shall appear upon the label. When any substance which does not reduce, however, or injuriously affect its quality or strength, is added to a food or drug product, or other than that necessary to its manufacture or refining, the label shall bear a statement to that effect.”⁴¹

⁴¹ Regulation 25.

Thus where apples grown in Arkansas were labeled “Tepee Apples Packed by C. H. Godfrey & Son, Watervliet and Benton Harbor, Michigan,” by a company at Kansas City, Missouri, it was held that there was such a misrepresentation as was a violation of the statute. *United States v. 100 Cases of Tepee Apples*. Reported in Notice of Judgment No. 36, issued by Department of Agriculture January 11, 1909.

So where whisky, distilled from fermented molasses, manufactured and produced in New Orleans, Louisiana, was labeled “Bourbon whisky,” it was held that there was a clear violation of the statute. *United States v. 50 Barrels of Whisky*. Notice of Judgment No. 68, issued by the Department of Agriculture May 14, 1909. In this case the court charged as follows on this point: “If the jury believes—and there is a great deal of testimony to that effect—that the word ‘whisky’ is applied only to a distillate made of grain, that is an end of the case, an end of the defense in the case, this verdict must be for the United States, because it is admitted in this case, and it is not a question of dispute, that this liquor is not made of grain, but is a distillate of molasses with a slight infusion of sulphuric acid. But the jury might possibly find that it could be called whisky. Then there is a second question, can it be called Bourbon whisky? There is a great deal of testimony to show that ‘Bourbon whisky,’ in its most general sense, is a whisky made from grains of which corn is the larger constituent. If you find that this was not such a whisky, then it is not Bourbon whisky, and your verdict must be for the United States. Then there is testimony also to the effect that ‘Bourbon whisky’ as understood in the trade is confined to a whisky made in Kentucky. If you find that to be the fact—and that is for you to decide entirely on the testimony—if you find that in the trade and among those who deal and who are familiar with the article ‘Bourbon whisky’ implies that it was made in Kentucky, then of course that is an end of the case so far as the claimant is concerned, because it is admitted that this liquor was made in New Orleans.”

“Further, in regard to Bourbon whisky, if the term ‘Bourbon whisky’ implies that the article was made of corn in greater part—not made

Sec. 846. Guaranteed goods.

“No dealer shall be prosecuted under the provisions of this act when he can establish a guaranty signed by the wholesaler,

of molasses but made of grain of which corn was the greater part—then of course it was misbranded. So, further, if you find that ‘Bourbon whisky’ is confined to whisky made in Kentucky, and of grain, and that the larger constituent part must be corn, then of course this would not be ‘Bourbon whisky,’ because it was not so made.”

Where canned peas were boxed and labeled “2 Doz. 2 lb. Cans Choice Standard Peas,” and the average weight of per can was one pound ten ounces, the entire box was condemned, besides several others. Notice of Judgment 43, Department of Agriculture, March 13, 1909.

Where whisky was labeled “J. Jackson, Old Rye Whisky,” and on the stamp end “Whisky Compound with Grain Distillate, Chas. H. Ross & Co., Baltimore, Md.,” and on analysis it was found to be colored by the addition of artificial coloring matter introduced for the purpose of concealing inferiority and producing an imitation of old mature whisky, it was condemned, being misbranded. Notice of Judgment No. 45. Department of Agriculture, March 13, 1909.

Where pluto water was labeled “2 Doz Qts Pluto Concentrated Mineral Water,” and the average of the bottles was 1.6 pints each, the water was condemned. Notice of Judgment No. 121. Department of Agriculture, November 27, 1909.

So where whisky was labeled “Quinine Whisky,” each bottle containing one and one-twenty-fourth grains per ounce, while in fact only one twenty-fourth grains of alkaloidal matter was to the ounce, the whisky was condemned. Notice of Judgment No. 112. Department of Agriculture, November 20, 1909.

Bottles of beer, among other things, bore the words “Saint Louis” and “Bohemian Beer,” thereby representing the beer to be Bohemian beer and to have been manufactured in St. Louis. The beer was not Bohemian beer, and it was made in Brooklyn, New York. The beer was condemned, because misbranded. Notice of Judgment No. 51. Department of Agriculture, April 1, 1909.

In Kansas seven barrels of beer were seized. They were labeled as follows:

“Kind. H. O. B.: No. A949; Fargo; CROWNS: CROCKERY for Rim Conrad, Newton, Kans., H. O. B. L. S.” (in pencil) “(1) (9), 9-26,” and filled with bottles labeled and branded “Hop-On. HB. (No. 11) Heim Brewery, Branch of the Kansas City Breweries Co. A mild beer, containing 1.82 per cent of alcohol. Guaranteed to comply with the Pure Food and Drugs Act of June 30, 1906. and Kansas Pure Food Law.” This beer had been shipped by the Heim Brewing Company from Missouri to Newton, Kan., and was confiscated and ordered de-

jobber, manufacturer or other party residing in the United States, from whom he purchases such articles, to the effect that the same is not adulterated or misbranded within the meaning of this act, designating it. Said guaranty to afford protection, shall contain the name and address of the party or parties making the sale of such articles to such dealer, and in such case said party or parties shall be amenable to the prosecutions, fines and other penalties which would attach, in due course, to the dealer under the provisions of this act.”⁴²

stroyed by the court in case of *State of Kansas v. Conrad et al.* A number of samples was subjected to analysis by a collaborating chemist of the Bureau of Chemistry of the Department of Agriculture, with the result that alcohol was found to be present in quantity varying from 4.41 per cent. to 4.78 per cent. The barrels were condemned. Notice of Judgment No. 65. Department of Agriculture, May 5, 1909.

“The act forbids the use of any statement, design, or device in connection with any drug product which is false or misleading in any particular. A defect of this kind would not be corrected by giving the formula on the label. If the formula is given, it must be the correct and complete formula. It is held that, in addition to those substances required by the act to be named, if only a part of the active medicinal agents used in the manufacture of a drug product are set forth on the label, such a procedure is misleading and therefore forbidden by the law. All drug products and their labels must conform to the act, whether the formula is or is not given on the label.” Food Inspection Decision No. 53. Department of Agriculture, January 28, 1907.

⁴² Section 9. A serial number is assigned to the goods guaranteed; but the guaranty represented by this number is the guaranty of the manufacturer and not of the Government. If the serial number is misrepresented or abused it will be withdrawn, and the guaranty returned, after proper notice. Food Inspection Decision No. 70, May 14, 1907.

In no case is a guaranty a good defense, unless it be from the person who sold the goods to the person offering the guaranty as a defense.

The words “Guaranteed under the Food and Drugs Act, June 30, 1906,” should be used and no other. Food Inspection Decision No. 40, Department of Agriculture, October 25, 1906.

The Secretary of Agriculture has adopted the following regulations applicable to this section:

“(a) No dealer in food or drug products will be liable to prosecution if he can establish that the goods were sold under a guaranty by the wholesaler, manufacturer, jobber, dealer or other party residing in the United States from whom purchased.

“(b) A general guaranty may be filed with the Secretary of Agricul-

Sec. 847. Exports and imports of foods and drugs.

“(a) Food products intended for export may contain added substances not permitted in foods intended for interstate com-

ture by the manufacturer or dealer and be given a serial number, which number shall appear on each and every package of goods sold under such guaranty with the words ‘Guaranteed by [insert name of guarantor] under the Food and Drugs Act, June 30, 1906.’

“(c) The following form of guaranty is suggested:

“I (we) the undersigned do hereby guarantee that the articles of foods or drugs manufactured, packed, distributed, or sold by me (us) [specifying the same as fully as possible] are not adulterated or misbranded within the meaning of the Food and Drugs Act, June 30, 1906.

“(Signed in ink.)

“_____.
_____.

[Name and place of business of wholesaler, dealer, manufacturer, jobber, or other party.]

“(d) If the guaranty be not filed with the Secretary of Agriculture as above, it should identify and be attached to the bill of sale, invoice, bill of lading, or other schedule giving the names and quantities of the articles sold.”

On November 11, 1907, the Attorney-General, in an opinion given to the Secretary of Agriculture, thus construed this section, and thereafter the original rule adopted under it was adopted as given above.

“SIR: I have the honor to acknowledge the receipt of your letter of September 10, in which you request my opinion upon a question which has arisen in your Department in the administration of the food and drugs act of June 30, 1906, in a class of cases of which the following is a type:

“An examination having been made in the Bureau of Chemistry, in accordance with section 4 of the act, of a sample of food purchased from a retail dealer in the District of Columbia, and the food having been found to be adulterated, the dealer was cited for a hearing, and, having appeared, established as a defense under which he claimed protection a written guaranty, conforming to the requirements of section 9 of the act, from a Maryland wholesaler who had sold him the food and shipped it to him in the District of Columbia in the exact condition in which he sold it here.

“The Maryland wholesaler, having been then cited, in turn appeared and established a similar guaranty, under which he also claimed protection, from a Pennsylvania manufacturer who had sold him the food and had shipped it to him in Maryland in the exact condition in which he had, in turn, guaranteed it and shipped it to the retailer in the District of Columbia.

merce, when the addition of such substances does not conflict with the laws of the country to which the food products are

"The question upon which my opinion is requested is whether, upon such state of facts, the Maryland wholesaler is amenable to prosecution for violation of the act or is protected by the guaranty from the Pennsylvania manufacturer.

"By section 2 of the food and drugs act (34 Stat., 768) it is made a misdemeanor, *inter alia*, to ship any adulterated or misbranded food or drugs in interstate commerce, or to receive the same in such commerce, and, having so received, to deliver the same to any other person in original, unbroken packages, or to sell the same in the District of Columbia.

"Section 9 of the act further provides:

"That no dealer shall be prosecuted under the provisions of this act when he can establish a guaranty signed by the wholesaler, jobber, manufacturer, or other party residing in the United States, from whom he purchases such articles, to the effect that the same is not adulterated or misbranded within the meaning of this act, designating it. Said guaranty, to afford protection, shall contain the name and address of the party or parties making the sale of such articles to such dealer, and in such case said party or parties shall be amenable to the prosecutions, fines, and other penalties which would attach, in due course, to the dealer under the provisions of this act.

"After careful consideration of this act, together with the memoranda prepared by the members of the Board of Food and Drug Inspection, which you have submitted with your letter, I am of the opinion that the guaranty from the Pennsylvania manufacturer affords complete protection to the Maryland wholesaler and that he is hence not amenable to prosecution under the act on account either of the interstate sale and shipment made by him to the retailer in the District of Columbia or of the guaranty given by him in connection therewith.

"1. It is clear that the Maryland wholesaler is protected from prosecution for the interstate sale and shipment made by him, by the explicit provision of section 9, that 'no dealer shall be prosecuted under the provisions of this act when he can establish a guaranty signed by the wholesaler, jobber, manufacturer, or other party residing in the United States, from whom he purchases such articles, to the effect that the same is not adulterated or misbranded within the meaning of the act.'

"The broad term 'dealer' which is used in this section, not being restricted in its meaning by any other provision of the act, includes those who deal at wholesale as well as those who deal at retail. I am of the opinion, therefore, that under the plain language of this provision any dealer, whether a wholesaler or retailer, who would otherwise be amenable to prosecution for dealing in an adulterated or misbranded

to be exported, and when such substances are added in accordance with the directions of the foreign purchaser or his agent.

article in violation of the act, is protected from prosecution on such account by establishing a guaranty in conformity with the requirements of the act, signed by a resident of the United States from whom he purchased such article.

"2. A more difficult question, however, arises in reference to the liability of the Maryland wholesaler to prosecution by reason of the guaranty which he gave the District of Columbia retailer in connection with the sale and shipment to him.

"It is expressly provided by section 9 of the act that wherever a dealer who would otherwise be subject to prosecution establishes a guaranty from a resident of the United States who sold him the articles, the dealer is thereby protected, and such guarantor 'shall be amenable to the prosecutions, fines, and other penalties which would attach, in due course, to the dealer under the provisions of this act.' Construing this section in its entirety, I am of the opinion that its purpose was to create, in addition to the offense of manufacturing and dealing in adulterated and misbranded food and drugs specifically made misdemeanors by sections 1 and 2 of the act, the distinct and substantive offense of guaranteeing, under the food and drugs act, any adulterated or misbranded article—thereby enabling the purchaser to deal with such articles in a manner otherwise forbidden without being amenable to the punishment to which he would otherwise be subject—the offense of giving such false guaranty, however, not to be complete until the purchaser deals with the article thus guaranteed in a manner otherwise punishable by the act, in which event the guarantor would become subject to the same punishment for giving the false guaranty as that to which the purchaser would otherwise be amenable by reason of his dealing with the article.

"Without discussing the scope and effect of this provision, I am of the opinion that whatever this may be, the maker of a false guaranty is just as much protected from any prosecution to which he might be liable on this account by establishing a former guaranty from the person from whom he purchased the article as he is thereby protected from prosecution for dealing with the article in a manner otherwise forbidden by the act; in other words, that the former guaranty is a complete protection against any prosecution under this act.

"It is true that section 9 does not specifically state that the first guaranty shall protect the second guarantor, but this result follows from the broad provision that 'no dealer shall be prosecuted under the provisions of this act when he can establish a guaranty signed by the . . . party . . . from whom he purchases such articles.' As a prosecution for the false guaranty would be a prosecution 'under the provisions' of the act, and as the dealer's protection under his vendor's

“(b) The exporter is not required to furnish evidence that goods have been prepared or packed in compliance with the

guaranty is not limited by the act to prosecutions for dealing in the articles, but includes all prosecutions under its provisions, a former guaranty would in my opinion afford a dealer protection against the punishment to which he might otherwise be amenable for his own false guaranty as well as for selling or shipping the article in violation of the act.

“In short, the intention of Congress appears to have been to relieve from liability any person who would otherwise be subject to any prosecution under the act if he establishes a guaranty from the person who sold him the goods, provided such person is a resident of the United States, and therefore himself within the reach of prosecution, and to make such original guarantor subject to prosecution in lieu of the subsequent offender, Congress evidently intending to refer back liability in such case, in general, to the original guarantor, who, of course, in the case of goods of domestic production, would usually be the manufacturer, who would know their real character, and, in the case of goods imported from a foreign country, would be the importer, who would assume responsibility therefor, and to make the liability to punishment fall upon such original guarantor so far as possible.

“It further appears from the report of the House Committee on Interstate and Foreign Commerce, which reported the food and drugs bill for passage in substantially the form in which it was afterwards enacted, and which, under the doctrine of *Holy Trinity Church v. United States*, 143 U. S. 457, 464, and *United States v. Binns*, 194 U. S. 486, 495, may be properly looked to for the purpose of throwing light upon the intent of Congress, that the provision in question was inserted in the bill by the committee and that its general purpose was to protect persons dealing in the articles subsequent to the manufacturer or importing agent and direct the penalty to the original guarantor as far as possible. The committee in its report said:

“‘As the principal purpose of the bill is to prevent interstate and foreign commerce in adulterated or falsely branded articles of food, drink, and medicine, the committee has inserted in the bill a provision intended to protect all persons dealing in the articles subsequent to the manufacturer or importing agent.

“Section 8 of the bill provides that no dealer shall be convicted when he is able to prove a guaranty of conformity with the provisions of the act signed by the manufacturer or the party from whom he purchased. The section requires that the guarantor shall reside within the United States and that the guaranty shall contain his full name and address.

“In other sections of the bill there are provisions for collecting samples or specimens and the examination of such in order to determine

laws of the foreign country to which said goods are intended to be shipped, but such shipment is made at his own risk.

whether they are adulterated or misbranded, and the bill provides that any party from whom a sample was obtained shall be given an opportunity to be heard before the Secretary of Agriculture shall certify to the United States district attorney the results of an examination of the article as the basis for prosecution; so that if samples of goods shall be taken from a retail or wholesale dealer who has received a guaranty of conformity with the provisions of the act from the person who sold to him, he will be relieved from prosecution, and any penalty which may attach under the act will be directed to the original guarantor.

"These carefully prepared provisions of the bill will prevent any dealer being put to the expense of a prosecution when he takes the precaution to protect himself by requiring a guaranty. (Ho. Rep. 2118, 59th Cong., 1st sess., p. 3.)'

"And again:

"The prosecutions which will be commenced by the national authorities will be mainly directed against the manufacturers of food products; or, if it be impossible to find the manufacturer, against the jobbers and wholesale dealers. (Ho. Rep. 2118, *supra*, p. 9.)'

"Section 8 of the bill which was thus inserted by the committee read as follows:

"That no dealer shall be convicted under the provisions of this act when he is able to prove a guaranty of conformity with the provisions of this act in form approved by the rules and regulations herein provided for, signed by the manufacturer or the party or parties from whom he purchased said articles: *Provided*, That said guarantor resides within the United States. Said guaranty shall contain the full name and address of the guarantor making the sale to the dealer, and said guarantor shall be amenable to the prosecutions, fines, and other penalties which would otherwise attach in due course to the dealer under the provisions of this act. (Ho. Rep. 2118, *supra*, p. 11.)'

"It will be seen that the provision thus inserted and commented upon by the committee is substantially the same, so far as the present question is concerned, as section 9 of the bill as afterwards enacted, and it is made clear by this report that it was the intent of the committee, at least, in inserting this provision to entirely relieve from prosecution any retail or wholesale dealer who had received a guaranty from the person from whom he purchased, and, as stated by the committee, to 'prevent any dealer from being put to the expense of a prosecution when he takes the precaution to protect himself by requiring a guaranty.'

"Any other construction of this act would work great hardship upon an innocent intermediary who, relying upon the guaranty which he re-

“(c) Food products for export under this regulation shall be kept separate and labeled to indicate that they are for export.

ceives from the original manufacturer of an article, sells it in interstate trade and guarantees it in his turn. And if the original guaranty does not fully protect him in such case, it would become exceedingly hazardous to sell and guarantee such article, even though guaranteed by the manufacturer, without first making, on his own account, a detailed investigation, chemical or otherwise, to ascertain whether it is in fact adulterated or misbranded. Manifestly, however, such a requirement would in many cases seriously impede and obstruct interstate trade.

“It is stated in Doctor Dunlap’s memorandum that, from the conditions that the Board of Food and Drug Inspection has found to exist throughout the whole business community, dealers engaged in interstate trade are insisting on a guaranty from the seller and purchasing only under such guaranty; that in order to do an interstate business to-day a dealer must give a guaranty with the goods he sells, whether he be the actual manufacturer or not; and that if the dealer can not rely upon the manufacturer’s guaranty as a protection, it must have the effect of preventing interstate sales on the part of small concerns, and even of large concerns who probably would not care to incur the added expense and trouble, in many cases prohibitive, of having the goods carefully analyzed in order to be fully acquainted with their character.

“There is, however, a presumption against a construction of a statute which ‘would cause grave public injury or even inconvenience’ (*Bird v. United States*, 187 U. S. 118, 124 [23 Sup. Ct. 42]). And it was said by Lord Coke, in language which was quoted by Abbott, C. J., in *Margate Pier Co. v. Hannam*, 3 B. and Ald. 266, 270, and cited with approval in *Holy Trinity Church v. United States*, 143 U. S. 457, 459 [12 Sup. Ct. 511] that: “Acts of Parliament are to be so construed as no man that is innocent or free from injury or wrong be, by a literal construction, punished or endamaged.”

“The construction which I have given the act is furthermore supported by the view expressed in Greeley’s Food and Drugs Act, sec. 65, p. 4, that:

“‘A wholesaler or jobber who purchases food or drug products from the producer or from anyone else who may safely guarantee the goods so purchased to his consumers, provided he has from the producer or other person from whom he purchased the goods a guaranty covering them.’

“For these reasons, I am of the opinion that in the case stated the Maryland wholesaler is not amenable to prosecution under the act but is completely protected by his guaranty from the Pennsylvania manufacturer.

“(d) If the products are not exported they shall not be allowed to enter interstate commerce.”⁴³

“Unless otherwise declared on the invoice, all substances ordinarily used as food products will be treated as such. Shipments of substances ordinarily used as food products intended for technical purposes should be accompanied by a declaration stating that fact. Such products should be denatured before entry, but denaturing may be allowed under customs supervision with the consent of the Secretary of the Treasury, or the Secretary of the Treasury may release such products without denaturing, under such conditions as may preclude the possibility of their use as food products.”⁴⁴

“3. I should add, however, that the fact that both the District of Columbia retailer and the Maryland wholesaler are protected from prosecution by the guaranties which they have established from their respective vendors, does not, in my opinion, exempt the adulterated food from confiscation under section 10 of the act, which provides, *inter alia*, that *any* adulterated or misbranded food or drug which is being transported in interstate commerce for sale, or, having been transported, remains unloaded, unsold, or in original, unbroken packages, or is sold or offered for sale in the District of Columbia, may be proceeded against in the district where found ‘and seized for confiscation by a process of libel for condemnation.’ The provision of section 9 that no dealer shall be prosecuted when he establishes a guaranty from his vendor merely affords protection, in my opinion, against the criminal prosecution, fines, and other penalties to which the dealer would otherwise be personally amenable, and does not in any way affect the liability of the merchandise to confiscation under the provisions of section 10.”

Respectfully,

CHARLES J. BONAPARTE,
Attorney-General.

⁴³ Regulation 31.

⁴⁴ Regulation 34.

“(a) All invoices of food or drug products shipped to the United States shall have attached to them a declaration of the shipper, made before a United States consular officer, as follows:

“‘I, the undersigned, do solemnly and truly declare that I am the _____ of the merchandise herein mentioned and described, (Mfr., agt. or shipper.)

and that it consists of food or drug products which contain no added substances injurious to health.

receiving in any State, Territory or the District of Columbia from any other State or Territory or foreign country, and delivering them, any unbroken package, for pay or otherwise. The same term is used in the third and fourth sections of that act. Naturally, it becomes of moment to determine what is meant by this term. The word "original" is omitted in section two of the act. The construction put upon this phrase by the Government officials is "to restrict it to such a package containing the food and drug product as has been prepared for shipment or transportation and shipped or transported, as an entirety or unit from a State, Territory, or the District of Columbia or a foreign country into another State, Territory or the District of Columbia and delivered to the consignee, remaining his property in the identical form and condition in which it was shipped or transported. After arrival in a State and delivery to the consignee, if any part of the package be removed, or if the package be opened and commingled with other property, or if the package be *transferred* by the consignee, it is no longer an original package. The retail package is not an original package unless it bears the characteristics set forth above."⁴⁵

⁴⁵ Food Inspection Decision No. 86, rendered January 31, 1908. See section 193.

This decision contains such an exhaustive discussion of the question what is and what is not an "original unbroken package" that we give it practically in full.

"It is not practicable," proceeds the decision immediately after the paragraph quoted in the text, "to frame an universally accurate and satisfactory definition of an 'original package.' No statute has done so, and the Department disclaims any attempt to do so in its construction of the term. The question must be determined largely upon each case as it arises, with the guidance of the authoritative decisions of the courts."

The opinion then sets out certain extracts from sections two, three and ten where the phrase is used, and then proceeds as follows:

"In the enforcement and administration of these provisions, it is necessary to determine what is an 'original unbroken package' or an 'unbroken package.' For the purpose of such determination it is not permissible to resort to the common and popular understanding of these words, for the reason that they have received a *special* meaning and

import when applied to the law of interstate and foreign commerce through numerous judicial decisions upon the commerce clause of the Constitution and were employed in the food and drugs act in that sense. It will be seen hereafter that these words, when used in their legal signification in connection with interstate or foreign commerce, are of restricted import.

"The expression 'original package' was employed for the first time in the case of *Brown v. Maryland* (25 U. S. 419), decided by the Supreme Court of the United States in 1827. In the larger number of cases subsequent thereto in which the expression is used it will be seen that no modification is made in the term. But in the present act the word 'unbroken' has been added in sections 2 and 10, and has been substituted for 'original' in section 3, but without qualifying effect, as the courts have used the words 'unbroken' and 'original' as synonymous. It is held, therefore, that their combination or substitution effects no change in significance. (*Low et al. v. Austin*, 80 U. S. 29; *United States v. Fox*, Federal Cases No. 15155.)

"It is sought in this decision to show *what is an original package*. Possibly it might be logical to proceed to that question at once, but it has been thought advisable, if necessary, to consider first the extent of the power of Congress over food and drug articles transported into a State from another State or Territory, the District of Columbia, or a foreign country, and there remaining. When this has been considered it will appear that the control of Congress over food and drugs, so transported, continues, after their arrival in the State, so long as they are in original packages. It will then be shown what is an original package.

"In *Brown v. Maryland*, heretofore referred to, it was decided that the law of Maryland imposing a license tax upon all importers of foreign articles, dry goods, and merchandise by bale or package, and upon other persons selling the same, was unconstitutional so far as it undertook to require such license tax from an importer of goods from a foreign country for the sale thereof *in the original packages in which they were imported*; that such a tax was an interference with foreign commerce, which, under the Constitution of the United States, was committed to Congress to regulate. The conclusion of the court is contained in the following syllabus:

"'An act of a State Legislature, requiring all importers of foreign goods by the bale or package, etc., and other persons selling the same by wholesale, bale, or package, etc., to take out a license, for which they shall pay \$50, and in case of neglect or refusal to take out such license, subjecting them to certain forfeitures and penalties, is repugnant to that provision of the Constitution of the United States which declares that "no State shall, without the consent of Congress, lay any impost or duty on imports or exports, except what may be absolutely necessary for executing its inspection laws;" and to that which declares that Congress

shall have power "to regulate commerce with foreign nations, among the several States, and with the Indian tribes."

"The goods in this case were imported from a foreign country, but the court said:

"It may be proper to add; that we suppose the principles laid down in this case, to apply equally to importations from a sister State."

"This dictum was afterwards affirmed as law in the case of *Leisy v. Hardin* (135 U. S. 100 [10 Sup. Ct. 681]), decided in 1899, which overruled *Peirce v. New Hampshire* (46 U. S. 504), decided subsequently to *Brown v. Maryland*. In *Peirce v. New Hampshire*, it was held that a barrel of gin shipped from Massachusetts to New Hampshire was subject to the law of New Hampshire prohibiting the sale of gin, so as to render the seller amenable to the law for the sale of the barrel in the exact condition in which he received it.

"In the case of *Waring v. The Mayor* (75 U. S. 110), decided in 1868, the Supreme Court held that sacks of salt brought into Mobile Bay from England and sold to a merchant in Mobile City after arrival of the vessel in the bay, twenty-five miles from the city, and transported by the merchant's lighters to Mobile, were subject to taxation by the city. The sacks had been sold by the importer after their arrival in Alabama, and hence were merged in the general mass of property in the State and were no longer under the shelter of the commerce clause of the Constitution when taxed by the city of Mobile.

"In 1871 the question of taxation of imports from foreign countries in the original packages came again before the Supreme Court in the case of *Low et al. v. Austin* (80 U. S. 29), and it was there held—

"Goods imported from a foreign country, upon which the duties and charges at the custom house have been paid, are not subject to State taxation whilst remaining in the original cases, unbroken and unsold, in the hands of the importer, whether the tax be imposed upon the goods as imports, or upon the goods as part of the general property of the citizens of the State, which is subjected to an *ad valorem* tax."

"It will be seen that the court here uses the expression 'original cases, unbroken and unsold.'

"In *Cook v. Pennsylvania* (97 U. S. 566), decided in 1878, the same court held a tax imposed by the law of the State upon every auctioneer on the amount of his sales invalid when applied to the sale of imported goods in original packages. It was held that—

"The statute of Pennsylvania of May 20, 1853, modified by that of April 9, 1859, requiring every auctioneer to collect and pay into the State treasury a tax on his sales, is, when applied to imported goods in the original packages, by him sold for the importer, in conflict with sections 8 and 10 of article 1 of the Constitution of the United States, and therefore void, as laying a duty on imports and being a regulation of commerce.

"In *Schollenberger v. Pennsylvania* (171 U. S. 1 [18 Sup. Ct. 757]), an act of the State of Pennsylvania prohibiting the sale of any oleaginous substance or compound of the same designed to take the place of butter was held unconstitutional so far as attempted to be enforced in the case of a sale of a 40-pound tub of oleomargarine imported from Rhode Island and sold as oleomargarine in the identical condition in which imported. The law of the case is contained in the following syllabus:

" 'Act No. 21 of the Legislature of Pennsylvania, enacted May 21, 1885, enacting that "no person, firm or corporate body shall manufacture out of any oleaginous substance, or any compound of the same, other than that produced from unadulterated milk or of cream from the same, any article designed to take the place of butter or cheese produced from pure unadulterated milk, or cream from the same, or of any imitation or adulterated butter or cheese, nor shall sell or offer for sale, or have in his, her or their possession with intent to sell the same as an article of food," and making such act a misdemeanor, punishable by fine and imprisonment, is invalid to the extent that it prohibits the introduction of oleomargarine from another State, and its sale in the original package.'

"The right of a State to prohibit the importation of a recognized article of commerce was distinctly denied by the Supreme Court in the case of *Bowman v. Chicago and Northwestern Railway Company* (125 U. S. 465 [8 Sup. Ct. 1062]), decided in 1887. In that case the court declared invalid the statute of Iowa forbidding any railway company from bringing into the State intoxicating liquors unless previously furnished with a certificate from the county auditor that the consignee was authorized to sell them. It was held that—

" 'A State can not, for the purpose of protecting its people against the evils of intemperance, enact laws which regulate commerce between its people and those of other States of the Union, unless the consent of Congress, express or implied, is first obtained.

"Section 1553 of the Code of the State of Iowa, as amended by C. 143 of the Acts of the 20th General Assembly in 1886 (forbidding common carriers to bring intoxicating liquors into the State from any other State or Territory, without being first furnished with a certificate, under the seal of the auditor of the county to which it is to be transported or consigned, certifying that the consignee or person to whom it is to be transported or delivered is authorized to sell intoxicating liquors in the county), although adopted without a purpose of affecting interstate commerce, but as a part of a general system designed to protect the health and morals of the people against the evils resulting from the unrestricted manufacture and sale of intoxicating liquors within the State, is neither an inspection law, nor a quarantine law, but is essentially a regulation of commerce among the States, affecting interstate

commerce in an essential and vital part, and, not being sanctioned by the authority, express or implied, of Congress, is repugnant to the Constitution of the United States.'

"It will be seen from the above that in this case the question of the right of the importer to sell the article so imported in the original package was not decided.

"Two years later the question just stated was squarely presented to the court in the case of *Leisy v. Hardin* (135 U. S. 100 [10 Sup. Ct. 681]), where it was held that the statute of Iowa prohibiting the sale of intoxicating liquors, except for certain prescribed purposes, was, as applied to the sale by the importer, in original packages or kegs, unbroken and unopened, of liquors manufactured in and brought from another State, unconstitutional and void, as repugnant to the Constitution of the United States granting to Congress the power to regulate commerce among the States. The law of the case was stated in the following syllabus:

"A statute of a State, prohibiting the sale of any intoxicating liquors, except for pharmaceutical, medicinal, chemical or sacramental purposes, and under a license from a county court of the State, is, as applied to a sale by the importer, and in the original packages or kegs, unbroken and unopened, of such liquors manufactured in and brought from another State, unconstitutional and void, as repugnant to the clause of the Constitution granting to Congress the power to regulate commerce with foreign nations and among the several States. *Peirce v. New Hampshire*, 5 How. 504, overruled.'

"In *Vance v. Vandercook Co.* (170 U. S. 438 [18 Sup. Ct. 674]), the court reaffirmed its prior decisions upon the subject. The law of interstate commerce and the relation of the original package thereto is succinctly stated in the following syllabus to the opinion:

"It is settled by previous adjudications of this court—

"(1) * * *

"(2) That the right to send liquors from one State into another, and the act of sending the same, is interstate commerce, the regulation whereof has been committed by the Constitution of the United States to Congress, and, hence, that a State law which denies such a right, or substantially interferes with or hampers the same, is in conflict with the Constitution of the United States.

"(3) That the power to ship merchandise from one State into another carries with it, as an incident, the right in the receiver of the goods to sell them in the original packages, any State regulation to the contrary notwithstanding; that is to say, that the goods received by interstate commerce remain under the shelter of the interstate commerce clause of the Constitution, until by a sale in the original package they have been commingled with the general mass of property in the State. * * *

"These decisions settled the respective rights of the Federal and State governments over goods moving in interstate and foreign commerce. It was determined that a State could not prevent the introduction into its territory of a recognized article of commerce; that it could not prevent the disposition by the importer in the original package of an article of commerce brought into its territory; and that Congress alone could regulate interstate commerce in such goods and the disposition of them in the original package by the importer. This is now the settled law. Hence the food and drugs act asserts the right of the United States to prohibit the sale or disposition of adulterated and misbranded food and drugs imported into a State and remaining in the original package.

"The next question to be determined is, At what time in the existence of imports does the power of Congress to regulate their disposition cease? Stated otherwise, When does an original package cease to be such and the regulation of its disposition pass beyond the jurisdiction of the Federal Government?

"This question was answered in general terms by the Supreme Court in *Brown v. Maryland*, heretofore mentioned, as follows:

"It is sufficient for the present to say, generally, that when the importer has so acted upon the thing imported, that it has become incorporated and mixed up with the mass of property in the country, it has, perhaps, lost its distinctive character as an import, and has become subject to the taxing power of the State."

"In the case of *Low et al. v. Austin* (80 U. S. 29), decided in 1871, it was held that—

"Goods imported do not lose their character as imports, and become incorporated into the mass of property of the State *until they have passed from the control of the importer, or been broken up by him from their original cases.*"

"Again in *Vance v. Vandercook Co.*, heretofore referred to, it was held that—

"Goods received by interstate commerce remain under the shelter of the interstate commerce clause of the Constitution, *until by a sale in the original packages they have been commingled with the general mass of property in the State.*"

"In the case of *Heyman v. Southern Railway Company* (203 U. S. 270 [27 Sup. Ct. 104]), recently decided, it was said—

"In the absence of Congressional legislation goods moving in interstate commerce cease to be such commerce *only after delivery and sale in the original package.*"

"From these decisions it will be seen that merchandise brought into a State is protected from State interference only so long as it remains in the original package, unbroken, and in the hands of the importer. If the importer sells the article in the identical condition and form in which imported, or if he breaks the package, it is no longer an original

package, but has become merged in the mass of property in the State and subject to its laws.

"Let these decisions be applied to a hypothetical case under the food and drugs act:

"A, a wholesale dealer in New York City, ships by express to B, in Hoboken, N. J., a box containing one dozen cans of adulterated condensed milk. B receives them into his store and shortly thereafter sells the box, just as received, to C.

"B in this example would be liable to the penalties prescribed by the act, because he is the importer and sold the original package. But, should C, in due course, sell this identical box to D in Hoboken, he could not be successfully prosecuted under the act because he is not the importer. When the box was sold by B it lost the character of an original package and became merged in the property of the State, and the State only may regulate its disposition by C.

"Suppose B, after receipt of the box, opens it and removes a can of the milk, which he sells to C. B is exempt from prosecution under the food and drugs act for the sale of this can or for a subsequent sale of the remaining eleven, even though he sells the eleven in the box. By this act of removing one can he has broken the original package and in consequence destroyed the jurisdiction of the United States over it and over him.

"But suppose B simply removes the top of the box to permit inspection, in no way disturbing the contents, replaces the top, and sells box and milk to C. Has B incurred the penalties prescribed by the food and drugs act? Such a question has not been presented to the Supreme Court, but two case very similar have been decided by the lower Federal courts.

"The first case, *United States v. Fox* (Federal Case No. 15155), decided in 1869, was a suit by the United States under the internal revenue act of July 13, 1866 (14 Stat., 144), to recover the penalties therein prescribed for the sale of perfumery without affixing a proper stamp thereon. A proviso in the act prescribed that when imported perfumery was sold in the original and unbroken package in which the bottle or other inclosure was packed by the manufacturer the person so selling should not be liable to the aforesaid penalty.

"Fox sold one small wooden box containing twelve 1½-ounce bottles of hair oil and a similar but larger box containing twelve bottles of pomade. He opened both boxes, so that the purchaser might examine the contents. The top of the smaller box was put on again before delivery without change of the contents. In the larger box, containing pomade, Fox, at the request of the purchaser, substituted three smaller bottles taken from the shelf of the store, and nailed up the box.

"In respect to the smaller box of oil the court said—

"'Although the top of this box was taken off by the defendant Fox,

it was only for the purpose of enabling the witness Quivey to ascertain the kind and quality of its contents, and before the sale and delivery to him was put on again, with the contents unchanged in kind or quantity. Under these circumstances the defendant must be considered as selling an unbroken package, the contents of which were not then required to be stamped.'

"But as to the sale of the box of pomade, the court said—

"The package was opened, and three bottles being taken out of it, it was sold with only the remaining nine bottles in it. This was a broken package, and so the court instructed the jury.'

"The verdict of the jury in favor of the defendant, Fox, was set aside on motion of the United States, upon the ground that the package of pomade was not an original package, the court holding—

"Goods are sold "in the original and unbroken package" within the meaning of the act of July 13, 1866 (14 Stat., 144), although the package is opened for inspection, if closed again before delivery without the contents being changed.'

"In the other case, *In re McAllister* (51 Fed. 282), decided in 1892, the facts were these: Two men, emissaries of a butter dealer in Baltimore, went to the store of McAllister, a dealer in oleomargarine, and sought to buy butter. McAllister stated that he had none, but could supply oleomargarine. They requested him to remove the lid from the tub of oleomargarine that they might look at it. He did so, stating that he could not sell less than ten pounds, as it reached him in the tub from Chicago. They purchased the tub and forthwith informed on him. He was duly tried in the State court and convicted. The State Court of Appeals affirmed the conviction, and McAllister applied to the Circuit Court of the United States for a writ of *habeas corpus*, on the ground that the sale of the tub of oleomargarine was a sale of an original package and beyond the power of the State to prohibit, which it sought to do in an act of the Legislature. The court granted the writ and announced the proposition of law involved, in the following syllabus to the case:

"Removing the lid of an original package of oleomargarine, so that a prospective buyer may examine its contents, is not such a breaking of the package as will destroy its original character.'

"In reaching the above conclusion the court said—

"It is argued that the taking from the lid from the tub containing this oleomargarine was a breaking of the package so as to destroy its original character. This in no sense did it do. The goods had in no way become commingled with his property or the general property of the State (*Low v. Austin*, 13 Wall. 29). Any one calling for oleomargarine with an honest purpose would have purchased this package as an original one, even if he knew it had had its lid lifted off once to see whether or not it held another substance than it purported to

hold. The laws of the United States recognize oleomargarine as a merchantable article. Being such, while a State may perhaps regulate its sale, it can not prohibit its importation. The statute in question does this, and is unconstitutional, and in this respect void. The petitioner is discharged.'

"Upon the authority of these two cases, and following their reasoning, it must be concluded that B, in the last example (p. 8), is amenable to the penalties prescribed by the food and drugs act. The first of these cases has another and important significance in connection with this decision, namely, the use of the word 'unbroken' as synonymous with 'original,' thus substantiating the statement in the preliminary part of this discussion that the courts used the words interchangeably.

"An example may be profitably introduced at this point to show how far goods moving in interstate commerce may be subjected to seizure under section 10 of the act.

"A, a wholesale dealer in New York City, ships fifty barrels of flour to B in St. Louis, Mo. This flour may be seized, if adulterated or misbranded, at New York City after delivery to the carrier, or at any point along the route, and may likewise be seized in St. Louis in the hands of the carrier before delivery to B, regardless of the question of whether or not it still remains in original packages, which, in the illustration, are the barrels.

"After delivery of the flour to B it may still be seized, in his hands, if it remains in the barrels (the original packages) as shipped. But if B, after delivery to him, transfers the flour to 5-pound sacks, or otherwise breaks the barrels and commingles the flour with his stock of goods, the original packages have been destroyed, and it is no longer subject to seizure by the United States; nor are the barrels liable to seizure by the United States after B disposes of them to C in Missouri, even though no alteration is made in their condition.

"Having now briefly reviewed the decisions of the Federal courts asserting the power of Congress to regulate the disposition of goods imported into a State from elsewhere, it is necessary to advert to the original question of what is an original package.

"The first distinct definition of an original package by the Supreme Court was announced in the case of *Austin v. Tennessee* (179 U. S. 343 [21 Sup. Ct. 132]), where it was held that—

"'Original packages are such as are used in *bona fide* transactions carried on between the manufacturer and wholesale dealers residing in different States.'

"This is hardly an accurate test to determine what is an original package in every case, and certainly can not restrict the provisions of sections 2 and 10 of the food and drugs act of 1906 to transactions wholly between the manufacturer and the wholesale dealer. If so, the plain intent of the act could be easily defeated, in the case of sales by

importers in original packages. An illustration will forcibly demonstrate the incompleteness of the definition when applied to the food and drugs act.

"It will scarcely be gainsaid that a can of tomatoes shipped by a person in no way connected with the manufacture or preparation thereof, from one State to a person in another State in no way engaged in the general sale of such commodities, is a shipment and receipt of an original package, and if the recipient disposes of it in any way, in the form in which it comes to him, he has violated the food and drugs act.

"The above language of the court is materially modified by its expressions in *Schollenberger v. Pennsylvania*, heretofore referred to, where it was said—

"The right of the importer to sell can not depend upon whether the original package is suitable for retail trade or not. His right to sell is the same whether to consumers or to wholesale dealers in the article, provided he sells them in original packages."

"A much more satisfactory and exact definition is contained in the decision in *Guckenheimer v. Sellers* (81 Fed. 997), where it was held that—

"An original package within the meaning of the law of interstate commerce, is the package delivered by the importer to the carrier at the initial point of shipment, in the exact condition in which it was shipped."

"And when this is followed by the expression of the court in the case *In re Beine* (42 Fed. 545), where it was said—

"It is not perceived why, in the absence of a regulation by Congress to the contrary, the importer may not determine for himself the form and size of the packages he puts up for export."

it seems there could hardly arise a question in the enforcement of the provisions of the food and drugs act under consideration that could not be tested by the foregoing definitions.

"Concrete examples of what have been held to be original packages are found in several of the adjudicated cases:

"*Peirce v. New Hampshire* (46 U. S. 504): A barrel of gin.

"*Bowman v. Chicago and Northwestern Railway Company* (125 U. S. 465 [8 Sup. Ct. 689, 1062]): A barrel of beer.

"*Leisy v. Hardin* (135 U. S. 100 [10 Sup. Ct. 681]): One-fourth barrel of beer; one-eighth barrel of beer; and a sealed case of beer.

"*Schollenberger v. Pennsylvania* [(171 U. S. 1 [18 Sup. Ct. 757]): 10 and 40-pound tubs of oleomargarine.

"*Rhodes v. Iowa* (170 U. S. 412 [18 Sup. Ct. 664]): A box of liquors.

"*May v. New Orleans* (178 U. S. 496 [Sup. Ct. 976]): Box, case, or bale in which were inclosed separate bundles and packages of dry goods.

"*Austin v. Tennessee* (179 U. S. 343 [21 Sup. Ct. 132]): A large open basket in which were shipped numerous pasteboard boxes, each containing ten cigarettes.

"*Plumley v. Massachusetts* (155 U. S. 461 [15 Sup. Ct. 154]): A 10-pound package of oleomargarine.

"*In re Beine* (42 Fed. 545): A single bottle of beer or whisky, packed, sealed, and nailed up in a pasteboard or wooden box.

"*In re Harmon* (43 Fed. 372): An open pine box containing several pint and quart bottles of whisky, each done up in a paper wrapper or box and sealed.

"*In re McAllister* (51 Fed. 282): A 10-pound tub of oleomargarine, even though its lid had been removed to allow inspection by the purchaser.

"*United States v. Fox* (Federal Cases No. 15155): A small wooden box containing twelve 1½-ounce bottles of oil, even though its top had been removed by the seller to permit inspection by the purchaser.

"*Guckenheimer v. Sellers* (81 Fed. 997): A single bottle of beer, if shipped singly; several bottles of beer fastened together and so shipped constitute one package; if several bottles be inclosed in one box, barrel, crate, or other receptacle, the box, barrel, crate, or other receptacle is the original package.

"In *May v. New Orleans* (178 U. S. 496 [28 Sup. Ct. 976]), decided in 1899, the Supreme Court held that where dry goods were imported into New Orleans from a foreign country in boxes, bales, and cases, each containing separate bundles of merchandise, separately marked and packed, which were so exposed for sale or taken out of the boxes, bales, and cases and sold, the boxes, bales, and cases were the original packages, and when the separate bundles were removed or exposed for sale the goods lost their distinctive character as imports and each parcel or bundle become a part of the general mass of property in the State and subject to local taxation. The syllabus of the case states the law as follows:

"*May & Co.*, merchants at New Orleans, were engaged in the business of importing goods from abroad, and selling them. In each box or case in which they were brought into this country, there would be many packages, each of which was separately marked and wrapped. The importer sold each package separately. The city of New Orleans taxed the goods after they reached the hands of the importer (the duties having been paid) and were ready for sale. *Held*:

"(1) That the box, case, or bale in which the separate parcels or bundles were placed by the foreign seller, manufacturer or packer was to be regarded as the original package, and when it reached its destination for trade or sale and was opened for the purpose of using or exposing to sale the separate parcels or bundles the goods lost their distinctive character as imports and each parcel or bundle became a

part of the general mass of property in the State and subject to local taxation.

“(2) * * *”

The case *In re Harmon* (43 Fed. 372) presented the following facts: Harmon was agent in Sardis, Miss., for Jordan, a liquor dealer in Memphis, Tenn. Panola County, in which Sardis is situated, was a “prohibition” county. Jordan shipped from Memphis to Harmon at Sardis a number of boxes containing bottles or flasks of whisky, some containing a pint, others a quart. These bottles or flasks had each a paper wrapper or box placed around it and sealed. These boxes so inclosed were by Jordan placed in ordinary pine boxes, *but without cover*, closely packed together. They were so shipped, and there was an understanding between Harmon and Jordan that the wooden boxes were to be returned to Jordan when all the bottles or flasks of whisky had been sold. (The fact that these boxes were comparatively valueless and not worth the return express charges exposed the agreement to return them to the suspicion of fraud.) Harmon received the liquors in this condition, and when a sale was effected would take each bottle out of the box and deliver to purchaser. He was convicted in the State court for selling liquor. Being imprisoned upon the judgment, he applied to the Circuit Court of the United States for a writ of *habeas corpus*, alleging the restraint of his liberty in violation of the Constitution of the United States, supporting this contention by the allegation that the whisky was sold in original packages and therefore beyond the jurisdiction of the State to prevent. The decision was as follows:

“Where bottles of whisky, each sealed up in a paper wrapper and closely packed together in uncovered wooden boxes furnished by an express company, and marked, ‘To be returned,’ are shipped from one State to another, the boxes, and not the bottles, constitute the ‘original packages’ within the meaning of decisions of the Supreme Court upon the interstate commerce provision of the National Constitution.”

The case of *Guckenheimer et al. v. Sellers et al.* (81 Fed. 997) contains the following definition of an original package:

“An original package, within the meaning of the law of interstate commerce, is the package delivered by the importer to the carrier at the initial point of shipment, in the exact condition in which it was shipped. In the case of liquors in bottles, if the bottles are shipped singly, each is an original package, but if a number are fastened together, and marked, or are packed in a box, barrel, crate or other receptacle, such bundle, box, barrel, crate or receptacle constitutes the original package.”

In the Austin case (179 U. S. 343 [21 Sup. Ct. 132]) there was presented the question whether or not a pasteboard box containing ten cigarettes, over one end of which was securely pasted the United States revenue stamp, was an original package under the circumstances of that case and within the prior decisions of the court. The facts were:

The Legislature of Tennessee in 1897 passed an act to prohibit the sale of any cigarettes or introduction of them into the State for that purpose. Austin was a merchant in the State, and in the course of his business purchased from a factory in North Carolina a number of packages of cigarettes put up in small boxes, containing ten cigarettes each, there being securely pasted over the end of each box a United States revenue stamp. When the order was received by the North Carolina factory, the packages above described were placed in a pile on the floor of their warehouse and the agent of the Southern Express Company notified to come for them. An employe of the company brought with him a large basket without cover, belonging to his company, in which he gathered the individual boxes and took them to the station for carriage to Austin, in Tennessee. When the basket containing the packages reached its destination in Tennessee, the agent of the company there took it to Austin's store and emptied the packages on the counter of the store and took the basket away with him. Austin immediately exposed the cigarettes for sale and sold one package to a customer. He was indicted, tried and convicted for this sale. His defense was that the package sold was an original package, and that the law of the State so far as applicable to this transaction was unconstitutional as an interference with interstate commerce. Upon appeal to the Supreme Court of the State, the conviction was affirmed. He then sued out a writ of error to the Supreme Court of the United States. A majority of the justices held that the original package in this case was the basket in which the packages were transported, and not the package sold. They therefore affirmed the judgment of the State court.

"The results of the conclusions reached are expressed in the syllabus, as follows:

"Original packages are such as are used in *bona fide* transactions carried on between the manufacturer and wholesale dealers residing in different States. Where the size of the package is such as to indicate that it was prepared for the purpose of evading the law of the State to which it is sent, it will not be protected as an original package against the police laws of that State.

"Where cigarettes were imported in paper packages of three inches in length and one and one-half in width, containing ten cigarettes, unboxed but thrown loosely into baskets: *Held*, that such paper parcels were not original packages within the meaning of the law, and that such importations were evidently made for the purpose of evading the law of the State prohibiting the sale of cigarettes."

"The court rested its decision in this case more upon the palpable fraud upon the laws of Tennessee than upon any attempt to analyze the definition of an original package. So in *Cook v. Marshall County, Iowa* (196 U. S. 261 [25 Sup. Ct. 233]), the boxes of cigarettes in the same form as in the Austin case were shoveled into the car in Missouri and

delivered to Cook in Iowa in that condition. They were not inclosed in any receptacle, but shipped in bulk. The State imposed a tax of \$300 on the business of selling cigarettes. Cook resisted the payment upon the ground that he sold only in original packages and was therefore protected by the interstate commerce clause of the Constitution. Having lost in the State courts, he prosecuted a writ of error to the Supreme Court of the United States, where it was held that Cook was not exempt from the tax; that the manner of dealing disclosed by the facts in the case was a gross fraud upon the laws of Iowa, and the court would not lend its aid to such a proceeding. The question of what was an original package in the case was a matter of minor importance, though the court said the term original package did not include packages which could not be commercially transported from one State to another. The syllabus contains the law, as follows:

“The term original package is not defined by statute, and while it may be impossible to judicially determine its size or shape, under the principle upon which its exemption while an article of interstate commerce is founded, the term does not include packages which cannot be commercially transported from one State to another.

“While a perfectly lawful act may not be impugned by the fact that the person doing it was impelled thereto by a bad motive, where the lawfulness or unlawfulness of the act is made an issue, the intent of the actor may be material in characterizing the transaction, *and where a party, in transporting goods from one State to another, selects an unusual method for the express purpose of evading or defying the police laws of the latter State, the commerce clause of the Federal Constitution cannot be invoked as a cover for fraudulent dealing.*

“This court adheres to its decision in *Austin v. Tennessee*, 179 U. S. 343, that small pasteboard boxes, each containing ten cigarettes, and sealed and stamped with the revenue stamp, whether shipped in a basket or loosely, not boxed, baled or attached together, and not separately or otherwise addressed but for which the express company has given a receipt and agreement to deliver them to a person named therein in another State, are not original packages, and are not protected under the commerce clause of the Federal Constitution from regulation by the police power of the State.’

‘From a consideration of all the decisions and upon the basis of common understanding of the words, it seems that an original package within the meaning of the Food and Drugs Act is the unit, complete in itself, delivered by the shipper to the carrier, addressed to the consignee, and received by him in the identical condition in which it was sent, without separation of the contents in any manner. This unit may be a hogshead containing 500 bottles of wine, or a single can of tomatoes, or it is a small ounce phial of some drug if shipped to the consignee in that form; and if the consignee sells or gives away any one of the three

in the unaltered condition in which he received it, if the contents be adulterated or misbranded, he has violated the act.

"This presentation of the decisions of the courts would not be complete, and certainly not satisfactory, if some reference were not made to three very important decisions, two of the Supreme Court of the United States—*Plumley v. Massachusetts* (155 U. S. 461), and *Crossman v. Lurman* (192 U. S. 189)—and one of the Circuit Court of Appeals of the Sixth Circuit—*Arbuckle Bros. v. Blackburn, Dairy and Food Commission of Ohio* (113 Fed. 616). But they are referred to here simply to show that, so far as the Food and Drugs Act of June 30, 1906, is concerned, they are in a sense obsolete. These decisions were rendered prior to the passage of the aforesaid act, and asserted the right of the States to prohibit the sale and traffic in adulterated and misbranded foods and drugs even in original packages. They were rendered in the absence of congressional action covering the entire subject matter of interstate commerce in foods and drugs. Since then Congress has assumed its full authority over the subject by the passage of the act of June 30, 1906.

"The decisions proceeded upon the well-recognized principle that in the absence of complete Federal regulation of interstate and foreign commerce, effect will be given to the legitimate exercise of the police powers of the States, even though incidentally affecting that commerce. There can scarcely be a doubt that, since the enactment of the Food and Drugs Act, all power of the States over interstate commerce in foods and drugs, including the regulation of importations and sales in original packages, has been abrogated, and the subject is entirely and exclusively under the control of the Federal Government. That such is the state of the law is clearly and succinctly shown by the following quotation from the opinion of Justice Harlan in the case of *Reid v. Colorado*, 187 U. S., at page 146 [23 Sup. Ct. 20]:

"It is quite true, as urged on behalf of the defendant, that the transportation of live stock from State to State is a branch of interstate commerce, and that any specified rule or regulation in respect of such transportation, which Congress may lawfully prescribe or authorize and which may properly be deemed a regulation of such commerce, is paramount throughout the Union. So that when the entire subject of the transportation of live stock from one State to another is taken under direct national supervision and a system devised by which diseased stock may be excluded from interstate commerce, all local or State regulations in respect of such matters and covering the same ground will cease to have any force, whether formally abrogated or not; and such rules and regulations as Congress may lawfully prescribe or authorize will alone control. * * * The power which the States might thus exercise may in this way be suspended until national control is abandoned and the subject be thereby left under the police power of the States."

"This case involved the validity of a certain act of the State of Colorado designed to prevent the introduction of infectious and contagious diseases among the cattle of the State. The defendant contended that the act was void as an interference with interstate commerce, and because the subject matter had already been covered by an act of Congress. The Supreme Court sustained the validity of the act of Colorado, because a legitimate exercise of the police power in the absence of complete regulation by Congress covering the matter. The act of Congress in force at that time did not attempt a full and complete regulation of interstate transportation of animals.

"The principle that the State police laws affecting interstate and foreign commerce must yield to the regulation of Congress when it shall assume jurisdiction is well and tersely stated by Freund in his work on Police Power, at page 82, as follows:

"SEC. 85. The State may enact measures for the protection of safety, order and morals, though affecting foreign and interstate commerce, subject to the following principles:

"1. Every measure of State legislation, however legitimate in itself, yields to positive regulation of interstate or foreign commerce by act of Congress, inconsistent with such measure or intended fully to cover the same matter.'"

F. L. DUNLAP,

GEO. P. McCABE,

Board of Food and Drug Inspection.

Approved:

JAMES WILSON,

Secretary of Agriculture.

WASHINGTON, D. C., January 31, 1908.

"If a package, compounded according to a physician's prescription, be shipped, sent or transported from any State or Territory or the District of Columbia to another State or Territory or the District of Columbia by a compounder, druggist, physician or their agents, by mail, express, freight or otherwise, the label upon such package is required to bear the information called for by Congress. If, however, the patient himself, or a member of his household, or the physician himself carries such package across a State line, and such package is not subject to sale, it is held that such package need not be marked so as to conform with the law, because such a transaction is not considered one of interstate commerce." Food Inspection Decision No. 57, Department of Agriculture, March 13, 1907.

CHAPTER XXVIII.

INDICTMENT.

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Sec. 849. Certainty.

Since prosecutions for violation of liquor statutes are criminal prosecutions, and the offenses under them are crimes, the same certainty is required as in any other criminal prosecutions. Necessarily the accused must be informed with certainty of the offense of which he is to be put on trial, and the facts must be stated with that certainty which will disclose to him what statute it is claimed he has violated.¹ That certainty required at common law is sufficient as to an indictment based

¹ *Whitney v. State*, 10 Ind. 404; *Scales v. State*, 47 Ark. 476; 1 S. W. 769; 58 Am. Rep. 768; *State v. Cox*, 29 Mo. 475; *Bridgeford v. Lexington*, 7 B. Mon. 47; *Rosenbaum v. State*, 4 Ind. 599;

McLaughlin v. State, 45 Ind. 338; *State v. Kiefer*, 90 Md. 165; 44 Atl. 1043; *Nadeau v. Lewis*, 16 Que. L. R. 210; *Laliberte v. Fortin*, 2 Que. L. R. 573, reversing 3 Que. C. R. 385.

upon a statute;² and while the statutes have often dispensed with the strictness required at common law, yet the courts will not for that reason hold that the door was intended to be opened any wider than they actually provided.³ But under none of these statutes has the law been so modified as to dispense with the necessity of stating the specific facts which it is claimed constituted a violation of the statute.⁴ Certain terms have been so long used as to have well-defined significance. This is very well illustrated by the use of the words "saloon" and "tippling house." If an indictment charge that the accused kept a "saloon," it would be difficult to determine just what kind of a place he kept; but if the charge was that he kept a "tippling house," then, because of the use of that term in liquor statutes for centuries, there could be no doubt of its exact meaning. Hence, the charge that the accused kept a "tippling house" without a license, as the statute requires, is sufficient without otherwise describing the place kept.⁵ Where a sale of liquor may be a violation of two statutes—as where it is sold either on or off the premises—such facts must be alleged as show whether the sale was on or off the premises, and it is not sufficient to allege merely a sale.⁶ The indictment must charge with certainty the time and place where the offense was committed.⁷ A statute which seeks to dispense with allegations sufficient to notify the accused of what evidence he may be expected to meet is unconstitutional, being in violation of that provision of the Constitution requiring that the accused be notified of the charge against him, or granting to him the right to demand the nature and cause of

² State v. Wooley, 59 Vt. 357; 10 Atl. 84; Alexander v. State, 29 Tex. 495; State v. Smith, 35 Tex. 132; State v. Ratner, 44 Kan. 429; 24 Pac. 953; Regina v. Edgar, 15 Ont. Rep. 142.

³ Benallick v. People, 31 Mich. 200.

⁴ State v. Cox, 29 Mo. 475; Com-

monwealth v. White, 18 B. Mon. 492.

⁵ Commonwealth v. Riley, 14 Bush 14.

⁶ State v. Auberry, 7 Mo. 304; Burke v. State, 52 Ind. 461; Vandewood v. State, 50 Ind. 26, 295; Plunkett v. State, 69 Ind. 68.

⁷ Clarke v. State, 34 Ind. 436; State v. Hopkins, 5 R. I. 53.

the accusation.⁸ A sale charged argumentatively is not sufficiently certain.⁹

Sec. 850. Following the terms of the statute.

"If a criminal statute provides a definition of an offense, and states specifically what acts constitute it, it will suffice to charge the offense in the language of the statute;"¹⁰ and in a still earlier case from the same State it is said: "No rule is better settled than that which regards as sufficient in an indictment, the averment of an offense in the language of a statute."¹¹ But if the statute use general terms and does not specify what acts shall constitute the offense forbidden, it is not sufficient merely to use the language of the statute; the pleader must state the particular facts in the case.¹² In other words, the pleader must expand the indictment beyond the statutory terms.¹³ Not infrequently statutes prescribe the form of indictment; but this is always subject to the constitutional provision that the facts charged be sufficient so that the accused "be informed of the nature and cause of the accusation against him;" nothing less than this will do.¹⁴ This is particularly true if the indictment use the statutory form, and yet does not state facts sufficient to show a violation of

⁸ Jones v. State, 136 Ala. 118; 34 So. 236; Coleman v. State, 150 Ala. 64; 43 So. 715.

⁹ State v. Stacks (Miss.), 26 So. 962.

¹⁰ Johns v. State, 159 Ind. 413; 65 N. E. 287; Segars v. State, 40 Tex. Cr. App. 577; 51 S. W. 211; State v. Heibel, 116 Mo. App. 43; 90 S. W. 758; Louisiana v. Anderson (Mo. App.), 73 S. W. 875.

¹¹ State v. Bougher, 3 Blackf. 307; State v. Beach, 147 Ind. 74; 43 N. E. 949; 46 N. E. 145; 36 L. R. A. 179; State v. Darlington, 153 Ind. 1; 53 N. E. 925; State v. New, 165 Ind. 571; 76 N. E.

400; State v. New, 36 Ind. App. 521; 76 N. E. 181; State v. Heibel, 116 Mo. App. 43; 90 S. W. 758; State v. Edmunds (Ore.), 104 Pac. 430.

¹² Parks v. State, 159 Ind. 211; 64 N. E. 862; State v. Aydelott, 7 Blackf. 157; State v. Hunter, 8 Blackf. 212; Markel v. State, 3 Ind. 535; Bowles v. State, 13 Ind. 427; Greene v. State, 79 Ind. 537; State v. Crooker, 95 Mo. 389; 8 S. W. 422.

¹³ State v. Garrigan, 36 Kan. 327; 13 Pac. 554.

¹⁴ McLaughlin v. State, 45 Ind. 338.

any statute.¹⁵ Although a statutory indictment be insufficient at common law, yet if it does not violate any constitutional provision, it may be sufficient.¹⁶ In charging an offense it is not necessary to strictly pursue the words used in a statute which defines the offense, but other words conveying the same meaning may be used.¹⁷

Sec. 851. Duplicity.

Duplicity is fatal to an indictment, and renders it subject to a motion to quash.¹⁸ But if an offense be charged, the fact that parts of another offense are also charged will not render the indictment bad, for such parts are mere surplusage.¹⁹ But where a section of a statute forbids two or more acts, connecting the several offenses by the conjunction "or," a single count of the indictment may charge all of such offenses, conjunctively, connecting the several allegations of facts by the word "and."²⁰ Notwithstanding this rule, where an indictment was based upon the words of a statute forbidding any person to sell "any wines or spirituous liquors in less quantities than one gallon, nor suffer the same or any part thereof" to be used on the premises, charging these facts was held bad

¹⁵ State v. Learned, 47 Me. 426.

¹⁶ State v. Murphy, 15 R. I. 543; 10 Atl. 585; State v. Comstock, 27 Vt. 553.

¹⁷ State v. Conway, 38 Mont. 42; 98 Pac. 654.

¹⁸ State v. Shields, 8 Blackf. 151; Knopf v. State, 84 Ind. 316; Herron v. State, 17 Ind. App. 161; 46 N. E. 540; Davis v. State, 100 Ind. 154; *Ex parte* Hague, 3 Low. Can. 94; Otte v. State, 29 Ohio Cir. Ct. Rep. 203.

¹⁹ State v. Smause, 50 Iowa 43; Herron v. State, 17 Ind. App. 161; 46 N. E. 540. "The affidavit may contain averments not absolutely necessary, but it cannot be held bad for duplicity because it con-

tains part only of the averments necessary to charge an offense under another and different statute." State v. Hutzell, 53 Ind. 160; People v. Seeley, 105 N. Y. App. Div. 149; 93 N. Y. Supp. 982.

²⁰ Davis v. State, 100 Ind. 154; Regadanz v. State, 171 Ind. 387; 86 N. E. 449; Fahnestock v. State, 102 Ind. 156; 1 N. E. 372; Elsner v. State, 30 Tex. 524; Rosenbarger v. State, 154 Ind. 425; 56 N. E. 914; Diehl v. State, 157 Ind. 549; 62 N. E. 51; State v. Emmons (Ore.), 104 Pac. 882; State v. Field (Mo.), 119 S. W. 499; State v. Labore (Kan.), 103 Pac. 106.

for duplicity, although it set out the words of the statute.²¹ Yet where an indictment charged that the accused was not licensed, but he kept and owned liquors with intent to sell them, offered and exposed them for sale, and sold them, it was held not bad for duplicity, though each act was a separate offense under the statute.²² And where it was an offense to retail "intoxicating liquors by the dram," an indictment charging sales of twenty glasses to divers persons at divers times, was held to charge but one offense, upon the principle that the statute required or admitted several acts to constitute the offense.²³ And where a statute declared "all grogshops, tippling shops or buildings, places or tenements" used for the illegal sales of liquor should be nuisances, it was held proper to charge in the indictment that the accused kept "a certain grogshop and tippling house, and building place and tenement" for the sale of intoxicating liquors.²⁴ And where a statute provided that if a certain act should be committed in one of either of two modes it should be an offense, the commission may be alleged to have been done in both modes.²⁵ Returning to the principle announced above, the rule is that where a statute makes it an offense to "sell or give away" liquors without a license, a single count in an indictment may charge that the accused "did sell *and* give away" liquor, and it will not be bad for duplicity.²⁶ Nor is an indictment charg-

²¹ *Miller v. State*, 5 How. (Miss.) 250; *State v. Ball*, 27 Neb. 601; 43 N. W. 398.

²² *State v. Burns*, 44 Conn. 149; *People v. Paguin*, 74 Mich. 34; 41 N. W. 852; *Luton v. Palmer*, 69 Mich. 610; 37 N. W. 701; *Morganstern v. Commonwealth*, 94 Va. 787; 26 S. E. 402.

²³ *Zumhoff v. State*, 4 Greene (Iowa) 526; *Commonwealth v. Broker*, 151 Mass. 355; 23 N. E. 1137; *State v. McCormick* (Wash.), 105 Pac. 1037.

²⁴ *State v. Brady*, 16 R. I. 51; 12 Atl. 238; *State v. Tracey*, 12

R. I. 216; *Rawson v. State*, 19 Conn. 292; *Conley v. State*, 5 W. Va. 522; *State v. Clark*, 44 Vt. 636.

²⁵ *State v. Brady*, 6 R. I. 76.

²⁶ *State v. Brown*, 36 Vt. 560; *State v. Pittman*, 76 Mo. 56; *Boldt v. State*, 72 Wis. 7; 35 N. W. 935; 38 N. W. 177; *State v. Ball*, 27 Neb. 601; 43 N. W. 398; *Smith v. State*, 32 Neb. 105; 48 N. W. 823; *State v. Pischel*, 16 Neb. 490; 20 N. W. 848; *Regina v. Coulter*, 4 Manitoba 309.

For illustrations, see *State v. Nolan*, 15 R. I. 529; 10 Atl. 481;

ing a sale and barter and gift bad,²⁷ nor one charging that the accused "did sell, and offer to sell, by himself and by an agent,"²⁸ nor one charging that he "did presume to be a retailer, and did sell" to a certain person,²⁹ or did "offer to sell, sell and suffer to be sold,"³⁰ nor one charging that he "unlawfully did sell, and was interested in the sale of, alcoholic, ardent and vinous liquors and intoxicating spirits."³¹ So where it is an offense to sell "vinous, spirituous *or* malt liquors," the indictment may charge a sale of "vinous, spirituous *and* malt liquors," and it will not be bad for duplicity.³² A charge of a sale of liquor to be drunk and suffered to be drunk on the premises where sold is not bad for duplicity,³³ nor is one that the accused unlawfully kept a house for selling liquor and

Commonwealth v. Miller, 107 Pa. St. 276; State v. Wood, 14 R. I. 151; United States v. Hull, 14 Fed. 324; State v. Schweiter, 27 Kan. 499; Commonwealth v. Dolan, 121 Mass. 374; Commonwealth v. Eaton, 15 Pick. 273; Commonwealth v. Curran, 119 Mass. 206; Commonwealth v. Foss, 14 Gray 50; Commonwealth v. Nichols, 10 Allen 199.

²⁷ State v. Teahan, 50 Conn. 92; State v. Brown, 36 Vt. 560; State v. Schweiter, 27 Kan. 499; State v. Irvine, 3 Heisk. 155; Boldt v. State, 72 Wis. 7; 35 N. W. 935; 38 N. W. 177; State v. Fant, 2 La. Ann. 837; State v. Bogan, 2 La. Ann. 838.

²⁸ Barnes v. State, 20 Conn. 232; State v. Kerr, 3 N. D. 523; 58 N. W. 27; State v. Pittman, 76 Mo. 56.

²⁹ Commonwealth v. Wilcox, 1 Cush. 503.

³⁰ State v. Nolan, 15 R. I. 529; 10 Atl. 481.

³¹ Davis v. State, 50 Ark. 17; 6 S. W. 388

³² Kreamer v. State, 106 Ind. 192; 6 N. E. 341; Kamp v. State, 120 Ga. 157; 47 S. E. 548; Davis v. State, 100 Ind. 154; State v. Irvine, 3 Heisk. 155; Fahnestock 102 Ind. 156; 1 N. E. 372; State v. Reed, 168 Ind. 588; 81 N. E. 571; State v. Cottle, 15 Me. 473; Throckmorton v. Commonwealth (Ky.), 49 S. W. 474; State v. Nations, 75 Mo. 53; State v. Whitted, 3 Ala. 102; State v. Bradley, 15 S. D. 148; 87 N. W. 590; Lea v. State, 64 Miss. 201; 1 So. 51; State v. McGinnis, 30 Minn. 52; 14 N. W. 258; State v. Nerbovig, 33 Minn. 480; 24 N. W. 321; Davis v. State, 50 Ark. 17; 6 S. W. 388; Boldt v. State, 72 Wis. 7; 35 N. W. 935; 38 N. W. 177; Jones v. Commonwealth (Ky.), 47 S. W. 328; Petit v. People (Colo.), 52 Pac. 676; Cranor v. Albany, 71 Pac. 1042.

Contra, State v. Pischel, 16 Neb. 490; 20 N. W. 848; Smith v. State, 32 Neb. 105; 48 N. W. 823.

³³ Stout v. State, 93 Ind. 150.

did unlawfully sell liquor.³⁴ Under a statute making it unlawful to sell liquor in any place where women are employed or allowed to assemble, for the purpose of the business therein carried on, a charge of a sale in such a place where women were both employed and allowed to assemble is not bad for duplicity.³⁵ Selling and furnishing liquors, although distinct offenses, can be charged in one count conjunctively, it has been held.³⁶ So a charge of a sale without paying the liquor tax and of engaging in the liquor business without having the receipt and notice of sale posted up, being an offense under a single section of the statute, may be joined in one count.³⁷ Likewise a charge of a sale to a person who was intoxicated and was in the habit of getting intoxicated charges but one offense,³⁸ and so one charging the accused with keeping a place where liquors are unlawfully sold and also with keeping liquors for the purpose of making unlawful sales.³⁹ Upon a charge of keeping a nuisance several distinct causes as descriptive of the nuisance may be given.⁴⁰ An indictment charged that the accused in his saloon maintained "a certain screen, blind, shutter, curtain and partition" is not bad for duplicity where the statute makes the maintenance of any one of them an offense.⁴¹ So is an indictment for exposing and keeping for sale intoxicating liquors,⁴² and so one charging the accused with keeping and

³⁴ Commonwealth v. Price, 5 Pa. Co. Ct. Rep. 175; 4 Kulp. 289; Commonwealth v. Stowell, 9 Met. 569; Commonwealth v. Wilcox, 1 Cush. 503; State v. Stinson, 17 Me. 154; State v. Becker, 20 Iowa 438; State v. Baughman, 20 Iowa 497; State v. Churchill, 25 Me. 306; State v. Giroux, 75 Kan. 695; 90 Pac. 249; *Ex parte* Johnson, 6 Cal. App. 734; 93 Pac. 199; State v. Winebrenner, 67 Iowa 230; 25 N. W. 146; Segars v. State, 35 Tex. Cr. Rep. 45; 31 S. W. 370.

³⁵ State v. Marion, 14 Mont. 458; 36 Pac. 1044; State v. Mc-

Ginnis, 14 Mont. 462; 36 Pac. 1046.

³⁶ State v. Woodward, 25 Vt. 616.

³⁷ People v. Paquin, 74 Mich. 34; 41 N. W. 852; State v. Mude (N. D.), 115 N. W. 107.

³⁸ State v. Conner, 30 Ohio St. 405.

³⁹ Yazel v. State, 170 Ind. 535; 84 N. E. 972; Commonwealth v. Foss, 14 Gray 50.

⁴⁰ State v. Lang, 63 Me. 215.

⁴¹ Commonwealth v. Gibbons, 134 Mass. 197.

⁴² Commonwealth v. Curran, 119 Mass. 206; Commonwealth v. Dolan, 121 Mass. 374.

controlling a building where liquors were sold and where "gambling, fighting, drunkenness and breaches of the peace were permitted."⁴³ So one charging a sale on Sunday, which was illegal, and with keeping open a shop, selling and giving away liquor on that day is valid.⁴⁴ The principle underlying these decisions is that where a statute enumerates a series of acts, any one of which separately or altogether constitute an offense, all of them may be charged in a single count, for the reason that though each of itself may constitute the offense, yet all of them together constitute but one and the same offense.⁴⁵ There are a number of decisions, however, that are not in accord with those already cited. Thus charging a sale and a keeping for sale has been held to render the indictment bad for duplicity,⁴⁶ and so one charging the accused with selling to "P and K and C each one drink of whisky."⁴⁷ So under a statute prohibiting peddlers from "carrying for sale, or obtaining orders for the sale, of any intoxicating liquors," are several distinct offenses which it has been held could not be joined in one count.⁴⁸ So a charge of an illegal sale and of keeping a place where persons are permitted to resort for the purpose of drinking intoxicating liquors as a beverage cannot be joined.⁴⁹ Where a statute made it unlawful to sell liquors or to keep a saloon for their sale, a combination of two charges in one count that the accused "ran" a saloon and bar, and there sold to a certain person liquor, and that he kept a saloon where liquors were sold, was held bad for duplicity.⁵⁰ Where a liquor nuisance was defined as consisting in the use for prohibited purposes "any building, erection or "place," a charge that the accused used "a building, erection, place and railroad car" was held to charge two distinct

⁴³ State v. Dean, 44 Iowa 648.

⁴⁴ State v. Schleuter, 110 Mo. App. 7; 83 S. W. 1012.

⁴⁵ *Ex parte* Johnson, 6 Cal. App. 734; 93 Pac. 199; State v. Schleuter, 110 Mo. App. 7; 83 S. W. 1012.

⁴⁶ Regina v. Davis, 30 N. B.

⁴⁷ Alexander v. State, 51 Tex. Cr. App. 506; 102 S. W. 1122; State v. Salkowski (Del.), 69 Atl. 839.

⁴⁸ State v. Smith, 61 Me. 296.

⁴⁹ State v. Lund, 49 Kan. 209; 30 Pac. 518.

⁵⁰ People v. Keefer, 97 Mich. 15; 56 N. W. 105.

offenses.⁵¹ Selling and giving away liquors have been held distinct offenses in Kentucky which could not be joined in one count,⁵² and so in Nebraska.⁵³ If two offenses be charged in one count, one may be dismissed and the other prosecuted;⁵⁴ and where the charge was of a sale and keeping for sale, a conviction of a sale only was held valid, though the indictment was bad for duplicity.⁵⁵ Where the charge was that the accused sold at one time fermented liquor in less quantity than the statute permitted, and on divers times before and after such time, it was held that it did not include several offenses. But in this case it was conformable to the statute.⁵⁶ An indictment which charges that the accused kept a building in the county of H for the sale of liquors and in the town of P in the county of H for the sale of liquors is bad for duplicity, the indictment not containing an allegation of an intent to charge but one offense.⁵⁷ But where a statute provided that all saloons, restaurants, bars in hotels or elsewhere should not be opened on Sunday, an information charging the accused with keeping open his "saloon and bar" on Sunday, "such saloon and bar where intoxicating liquors are kept for sale," it was held that it was not open to the objection of charging two offenses.⁵⁸ A charge of retailing liquors without paying the liquor tax and without posting up the county treasurer's

⁵¹ *State v. Chapman*, 94 Iowa 67; 62 N. W. 659.

⁵² *Commonwealth v. Fleece*, 5 Ky. Rep. 429.

⁵³ *State v. Pischel*, 16 Neb. 490; 20 N. W. 848; *Smith v. State*, 32 Neb. 105; 48 N. W. 823.

⁵⁴ *Regina v. Klemp*, 10 Ont. Rep. 143.

⁵⁵ *King v. Stevens*, 8 Can. Cr. Cas. 76.

⁵⁶ *Ex parte Moley*, 7 Low. Can. Jr. 1.

It has been held that distinct sales to different persons at different times may be charged on one count, as constituting a sin-

gle offense. *Kilbourn v. State*, 9 Conn. 560; *Commonwealth v. Dillane*, 11 Gray 67; *Commonwealth v. Broker*, 151 Mass. 355; 23 N. E. 1137.

⁵⁷ *State v. Schuler*, 109 Iowa 111; 80 N. W. 213.

⁵⁸ *State v. Donaldson*, 12 S. D. 259; 81 N. W. 299.

An indictment charging a violation of a city ordinance and concluding contrary to the ordinance and against the statute, does not state two offenses. *Jordan v. Nicolin*, 84 Minn. 367; 87 N. W. 915.

notice and receipt for the tax, is not bad for duplicity,⁵⁹ nor is one alleging a failure to file a bond, pay the tax and post up the receipt.⁶⁰ Nor is one alleging a sale without taking the oath not to adulterate the liquor sold and without giving a bond.⁶¹ A charge of a sale of "two gills" is not bad for duplicity;⁶² but a charge of selling and shipping intoxicating liquors is bad, where the statute makes the two acts distinct offenses.⁶³

Sec. 852. Allegations in the disjunctive.

Care must be used in the use of disjunctive allegations. Thus it has been said by an author of repute that "'Or' is ordinarily a dangerous word in an allegation,"⁶⁴ though he adds "there are circumstances in which it is proper and even necessary." "For example," he continues, "it should be used in charging a duty, thus following the statute literally; though, in alleging a breach of duty, the statutory 'or' must commonly be made 'and' in the indictment. In the nature of a duty is the procuring of the authorizing license, so that, * * * if by the statute the offense consists of selling without this license, *or* that license, *or* that, the negative would be bad should it say, 'Not having this license *and* that one *and* that one.' The statutory 'or' should be retained in this averment. Thus, in Kentucky, a statute prohibited a sale to an infant without 'the written consent *or* request' of the father; and it was held ill to say 'without the written consent and request.'"⁶⁵ But an

⁵⁹ *People v. Aldrich*, 104 Mich. 455; 62 N. W. 570.

⁶⁰ *People v. Wade*, 101 Mich. 89; 59 N. W. 438.

⁶¹ *Webb v. State*, 11 Lea 662; *State v. Klein*, 78 Mo. 627.

⁶² *State v. Wickey*, 54 Ind. 438; *State v. Wickey*, 57 Ind. 596.

⁶³ *Sturgis v. State* (Okla.), 102 Pac. 57; *De Graff v. State* (Okla.), 103 Pac. 538.

⁶⁴ *Bishop Stat. Crimes* (2d ed.), § 1043.

⁶⁵ Citing *Commonwealth v. Haderaft*, 6 Bush, 91. "The act defines the offense," said the court, "to be a sale of liquor to a minor, 'without the written consent *or* request' of the father, mother or guardian of the minor; but the indictment in this case is so framed as to make the offense complete by so selling, if done without 'the written consent and request' of the father, mother or guardian; so that, according to

indictment charging a sale of "beer or wine," although it followed the language of the statute, would be bad for uncertainty, because the accused would not know whether he was to meet evidence showing a sale of beer or of wine.⁶⁶ The same would be true of a charge that the accused "kept or deposited" liquor at a particular place "or by some other person with his consent."⁶⁷ To charge that defendant "sold or suffered to be sold" liquors on his premises is not sufficient; the word "and" should be used in place of the word "or."⁶⁸ So to charge that the accused "did unlawfully sell or give away and dispose of intoxicating liquors" is a fatal allegation to the sufficiency of the indictment.⁶⁹ But a charge that the accused was "a liquor dealer or keeper of a barroom" is not a bad charge because in the alternative, since the words "dealer" and "keeper" are synonymous.⁷⁰ So a charge that the accused used a certain "building or place" for the purpose of unlawfully selling intoxicating liquors under a statute making the use of "any building, erection or place" for such purpose illegal, was held sufficient.⁷¹

Sec. 853. Joinder of counts.

The rules common as to the joinder of offenses prevail in cases for the violation of the liquor statutes.⁷² Thus, a count

the indictment, to have exonerated the defendant on that ground, he should not only have the *written consent*, but also the *written request* of the parent or guardian. It is obvious, therefore, that the facts stated in the indictment did not constitute the offense defined by the statute."

⁶⁶ Commonwealth v. Gray, 2 Gray 501; 61 Am. Dec. 476; Clifford v. State, 29 Wis. 327.

⁶⁷ State v. Moran, 40 Me. 129.

⁶⁸ State v. Colwell, 3 R. I. 284.

⁶⁹ State v. Fairgrieve, 29 Mo. App. 641.

If offenses be charged in the al-

ternative, not even a plea of guilty can cure the defect. *Ex parte* Hague, 3 Low. Can. 94.

⁷⁰ Hofheitz v. State (Tex. Cr. App.), 74 S. W. 310.

⁷¹ State v. Dixon, 104 Iowa 741; 74 N. W. 692.

Sometimes statutes permit charges to be made in the alternative. *Sima v. State*, 135 Ala. 61; 33 So. 162.

⁷² Stephens v. State, 14 Ohio 386; State v. Priestester, Cheves (S. C.) 103; Commonwealth v. Tuttle, 12 Cush. 505; Commonwealth v. Moorehouse, 1 Gray 470; Pope v. People, 26 Ill. App. 44; State

charging distinct sales to certain persons may be joined with one charging the accused with being a common seller of intoxicating liquors;⁷³ and an indictment may in one count charge illegal sales and in another the maintenance of a nuisance.⁷⁴ An indictment charging in one count a sale of whisky on Sunday and another charging a sale of alcohol on the same day charges only one offense.⁷⁵ So where the act charged constitutes different offenses, and is punishable under different statutes, separate counts may be joined, charging the same act, but under different statutes.⁷⁶ A charge of selling to a particular person may be joined with one of a sale to another person or to divers persons whose names are unknown.⁷⁷ Sales of different liquors may be joined in separate counts, although there be different punishments for such illegal acts.⁷⁸ Under a statute forbidding whisky dealers from selling or contracting to sell or taking orders for or soliciting, personally or by agent, the sale of liquors in a dry district, there may be joined a count for selling and another for soliciting of orders for whisky.⁷⁹ Under the Iowa Code⁸⁰ a charge of unlawfully keeping a place for the sale of liquors and an unlawful sale of them therein constitutes but one offense, and may be joined;⁸¹ and

v. Klein, 78 Mo. 627; *State v. Atkinson*, 33 S. C. 100; 11 S. E. 693; *Commonwealth v. Bearce*, 150 Mass. 389; 23 N. E. 99; *Walters v. State*, 5 Iowa 507; *Peer v. Commonwealth*, 5 Gratt. 674; *People v. Shaver*, 37 N. Y. App. Div. 21; 55 N. Y. Supp. 701.

⁷³ *Commonwealth v. Moorehouse*, 1 Gray 470; *Commonwealth v. Gilson*, 2 Allen 505; *Commonwealth v. Clark*, 14 Gray 367.

⁷⁴ *State v. McLaughlin*, 47 Kan. 143; 27 Pac. 840; *Nicholson v. People*, 29 Ill. App. 57; *Commonwealth v. Galligan*, 155 Mass. 54; 28 N. E. 1129; *Mitchell v. State*, 146 Ill. 175; 33 N. E. 757; 37 Am. St. 147.

⁷⁵ *Bridges v. State*, 37 Ark. 224.

⁷⁶ *People v. Charbineau*, 115 N. Y. 433; 22 N. E. 271.

⁷⁷ *Walters v. State*, 5 Clarke (Iowa) 507; *Lewis v. Commonwealth*, 90 Va. 843; 20 S. E. 777; *Commonwealth v. Broker*, 151 Mass. 355; 23 N. E. 1137; *De Graff v. State (Okla.)*, 103 Pac. 538.

⁷⁸ *Lowell v. State*, 126 Ga. 105; 54 S. E. 916.

⁷⁹ *Williams v. State*, 107 Ga. 693; 33 S. E. 641.

⁸⁰ Sec. 4300.

⁸¹ *State v. Haworth*, 70 Iowa, 157; 30 N. W. 389; *State v. Uferty*, 70 Iowa 160; 30 N. W. 391.

in Georgia a count charging a violation of the general prohibition law may be joined with one charging a violation of a local statute regulating or prohibiting the sale of liquor in a particular county.⁸² But where sales are totally prohibited a charge of its violation and another of a sale without a license cannot be joined, because they are totally inconsistent.⁸³ And where a statute provided that an indictment must charge only one crime, though separate counts might charge it was committed in different ways, it was held that charges of a sale in the same town, at different times to different persons, could not be joined, although different counts were used.⁸⁴ Under this same statute a charge of a sale without a license and also a sale in a town which had voted that no license should be granted was held allowable, where the allegation was merely that the liquor was sold in a town in which the electors had voted that no liquor should be sold.⁸⁵ And under the same statute a charge of an unlawful sale on Sunday to one not a guest at the accused's hotel could be combined with a count of an unlawful sale and also with one of an unlawful giving away of liquor to the same person on the same day.⁸⁶ A charge of a sale to one person, of a gift to another person, of a keeping in possession of liquors to be used by another, and with allowing his place of business to be a depository for such liquors, it has been held, could be embraced within a single indictment in four separate counts, and there was no joinder of disconnected criminal charges.⁸⁷

⁸² *Tooke v. State*, 4 Ga. App. 495; 61 S. E. 917; *Tillery v. State*, 10 Lea 35.

⁸³ *Butler v. State*, 25 Fla. 347; 6 So. 67.

⁸⁴ *People v. O'Donnell*, 46 Hun 358; *People v. Harmon*, 49 Hun 558; 2 N. Y. Supp. 421.

If there be separate counts, a verdict finding the accused "guilty of on the first, second and fourth counts of the indictment" is sufficient. *State v. Hopkins*, 94 Iowa 86; 62 N. W. 656.

⁸⁵ The question turned upon the fact that it was not alleged that the vote had been taken upon petition of the voters for an election and due notice thereof given, and therefore it was not shown that prohibition had been legally adopted. *People v. Selley*, 183 N. Y. 544; 76 N. E. 1102.

⁸⁶ *People v. McDonald* (N. Y.), 108 N. Y. Supp. 749.

⁸⁷ *State v. Blankeney*, 96 Md. 711; 54 Atl. 614.

Sec. 854. Verification and source of information.

Under a Kansas statute⁸⁸ the county attorney could subpoena witnesses and examine them to ascertain if there had been violations of the prohibitory liquor law. The testimony thus elicited was reduced to writing and was signed by the witnesses. If it disclosed an offense had been committed he was then required to file a complaint against the person who had committed the offense, which complaint he was required to verify, but this verification could be upon information and belief.⁸⁹ In Massachusetts an affidavit on information and belief is sufficient.⁹⁰ But an affidavit that the affiant has just cause to suspect and does suspect that the accused is guilty of a violation of a liquor statute or ordinance, is not sufficient, without averring he is guilty, not being the equivalent that it was made upon information and belief.⁹¹ Where, in South Dakota, a statute⁹² similar to the Kansas statute was in force, and the State's attorney, after filing the testimony he had elicited and caused to be reduced to writing, filed his information, which he concluded, "Now, therefore, I herein and hereby enter complaint against" the said defendant, "and hereby certify that to the best of my information and belief, from said testimony obtained on examination, said laws governing the sale of intoxicating liquors have been and are now being violated," it was held that the information was fatally defective.⁹³ But under this statute a statement that the information is "true to the best of deponent's knowledge, information and belief" is sufficient, the statute requiring a verifica-

⁸⁸ Gen. St. par. 2543.

⁸⁹ *State v. Blackman*, 32 Kan. 615; 5 Pac. 173; *State v. Lademberger*, 44 Kan. 261; 24 Pac. 347; *State v. Moseli*, 49 Kan. 142; 30 Pac. 189; *State v. Huffman*, 51 Kan. 541; 33 Pac. 377; *State v. Etzel*, 2 Kan. App. 673; 43 Pac. 798; *State v. Tegder*, 6 Kan. App. 762; 50 Pac. 985; *State v. Rozum*, 8 N. D. 548; 80 N. W. 477; *Sparta v. Boorum*, 125 Mich. 553;

89 N. W. 435; 90 N. W. 681; 8 Det. L. N. 1100.

⁹⁰ *Commonwealth v. Crawford*, 9 Gray, 129; *Logan v. State* (Okla.), 115 S. W. 1192.

⁹¹ *Roberson v. Lambertville*, 38 N. J. L. 69; *Mowery v. Camden*, 49 N. J. L. 106; 6 Atl. 438; *Chappel v. State* (Ala.), 47 So. 329.

⁹² Sess. Laws, 1890, c. 101, § 9.

⁹³ *State v. Butcher*, 1 S. D. 401; 47 N. W. 406.

tion only upon information and belief.⁹⁴ And where the statute required the prosecutor to state that he had good reason to believe the facts alleged were true, a statement that the facts are true upon the deponent's information and belief is sufficient.⁹⁵

Sec. 855. Surplusage.

Surplusage in an indictment does not render it bad, for it will be rejected or not considered.⁹⁶ This is very well illustrated in a charge of being a common seller of liquors on a day named where it is added "and on divers others days and times between that day and the return of this indictment," for the quoted words will be rejected.⁹⁷ So where a local option election was held to determine whether the "sale of intoxicating liquors should be prohibited," an information charging

⁹⁴State v. Brennan, 2 S. D. 384; 50 N. W. 625; Lincoln Center v. Linker, 6 Kan. App. 369; 51 Pac. 807; State v. Becker, 3 S. D. 29; 51 N. W. 1018.

(An attorney especially appointed to prosecute may likewise verify the information), "as affiant verily believes" is sufficient. Deveney v. State, 47 Ind. 208.

⁹⁵State v. Tall, 56 Wis. 577; 14 N. W. 596.

If the affidavit on which the prosecution is based be lost, the court may allow a substitute therefor to be filed. Roland v. State (Ala.), 41 So. 963.

In North Dakota the State's attorney must file with the court the depositions of some witness on which he bases the official information. If the deposition be attached to the information and the latter be filed, that is a "filing" of the deposition, though it be

not so marked. State v. Rozum, 8 N. D. 548; 80 N. W. 477.

A failure to verify the information is fatal to a conviction. State v. Weyland, 126 Mo. App. 723; 105 S. W. 660.

If the charge in one count is a direct contradiction of the charge in another, there can be no verification of the information. State v. Weyland, *supra*.

⁹⁶Rex v. Dickenson, 1 Sand. Wms. ed. 135, note; Regina v. Wigg, 2 Ld. Raym. 1163; Bennet v. Talbois, 1 Ld. Raym. 149; State v. Walker, Taylor (N. C.) 299; Commonwealth v. McAtee, 8 Dana 28; Commonwealth v. Peniman, 8 Met. 519; State v. Staples, 45 Me. 320; State v. Hall, 26 W. Va. 236; Scott v. State, 150 Ala. 59; 43 So. 181; State v. Erickson, 13 N. D. 139; 103 S. W. 389.

⁹⁷State v. Pillsbury, 47 Me. 449.

that it was held to determine whether the "sale or exchange of intoxicating liquors should be prohibited," was held to be surplusage so far as it related to the exchange of such liquors.⁹⁸

Sec. 856. Referring to the statute.

It is not necessary to allege under **what statute** the indictment is brought, for it is sufficient to allege the commission of acts forbidden by some statute, and then the court will apply the facts to the statute violated.⁹⁹ This is true where there is a statute of a general character applicable only to the county in which the indictment is found,¹ or to one prohibiting sales within a certain distance of a designated locality.² But where the same acts constitute an offense under two sections, it is held that the pleader must designate the section under which he has drawn the indictment, if they prescribe different punishments.³ Occasionally a statute makes a distinction in its sections in sales, in which case the indictment should indicate that section under which the indictment is brought, even though the penalties under all the sections are the same.⁴ And when there is a statute local to the county and another statute general throughout the entire State, it should be pointed out in the indictment under which of the two it is brought, in order that the judgment will be a bar to a second prosecution for the same offense.⁵ In Ohio it has been held sufficient to merely allege that a certain section of the Revised Statutes has been violated, but this is by reason of a particular statute.⁶

⁹⁸ *Segars v. State*, 40 Tex. Cr. App. 577; 51 S. W. 398.

⁹⁹ *Commonwealth v. Keefe*, 7 Gray 332; *Griffin v. State*, 115 Ga. 577; 41 S. E. 997. But see *Kee v. McSweeney*, 15 Abb. N. C. 229, and *State v. Langdon*, 74 N. H. 50; 64 Atl. 1099; *Donovan v. State*, 170 Ind. 123; 83 N. E. 744; *State v. Polk*, 69 Atl. 1006.

¹ *Powers v. Commonwealth*, 90 Ky. 167; 13 S. W. 450.

² *State v. Wallace*, 94 N. C. 827.

³ *State v. Leavitt*, 63 N. H. 381; *State v. Langdon*, 74 N. H. 50; 64 Atl. 1099.

⁴ *Benalleck v. People*, 31 Mich. 200.

⁵ *Camp v. State*, 27 Ala. 53. Consult *Stone v. State* (Miss.), 7 So. 500; *Sefried v. Commonwealth*, 101 Pa. St. 200; *Olmstead v. State*, 89 Ala. 16; 7 So. 775.

⁶ *Oshe v. State*, 37 Ohio St. 494.

Sec. 857. Character, occupation or condition of accused.

Licensed dealers may commit offenses which an unlicensed person could not commit, because the statute applies only to the former and not to the latter. So a statute may apply only to a retailer, or to a wholesaler, or it may only apply to a merchant. It is manifest, then, under such a statute, that the accused must be brought by appropriate allegations within the terms of the statute, and if the allegations in the indictment are not sufficient for that purpose it will be fatally defective.⁷ Thus, where a statute prohibited sales on Sunday and provided for a forfeiture of his license if convicted a second time for the same offense, it was held that it clearly required a description of the person to be incorporated into the indictment.⁸ And so a statute making it an offense to sell liquor to a drunkard after written notice given him was held to require that the defendant selling the liquor should be a tavern or hotel keeper, or merchant, for the statute only applied to such persons.⁹ And where only merchants were required to take out licenses to sell, an indictment for a sale without a license must specifically aver that the seller was a merchant.¹⁰ So if a statute makes it an offense for any "druggist" to sell liquor, an indictment charging that the

⁷ State v. Ryan, 30 Mo. App. 159; State v. Heitsch, 29 Minn. 134; 12 N. W. 353; State v. Runyan, 26 Mo. 167; People v. Page, 3 Parker Crim. 600; State v. Andrews, 26 Mo. 169; State v. Martin, 34 Ark. 340; Bode v. State, 7 Gill 326; State v. Bradford, 13 S. D. 201; 83 N. W. 47; 80 N. W. 143; State v. Barnett, 110 Mo. App. 592; 85 S. W. 613; State v. Scampini, 77 Vt. 92; 59 Atl. 201; State v. Andrews, 26 Mo. 169; State v. Chilton, 26 Mo. 170; Herine v. Commonwealth, 13 Bush 295; Hainline v. Commonwealth, 13 Bush 35. See Bloomfield v. State, 10 Mo. 556,

⁸ Bode v. State, 7 Gill 326. The statute applied only to licensed tavern keepers.

⁹ State v. Heitsch, 29 Minn. 134; 12 N. W. 353; People v. Page, 3 Parker Cr. Rep. 600; State v. Thomas, 7 Rich. L. 481; State v. Bradshaw, 2 Swan 627.

Contra, Brown v. State, 2 Head 180.

¹⁰ State v. Runyan, 26 Mo. 167; State v. Runyan, 26 Mo. 169; State v. Ryan, 30 Mo. App. 159; State v. Fanning, 38 Mo. 359; Stewart v. Calhoun, circuit judge (Mich.), 121 N. W. 279; State v. Stock, 95 Mo. App. 55; 68 S. W. 579.

accused at the time of the alleged sale was "then and there a dealer in drugs and medicines" is insufficient.¹¹ And while it must be alleged that the person who gave the prescription in violation of the statute was a physician, it need not be averred that he was a "reputable physician."¹² And where the statute makes it an offense for a dealer in intoxicating liquors to sell liquors to a minor, it must be averred and proven that the accused was a dealer.¹³ Where the offense could only be committed by a "licensed barroom liquor dealer," an indictment charging that the accused was "a barroom liquor dealer" was held fatally defective.¹⁴ Where a statute forbade any person to sell on Sunday "fermented or distilled liquor," and another forbade any keeper of a dramshop to sell on that day any "intoxicating liquors," it was held necessary on a charge of a Sunday sale of intoxicating liquor to allege that the accused was a keeper of a dramshop.¹⁵ An indictment against two defendants jointly need not aver they are partners.¹⁶ Under an indictment for employing women in a saloon the indictment must aver that the defendant was the owner or keeper of it.¹⁷ So where a statute makes it an offense for a common carrier to convey goods into a local option district, it must be averred that the accused was a common carrier.¹⁸ Where a statute made it an offense for a licensed saloon keeper to keep open his saloon on Sunday, an averment that the accused was the proprietor of a saloon and licensed to sell intoxicating liquors was held sufficient.¹⁹

¹¹ *State v. Baskett*, 52 Mo. App. 389; *Rafter v. State*, 62 Mo. App. 101; *State v. Shafer*, 82 Mo. App. 58; *State v. Shinn*, 63 Kan. 638; 66 Pac. 650.

¹² *State v. Farmer*, 104 N. C. 887; 10 S. E. 563; *McQuery v. State*, 40 Tex. Cr. App. 571; 51 S. W. 247.

¹³ *State v. Cronin*, 39 Tex. 171; *Baer v. Commonwealth*, 10 Bush 6; *State v. Lisles*, 58 Mo. 359.

¹⁴ *Glass v. Commonwealth*, 33 Gratt. 827.

¹⁵ *State v. Lisles*, 58 Mo. 359.

¹⁶ *Janks v. State*, 29 Tex. App. 233; 15 S. W. 815; *State v. Stock*, 95 Mo. App. 65; 68 S. W. 579.

¹⁷ *Johnson v. State* (Tex. Cr. App.), 21 S. W. 371, 372.

¹⁸ *Commonwealth v. Hardy*, 124 Ky. 375; 99 S. W. 239; 30 Ky. Law Rep. 532.

¹⁹ *State v. Gilbert*, 21 S. D. 209; 111 S. W. 538; *State v. McMillan*, 21 S. D. 20; 111 S. W. 540.

Usually it is not necessary to

But an indictment for selling liquor without a license need not aver that the accused was a liquor dealer unless only such a person can commit the offense.²⁰ So this is true of a sale on Sunday.²¹ Under a Massachusetts statute a charge against a defendant not being a common seller of liquors, to be used in his house or other building, it was held unnecessary to aver that he was an innholder or common victualer.²² But if an indictment unnecessarily charge the accused with having committed the offense in a particular capacity, as a licensee, he cannot object to it for that reason.²³

Sec. 858. Intent of vendor.

The question of "intent" arises most frequently upon a charge of keeping intoxicating liquors for sale. The word "intent" need not always be used. Thus, a charge that the accused sold the liquors "to be drunk upon the premises" is equivalent that he sold them "with the intent to be drunk" there.²⁴ Nor need it be averred that such intent was consummated by the liquors being actually there consumed, for it is the intent with which they are sold and not the fact of consumption on the premises that constitutes the crime.²⁵ Upon a charge that the accused allowed his saloon to remain open on Sunday, it is not necessary to set forth his intent or

aver the accused's occupation. *Stout v. Territory* (Okla.), 103 Pac. 75; *Shelling v. Commonwealth*, 11 Ky. L. Rep. (abstract) 675.

An indictment charging that the defendant sold liquors for other than medicinal, scientific and mechanical purposes, is sufficient without averring that he did not as a druggist sell such liquors to some other druggist. *State v. Hunt*, 29 Kan. 762.

²⁰ *State v. Butcher*, 40 Ark. 362; *Johnson v. People*, 83 Ill. 431; *Commonwealth v. Rucker*, 14 B. Mon. 228; *Austin v. State*, 10 Mo.

591; *State v. Schroeder*, 3 Hill L. (S. C.) 61; *State v. Riley*, 3 Hill L. (S. C.) 65; *State v. Thomas*, 7 Rich. L. (S. C.) 481; *Commonwealth v. Luddy*, 143 Mass. 563; 10 N. E. 448.

²¹ *State v. Edlavitch*, 77 Md. 144; 26 Atl. 406.

²² *Commonwealth v. Pearson*, 3 Met. 449.

²³ *State v. Fant*, 2 La. Ann. 837; *State v. Bogan*, 2 La. Ann. 838.

²⁴ *Bilbro v. State*, 7 Humph. 534.

²⁵ *Sanderlin v. State*, 2 Humph. 315.

purpose in so doing.²⁶ It is not necessary to allege an intent to sell in the place where liquor is kept, where it is alleged that it was kept with "intent unlawfully to sell the same within" the State.²⁷ And it has been held that a charge that the accused did keep for sale one pint of cider" sufficiently charged that he kept the pint of cider with the intent to sell it.²⁸ So it is said that if it be alleged that the accused knowingly and willfully did the unlawful act, a special intent need not be alleged.²⁹ And where a statute makes a sale without license an offense, it need not be alleged he "willfully" made it.³⁰ A failure to charge an intent to sell cannot be raised after judgment.³¹ Where a statute made it an offense to let a building with intent that it be used as a grogshop, an indictment based thereon charged that the accused let his house with intent that the tenant should during the lease maintain it as a grogshop. The indictment was held insufficient, because it contained no averment that the intent was ever carried into execution.³²

Sec. 859. Knowledge—Notice.

Upon a charge of a sale to a minor it is not necessary to allege that the vendor knew he was a minor at the time of the sale.³³ Nor is it necessary to aver that the vendor knew the purchaser was an habitual drunkard or was intoxicated at the time of the sale, for the sale is made at the peril of

²⁶ *Lederer v. State*, 24 Wkly. L. Bull. 153.

²⁷ *Commonwealth v. Gillon*, 148 Mass. 15; 18 N. E. 584.

²⁸ *State v. Prescott*, 67 N. H. 203; 30 Atl. 342.

²⁹ *State v. Pearis*, 35 W. Va. 320; 13 S. E. 1006.

³⁰ *State v. Abbott*, 31 N. H. 434.

³¹ *Commonwealth v. Blanchard*, 105 Mass. 173; *Commonwealth v. Sheehan*, 105 Mass. 174.

³² *State v. Worden*, 27 R. I. 484; 63 Atl. 486.

³³ *Loeb v. State*, 75 Ga. 258; *State v. Kalb*, 14 Ind. 403; *Ward v. State*, 48 Ind. 289, 294, 295; *Commonwealth v. Sellers*, 130 Pa. St. 32; 18 Atl. 541; 25 Wkly. N. C. 154; *State v. Cain*, 9 W. Va. 559; *Goetz v. State*, 41 Ind. 162; *Marshall v. State*, 49 Ala. 21; *State v. Bean* (N. H.), 71 Atl. 216.

the party selling.³⁴ But where the statute provides that if a person "knowingly" sells liquor to an inebriate, then it must be alleged that the accused knew the purchaser was such a person when he made the sale.³⁵ And this is true of a sale to a minor.³⁶ But where the offense can only be committed after notice of the habits of the purchaser has been duly given to the accused, the offense is a sale after notice given, and the giving of the notice must be averred. In such an instance it is not enough to aver that the notice was left at the accused's place of business.³⁷ But upon a statute which declares all places used for the illegal sale or keeping of liquors shall be common nuisances, it need not be alleged that the accused knew the place he so kept was a nuisance.³⁸ It is not necessary to aver that the accused knew the liquors he sold were intoxicating.³⁹ Where it was necessary to charge that the accused knew the purchaser was a minor, an allegation that he "did unlawfully and knowingly sell and give, and cause to be sold and given, spirituous, vinous and intoxicating liquors to W, the said W being then and there a minor under the age of twenty-one years," it was held that the charge sufficiently alleged that the accused knew the vendee was a minor.⁴⁰ Where it was a crime to aid a person to procure intoxicating liquors for unlawful purposes, and it was

³⁴ *Mapes v. People*, 69 Ill. 523; *Werneke v. State*, 49 Ind. 210; *Werneke v. State*, 50 Ind. 23; *Bain v. State*, 61 Ala. 75; *Jamison v. Burton*, 43 Iowa 282; *State v. Heck*, 23 Minn. 549.

³⁵ *Commonwealth v. Bell*, 14 Bush 433; *Jones v. State*, 46 Tex. Cr. App. 517; 81 S. W. 49; *Miller v. State*, 3 Ohio St. 475; *Ferguson v. State*, 50 Tex. Cr. App. 155; 95 S. W. 111; *Aultfather v. State*, 4 Ohio St. 467; *Felton v. United States*, 96 U. S. 699; *Perry v. Edwards*, 44 N. Y. 233; *Atkins v. State*, 60 Ala. 45; *Glenn v. State*, 25 Ala. 53; *O'Donnell*

v. Commonwealth, 108 Va. 882; 62 S. E. 373; *State v. Boggess*, 36 W. Va. 713; 15 S. E. 423; *State v. Parkersburg Brewing Co.*, 53 W. Va. 591; 45 S. E. 924.

³⁶ *Woods v. State* (Tex. Cr. App.), 20 S. W. 915.

³⁷ *State v. Smith*, 122 Ind. 178; 23 N. E. 714.

³⁸ *State v. Ryan*, 81 Me. 107; 16 Atl. 406; *State v. Stanley*, 84 Me. 555; 24 Atl. 983.

³⁹ *State v. Carson*, 2 Ohio Dec. 81; *Dominick v. State*, 27 Ohio Cir. Ct. Rep. 305.

⁴⁰ *Woods v. State* (Tex. Cr. App.), 20 S. W. 915.

charged that the accused knowingly aided a named person in procuring liquors to be disposed of for other purposes than lawful purposes, the indictment was held deficient on three grounds: (1) That it failed to charge that the accused knew the liquor was to be disposed of for unlawful purposes; (2) that it failed to allege for what purpose it was procured; and (3) that it failed to state the facts claimed to constitute the crime.⁴¹ But where the indictment followed the words of the statute and charged that the accused kept a house "used for the illegal sale or keeping of intoxicating liquor," it was construed to mean a keeping for such illegal use or with a knowledge of such use.⁴² And in Kentucky it was held, on a charge of an illegal sale by having possession and control of a house where the liquors were furnished, that the indictment was insufficient for a failure to allege guilty knowledge or personal participation in the selling.⁴³ But upon a charge of unlawfully keeping a house where liquors are sold, it need not be alleged that it was knowingly kept.⁴⁴ A charge that the accused willfully, unlawfully and knowingly sold liquor to a minor is equivalent to an averment that he had notice or knowledge that the purchaser was a minor when he made the sale.⁴⁵ Upon a charge of a sale within two miles of an agricultural fair, it is not necessary to allege that the defendant knew the fair was being held within that distance.⁴⁶

Sec. 860. Adoption and violation of local option laws.

It is when we come to deal with an indictment for a violation of local option laws that the greatest difficulty arises, for the courts, in the absence of a positive statute, will not take notice if local option prohibiting the sale of intoxicating liquors has been adopted by popular vote. It is, there-

⁴¹ State v. Benjamin, 49 Vt. 101.

⁴² State v. McGough, 14 R. I. 63.

⁴³ Hinkle v. Commonwealth (Ky.), 75 S. W. 231; 25 Ky. L. Rep. 313.

⁴⁴ Page v. State, 28 Ohio Cir. Ct. Rep. 660.

⁴⁵ State v. DePaoli, 24 Wash. 71; 63 Pac. 1102; Ferguson v. State (Tex. Cr. App.), 95 S. W. 111.

⁴⁶ State v. Fromer, 14 Ohio Cir. Ct. Rep. 289; 6 Ohio Dec. 374.

fore, necessary to first allege facts showing an election resulting in the adoption of the local option statute, and then to show the commission of such acts as is a violation either of that statute or of a statute making such acts an offense when committed in local option territory. Mere conclusions that the statute had been adopted is not sufficient to save the indictment from a motion to quash it.⁴⁷ An averment that the election was held "in the manner prescribed by law" has been held to show that it was held under the general election law and not under the local option election law, and was, therefore, insufficient.⁴⁸ The facts alleged must show that the election was held in strict compliance with the local option statutory provisions. Thus, as an illustration, where the election had to be ordered at the "next regular term" of court after receiving the petition for a local option election, an averment that the election was ordered at "a regular term" was held fatal.⁴⁹ And in this same case where the petition had to be signed by voters equal in number to twenty-five per cent. of the vote cast at the last city election, an averment that it was ordered on the petition of twenty-five per cent. of the legal voters of the city was held not sufficient.⁵⁰ So where the local option act did not go into force until the certificate of the board of county commissioners stating that the majority

⁴⁷ Cook v. State, 25 Fla. 698; 6 So. 451; Commonwealth v. Reynolds, 4 Ky. L. Rep. 623; Neighbors v. Commonwealth (Ky.), 98 S. W. 718; Commonwealth v. Throckmorton (Ky.), 32 S. W. 130; Commonwealth v. Boyd (Ky.), 32 S. W. 132; Commonwealth v. Howe (Ky.), 32 S. W. 133; State v. Chambers, 93 N. C. 600; McMillan v. State, 18 Tex. App. 375; Alexander v. State (Tex.), 120 S. W. 998; State v. O'Brien, 35 Mont. 482; 90 Pac. 514; State v. Campbell, 214 Mo. 362; 113 S. W. 1081; People v. Seeley, 105 N. Y. App. Div. 149;

93 N. Y. Supp. 982; Sanders v. State (Tex. Cr. Rep.), 20 S. W. 360; Fitch v. Commonwealth, 4 Ky. L. Rep. 339; Leach v. State, 35 Tex. Rep. 449; 34 S. W. 129; Commonwealth v. Anderson, 10 Ky. L. Rep. 307; Warden v. State (Tex. Cr. Rep.), 34 S. W. 125; Merrill v. Commonwealth, 6 Ky. L. Rep. (abstract) 663.

⁴⁸ Cook v. State, 25 Fla. 698; 6 So. 451.

⁴⁹ Commonwealth v. Green, 98 Ky. 21; 32 S. W. 169.

⁵⁰ Commonwealth v. Shelton, 99 Ky. 120; 35 S. W. 128.

of the votes cast at the election were against the sale of liquors was received and recorded by the county clerk, it was necessary to allege the receipt and recording of such a certificate.⁵¹ And where the statute required the commissioners of election to canvass the election returns, determine the result, and within ten days make a report of such result, which was to be spread on their minutes, and the indictment failed to charge that the commissioners determined the result and made the report, it was held fatally defective.⁵² If the local option law merely prohibits a sale of liquors, then a charge showing its adoption, but alleging merely an exchange, cannot be upheld.⁵³ As a rule, each step of the election, as required by law, must be alleged, and merely alleging that the law had been duly adopted is not sufficient, for it is only a legal conclusion.⁵⁴ Where the statute provided that the notice of the order decreeing the adoption of local option should be published pursuant to an order of the county judge, an allegation that it was published pursuant to the order of the commissioner's court was held insufficient, and the indictment was fatally defective.⁵⁵ But an allegation that it had been

⁵¹ *Throckmorton v. Commonwealth* (Ky.), 35 S. W. 635; *Evans v. Commonwealth*, 10 Ky. L. Rep. (abstract) 681; *Commonwealth v. Stamper*, 8 Ky. L. Rep. (abstract) 787; *Neighbors v. Commonwealth* (Ky.), 10 Ky. L. Rep. 594; 9 S. W. 718; *Leforce v. Commonwealth*, 5 Ky. L. Rep. (abstract), 608; *McCrory v. Commonwealth*, 8 Ky. L. Rep. (abstract) 437; *Griffin v. Commonwealth*, 7 Ky. L. Rep. (abstract) 300.

⁵² *McDonald v. State*, 68 Miss. 728; 10 So. 55; *Norton v. State*, 65 Miss. 297; 3 So. 665; *West v. State*, 70 Miss. 598; 12 So. 903; *Harris v. State* (Miss.), 12 So. 904; *Loubridge v. State* (Miss.), 3 So. 667.

But see *Williams v. State*, 52 Tex. Cr. App. 430; 107 S. W. 825, 826; *Starnes v. State*, 52 Tex. Cr. App. 403; 107 S. W. 550.

⁵³ *Ninenger v. State*, 25 Tex. App. 449; 8 S. W. 480; *Croom v. State*, 25 Tex. App. 556; 8 S. W. 661; *Flack v. State* (Tex. App.), 18 S. W. 414.

⁵⁴ *Stewart v. State*, 35 Tex. Cr. Rep. 391; 33 S. W. 1081; *Commonwealth v. Myrick*, 6 Ky. L. Rep. (abstract) 520; *Lowery v. State* (Tex. Cr. App.), 34 S. W. 956; *Alford v. State*, 37 Tex. Cr. App. 386; 35 S. W. 657.

⁵⁵ *Loving v. State* (Tex. Cr. App.); 100 S. W. 154; *Patton v. State* (Tex. Cr. App.), 100 S. W. 778; *King v. State* (Tex. Cr. App.), 100 S. W. 924; *Smith v.*

“published as required by law” was held sufficient.⁵⁶ It need not be alleged that the county judge selected the paper.⁵⁷ Yet where it was alleged that the county commissioners entered an order declaring the result of the local option election and prohibiting the sale of liquors, as required by law, and had caused the order to be published in the manner and form and for the length of time required by law, it was held that the indictment was not objectionable on the ground that it alleged the publication was by the county commissioners instead of by the county judge.⁵⁸ But there are statutes which require the courts in a local option district to take judicial notice whether local option has been duly adopted therein, and when that is the case it need not be alleged that it had been adopted.⁵⁹ And there are other statutes which dispense with allegation of specific facts showing the adoption of local option and permit a general allegation that such law was in force when the alleged crime was committed.⁶⁰ In the usual order, after sufficiently charging the adoption of the local

State (Tex. Cr. App.), 103 S. W. 953; *Rucker v. State* (Tex. Cr. App.), 101 S. W. 802; *Kilman v. State* (Tex. Cr. App.), 102 S. W. 404; *Green v. State* (Tex. Cr. App.), 102 S. W. 416; *Doyal v. State* (Tex. Cr. App.), 102 S. W. 1123; *Graf v. State* (Tex. Cr. App.), 102 S. W. 1133.

⁵⁶ *Covington v. State*, 51 Tex. Cr. App. 48; 100 S. W. 368; *Carnes v. State*, 51 Tex. Cr. App. 437; 103 S. W. 394.

⁵⁷ *Carnes v. State*, 51 Tex. Cr. App. 437; 103 S. W. 394.

⁵⁸ *Watson v. State*, 52 Tex. Cr. App. 551; 107 S. W. 544; *Pier-son v. State* (Tex. Cr. App.), 107 S. W. 546; *Benge v. State*, 52 Tex. Cr. App. 361; 107 S. W. 832; *Clark v. State* (Tex. Cr. App.), 107 S. W. 1198; *Jones v. State*, 52 Tex. Cr. App. 519; 107 S. W. 849, 850.

⁵⁹ *Combs v. State*, 81 Ga. 780; 8 S. E. 318; *Williams v. State*, 89 Ga. 483; 15 S. E. 552; *Jones v. State*, 67 Md. 256; 10 Atl. 216; *In re Savage*, 84 Va. 582; 5 S. E. 563; *Thomas v. Commonwealth*, 90 Va. 92; 17 S. E. 788; *Hargrave v. Commonwealth* (Va.), 22 S. E. 314; *Griffin v. State*, 115 Ga. 577; 41 S. E. 997; *Crigler v. Commonwealth* (Ky.), 83 S. W. 587; *State v. Arnold*, 80 S. C. 383; 61 S. E. 891.

⁶⁰ *People v. Adams*, 95 Mich. 541; 55 N. W. 461; *Combs v. Commonwealth* (Ky.), 104 S. W. 270; 31 Ky. L. Rep. 822; *State v. Searcy*, 39 Mo. App. 393; *State v. Watts*, 39 Mo. App. 409; *State v. Hutton*, 39 Mo. App. 410; *State v. Prather*, 41 Mo. App. 451; *State v. Searcy*, 111 Mo. 236; 20 S. W. 186, 240.

In Missouri the allegation is

option law prohibiting sales of liquors, follows a statement of the facts which show a violation of the statute,^{60*} but, in fact, this order may be reversed. And if the indictment shows facts sufficient on the question of the adoption of such law, it must charge that it continued until and was in force when the offense was committed,⁶¹ unless the statute provides that on the adoption of the law it shall continue in force for a certain length of time, and that time had not elapsed when the offense is alleged to have been committed.⁶² The charge of a violation of the local option statute must show that an offense had been committed under it, and it is not sufficient to show a violation of some other statute.⁶³ In Texas where the court does not take judicial notice of the boundaries of a school district in which local option has been adopted, the boundaries of the district must be set forth in the indictment.⁶⁴ It must be alleged that the offense was committed in the district adopting local option.⁶⁵

Sec. 861. Violation of local option laws.

At the expense of repetition we again allude to this subject. Where a county board have the power upon petition of the majority of the adult residents of the township to adopt

"that the act of the Legislature, approved April 5, 1887, known as the 'Local Option Law,' had been adopted and was in force as the law of the State within such city." *State v. Dugan*, 110 Mo. 138; 19 S. W. 195; *State v. Hanley*, 25 Minn. 429; *Wilson v. State*, 35 Ark. 414; *State v. Hall* (Mo. App.), 108 S. W. 1077; *State v. Hitchcock*, 124 Mo. App. 101; 101 S. W. 117; *State v. Campbell*, 214 Mo. App. 362; 113 S. W. 1081.

^{60*} *Shilling v. State* (Tex. Cr. App.), 51 S. W. 240; *State v. Hanley*, 25 Minn. 429.

⁶¹ *State v. Hall* (Mo. App.), 108 S. W. 1077.

⁶² *Massie v. State*, 52 Tex. Cr. App. 548; 107 S. W. 846.

If the local option law has been repealed by vote, then the sale is regulated by the general statute in force throughout the State; and allegations as to the former and its adoption is mere surplusage. *Territory v. Pratt*, 6 Dak. 483; 43 N. W. 711.

⁶³ *Rutherford v. State*, 49 Tex. Cr. App. 21; 90 S. W. 172.

⁶⁴ *Smith v. State* (Tex. Cr. App.), 49 S. W. 373.

⁶⁵ *Hodge v. Commonwealth*, 3 Ky. L. Rep. (abstract) 822; *Green v. Commonwealth*, 15 Ky. L. Rep. (abstract) 297; *Young v. Commonwealth*, 14 Bush 161; *State v. Emmons* (Ore.), 104 Pac. 282.

an order prohibiting the sale of liquors within a certain district, an indictment charging a sale within such district must aver the adoption of such an order by the county board, but it is not necessary to allege that it was upon such a petition, it being sufficient that the order was made in compliance with the statute.⁶⁶ In case of a violation of the local option law, where the court does not take judicial notice of its adoption, it must be alleged that such law had been duly adopted by setting out the various steps showing its adoption, and a failure to do so cannot be cured by a general allegation or conclusion that the defendant had violated that law.⁶⁷ Where the statute required the court to order the election at its "next regular term" after the petition was filed, an allegation that it had been ordered at "a regular term" was held insufficient,⁶⁸ and such was the case where the petition of a local option election had to be signed by voters equal to twenty-five per cent. of the number cast at the last election, and the averment was that the election was ordered on petition of twenty-five per cent. of the legal voters.⁶⁹ So where the

⁶⁶ *Wilson v. State*, 35 Ark. 414.

⁶⁷ *Cook v. State*, 25 Fla. 698; 6 So. 451; *Commonwealth v. Reynolds*, 4 Ky. L. Rep. 623; *Neighbors v. Commonwealth* (Ky.), 9 S. W. 718; *Commonwealth v. Throckmorton* (Ky.), 32 S. W. 130; *Commonwealth v. Boyd* (Ky.), 32 S. W. 132; *Commonwealth v. Shelton*, 99 Ky. 120; 35 S. W. 128; *Anderson v. Van Buren*, circuit judge, 130 Mich. 695; 90 N. W. 694; 9 Detroit Leg. N. 220; *Randall v. Tillis*, 43 Fla. 43; 29 So. 540; *Commonwealth v. Cope* (Ky.), 53 S. W. 272; 21 Ky. L. Rep. 845; *Com. v. Green* (Ky.), 32 S. W. 169; *Cress v. Com.* (Ky.), 37 S. W. 493; *Com. v. Pippin* (Ky.), 40 S. W. 252; *Com. v. Shelton*, 99 Ky. 120; 35 S. W. 128; *Taylor v. Com.* (Ky.), 40 S. W. 383; *Griffin v. Com.*, 7 Ky.

Law Rep. 300; *Hodge v. Com.*, 4 Ky. Law Rep. 341; *Evans v. Com.*, 10 Ky. Law Rep. 681; *Com. v. Stamper*, 8 Ky. Law Rep. 787; *Blackwell v. Commonwealth* (Ky.), 54 S. W. 843; 21 Ky. L. Rep. 1240; *Eastham v. Commonwealth* (Ky.), 49 S. W. 795; 20 Ky. L. Rep. 1639; *Combs v. Commonwealth* (Ky.), 104 S. W. 270; 31 Ky. L. Rep. 822; *State v. O'Brien*, 35 Mont. 482; 90 Pac. 514.

⁶⁸ *Commonwealth v. Green*, 98 Ky. 21; 32 S. W. 169. But see *Locke v. Commonwealth* (Ky.), 69 S. W. 763; 24 Ky. L. Rep. 654.

⁶⁹ *Commonwealth v. Green, supra*; *Commonwealth v. Shelton*, 99 Ky. 120; 35 S. W. 128; *Commonwealth v. Pippin* (Ky.), 40 S. W. 252.

act does not go into effect until the certificate of the election commissioners has been received and recorded by the county clerk, it must be averred that it was so received and recorded.⁷⁰ Where the statute requires the election commissioners to determine the result of the election, make a report of it to the court and that report shall be spread on record, a mere averment that an election was held resulting in the adoption of the local option law, and that within the time required the report was made and spread of record is not sufficient, for the reason that it does not show that the election commissioners determined the result of the election.⁷¹ It is not necessary, however, that it be alleged the defendant was indicted under the local option law, for when facts are alleged which show its adoption the court will take judicial notice whether the acts charged bring the case within its provisions.⁷² In Missouri, however, it has been held sufficient to merely allege that the act had been duly adopted and was in force at the time and place of the offense,⁷³ but if the indictment does set forth facts, and these show the law had not been properly adopted, then it is insufficient.⁷⁴ Of course, a failure to aver an election is fatal to the indictment,⁷⁵ unless the court is by statute required to take notice whether local option has been adopted in the locality where it is alleged the statute had been violated.⁷⁶ An allegation that the election was held "in the

⁷⁰ *Throckmorton v. Commonwealth* (Ky.), 35 S. W. 635.

⁷¹ *McDonald v. State*, 68 Miss. 728; 10 So. 56; *Loughridge v. State* (Miss.), 3 So. 667; *Harris v. State* (Miss.), 12 So. 904; *West v. State*, 70 Miss. 598; 12 So. 903; *Norton v. State*, 65 Miss. 297; 3 So. 665.

⁷² *State v. Bertrand*, 72 Miss. 516; 17 So. 235.

⁷³ *State v. Searcy*, 39 Mo. App. 393; *State v. Watts*, 39 Mo. App. 409; *State v. Hutton*, 39 Mo. App. 410; *State v. Prather*, 41 Mo. App.

451; *State v. Searcy*, 111 Mo. 236; 20 S. W. 186; 20 S. W. 240.

So in Michigan, *People v. Adams*, 95 Mich. 541; 55 N. W. 461.

⁷⁴ *State v. Prather*, 41 Mo. App. 451; *State v. Dugan*, 110 Mo. 138; 19 S. W. 195.

⁷⁵ *State v. Chambers*, 93 N. C. 600.

⁷⁶ *State v. Bertrand*, 72 Miss. 516; 17 So. 235.

Where the Legislature by public act adopts prohibition for a territory the courts will take judicial

manner prescribed by law" is not sufficient, it has been held, for that merely shows that the election was conducted under the general election laws and not under the local option law.⁷⁷ A conclusion of the indictment that the offense was committed "contrary to the form of the act of assembly in such case made and provided" is sufficient,⁷⁸ and a failure to aver that the election was held within the time prescribed after notice given is cured by the verdict.⁷⁹ Exceptions in a statute need not be negatived, for the defendant must bring forward the facts falling within their provisions if he desires to avail himself of their provisions.⁸⁰ The indictment charging an illegal sale need not aver that the liquor was sold to be consumed within the local option district.⁸¹ If the facts alleged show a violation of the general liquor law it is sufficient as against a motion to quash, although it is not sufficient under the local option or statute, or even if that statute is unconstitutional.⁸² If the local option is in force without a vote, then, of course, it is not necessary to allege that such law is in existence or in force,⁸³ nor need it be alleged, in any case, that the offense was "unlawfully" committed if the facts show an unlawful sale.⁸⁴ Where a statute dispenses with all

notice of that fact. *Jones v. State*, 67 Md. 256; 10 Atl. 216; *Combs v. State*, 81 Ga. 780; 8 S. E. 318; *Bogan v. State*, 84 Ala. 449; 4 So. 355; *Williams v. State*, 89 Ga. 483; 15 S. E. 552; *Savage v. Commonwealth*, 84 Va. 582; 5 S. E. 563.

Of course, the offense must be charged to have been committed after local option had been adopted. *State v. Hanley*, 25 Minn. 429.

⁷⁷ *Cook v. State*, 25 Fla. 698; 6 So. 451.

⁷⁸ *Slymer v. State*, 62 Md. 237.

⁷⁹ *State v. Houts*, 36 Mo. App. 265.

⁸⁰ *State v. Burton*, 138 N. C. 575; 50 S. E. 214.

⁸¹ *State v. Johnson*, 86 Minn. 121; 90 N. W. 16.

⁸² *Griffin v. State*, 115 Ga. 577; 41 S. E. 997.

See *Mitchell v. State*, 141 Ala. 90; 37 So. 407, and *State v. O'Brien*, 35 Mont. 482; 90 Pac. 514.

⁸³ *Edmonson v. Commonwealth*, 110 Ky. 510; 62 S. W. 1018; 22 Ky. L. Rep. 1902; *Tatum v. Commonwealth (Ky.)*, 65 S. W. 449; 23 Ky. L. Rep. 1533; *Commonwealth v. Neason (Ky.)*, 50 S. W. 66; 20 Ky. L. Rep. 1825.

⁸⁴ *Farris v. Commonwealth*, 111 Ky. 236; 63 S. W. 615; 23 Ky. L. Rep. 580.

allegations showing the adoption of the local option law, but permits a general allegation that it was in force in the district, that does not dispense with an allegation that the offense was committed within that district; and it is not sufficient to aver that the sale was in violation of the local option law there in force.⁸⁵ Although the statute may provide for the recording the certificate of the result of the election, or for the spreading of it upon the order book of the court ordering the election, yet if the law, when adopted, went into force in the district without such recording, then it is not necessary to allege the certificate had been so recorded.⁸⁶ It must be averred that the offense was committed after the law was adopted at the election.⁸⁷ A sale under a license in a local option district is an offense as much as if the seller had no license,⁸⁸ except in the case of a druggist or the like; and since no license can be granted, it is not necessary to aver that the sale was made without a license.⁸⁹ Although a statute may require the court to enter an order submitting the question of the adoption of the local option law to the voters of the district described in the petition "who are qualified to vote at elections for county officers," yet an allegation that an order was entered directing the sheriff to enter a poll at each of the voting places of the district to take the sense of the voters of such district on the question is sufficient.⁹⁰ As a local option law prohibits all sales (except for medicinal purposes and the like) of liquor, it is not necessary to aver that the illegal sale was a retail sale.⁹¹ After

⁸⁵ *Crigler v. Commonwealth*, 120 Ky. 512; 83 S. W. 587.

⁸⁶ *Tatum v. Commonwealth* (Ky.), 65 S. W. 449; 23 Ky. L. Rep. 1533.

⁸⁷ *Commonwealth v. Neason* (Ky.), 50 S. W. 66; 20 Ky. L. Rep. 1825. "Done within one year after the finding of this indictment" was held sufficient. *Luck v. State* (Tex. Cr. App.), 97 S. W. 1049.

⁸⁸ *Brame v. State* (Ala.), 38 So. 1031; *McClure v. State*, 148 Ala. 625; 42 So. 813.

⁸⁹ *Reynolds v. Commonwealth*, 106 Ky. 37; 49 S. W. 969; 20 Ky. L. Rep. 1681; *Watson v. State*, 42 Tex. Cr. App. 13; 57 S. W. 101.

But see *Dowdy v. Commonwealth* (Ky.), 101 S. W. 338; 31 Ky. L. Rep. 33.

⁹⁰ *Mahan v. Commonwealth* (Ky.), 56 S. W. 529; 21 Ky. L. Rep. 1807.

⁹¹ *Dowdy v. Commonwealth* (Ky.), 101 S. W. 338; 31 Ky. L. Rep. 33; *Combs v. Commonwealth* (Ky.), 104 S. W. 270; 31 Ky. L. Rep. 822.

stating the facts, when that is necessary, which show the law was in force, it is not necessary to aver that it was in force, for that is a legal conclusion.⁹² An averment that the defendant "did sell, give, or otherwise dispose of spirituous, vinous, or malt liquors without a license and contrary to the law" is a sufficient charge of a violation of the statute.⁹³

Sec. 862. Violation of local option laws—Texas.

Where a statute declares that an order for a local option election shall be *prima facie* evidence that all the provisions of the local option law had been complied with, it is not necessary to allege that the petition for an election was signed by the number of qualified voters which the law requires.⁹⁴ Nor is it necessary to allege that the petition was presented to the proper court or board and the election ordered.⁹⁵ But it must allege that an election was held, that the proper court declared the result, and that the publication of the result was made to put the law in force.⁹⁶ So far as the adoption of the local option law is concerned, the indictment is sufficient if it allege that an election had been held in the particular territory where it is claimed the offense was committed, that the proper court or board passed an order prohibiting the sale, where that is re-

⁹² State v. Hitchcock, 124 Mo. App. 101; 101 S. W. 117.

⁹³ McClure v. State, 148 Ala. 625; 42 So. 813.

⁹⁴ Gaines v. State, 37 Tex. Cr. App. 73; 38 S. W. 774; Stewart v. State, 35 Tex. Cr. Rep. 391; 33 S. W. 1081; Starnes v. State (Tex. Cr. App.), 107 S. W. 550; Lerverly v. State (Tex. Cr. App.), 34 S. W. 956; Hartsel v. State (Tex. Cr. App.), 68 S. W. 285; McMillan v. State, 18 Tex. App. 375; Ninenger v. State, 25 Tex. App. 449; 8 So. 480; Croon v. State, 25 Tex. App. 556; 8 S. W. 661; Flack v. State (Tex. App.), 18 S. W. 414; Wade v.

State, 52 Tex. Cr. App. 608; 108 S. W. 376, 377; Sawyer v. State, 52 Tex. Cr. App. 597; 108 S. W. 394; Wade v. State, 53 Tex. Cr. App. 184; 109 S. W. 191; Starbeck v. State, 53 Tex. Cr. App. 192; 109 S. W. 162.

⁹⁵ Dollins v. State (Tex. Cr. App.), 38 S. W. 775; Brown v. State (Tex. Cr. App.), 39 S. W. 578; Loveless v. State (Tex. Cr. App.), 49 S. W. 601; Key v. State, 37 Tex. Cr. App. 77; 38 S. W. 773; Stormes v. State (Tex. Cr. App.), 107 S. W. 550.

⁹⁶ Hall v. State (Tex. Cr. App.), 39 S. W. 578.

quired, that the order had been published where that also is required, and that the order was in full force.⁹⁷ The indictment should charge that the court or board had declared the result of the election.⁹⁸ The allegation that "the qualified voters of said county had, at a legal election held for that purpose in accordance with law, determined that the sale of intoxicating liquors should be prohibited," shows sufficiently that a legal election had been held although there be no averment that an order for the election had been published as the law required.⁹⁹ An averment that an election was duly held in a district is equivalent to an averment that the voters of the district held the election.¹ If at two elections the law has been adopted the indictment may be under either.² Failure in terms to declare the court or board had declared the result of the election is not fatal.³ A failure to allege that the sale took place within the prohibition territory renders the indictment fatally defective.⁴ It must be alleged that the order prohibiting the sale of liquor was published by order of the proper board or court, and if it allege that it was published by order of a court or board not authorized to make the order, it will be defective. But it is sufficient if it was duly published, or published as required by law.⁵ If enough is alleged

⁹⁷ *Williams v. State*, 37 Tex. Cr. App. 238; 39 S. W. 664; *Hollar v. State* (Tex. Cr. App.), 73 S. W. 961.

⁹⁸ *Stephens v. State* (Tex. Cr. App.), 97 S. W. 483.

⁹⁹ *Key v. State*, 37 Tex. Cr. App. 77; 38 S. W. 773.

¹ *Williams v. State*, 44 Tex. Cr. App. 235; 70 S. W. 213.

² *Riggs v. State* (Tex. Cr. App.), 96 S. W. 25; *Riggs v. State* (Tex. Cr. App.), 97 S. W. 482; *Wade v. State*, 52 Tex. Cr. App. 608; 108 S. W. 376; *Massie v. State*, 52 Tex. Civ. App. 548; 107 S. W. 846.

³ *Holloway v. State*, 53 Tex. Cr.

App. 246; 110 S. W. 745; *Williams v. State*, 52 Tex. Cr. App. 430; 107 S. W. 825.

⁴ *Maddox v. State*, 42 Tex. Cr. App. 509; 60 S. W. 960; *Williams v. State*, 38 Tex. Cr. App. 377; 43 S. W. 115; *Emmons v. State* (Tex. Cr. App.), 97 S. W. 1044.

⁵ The indictment alleged that a commissioner's court published the order when it should have been alleged the county judge did it. *Loving v. State* (Tex. Cr. App.), 100 S. W. 154; *Silvey v. State* (Tex. Cr. App.), 98 S. W. 1058; *Patton v. State* (Tex. Cr. App.), 100 S. W. 774; *King v. State* (Tex. Cr. App.), 100 S. W. 924;

to show the proper board or court had declared the result of the election, that is sufficient without a direct averment to that effect.⁶ The indictment must designate the district wherein local option had been adopted,⁷ but if the boundaries of the district have been changed since the adoption of the law, the district as thus changed need not be described, since the change of the boundaries does not affect the prohibition territory as it was when the local option was adopted.⁸ If the territory is described by metes and bounds, the omission of one call of the survey is immaterial if the boundaries are sufficiently definite.⁹ But if the boundary lines do not close,

Smith v. State (Tex. Cr. App.), 100 S. W. 953; Rucker v. State (Tex. Cr. App.), 101 S. W. 802; Killnan v. State (Tex. Cr. App.), 102 S. W. 404; Green v. State (Tex. Cr. App.), 102 S. W. 416; Rogers v. State (Tex. Cr. App.), 101 S. W. 803; Curlee v. State (Tex. Cr. App.), 101 S. W. 1197; McGrew v. State (Tex. Cr. App.), 101 S. W. 1198; Barrier v. State (Tex. Cr. App.), 103 S. W. 1196; Luck v. State (Tex. Cr. App.), 98 S. W. 1058; People v. State (Tex. Cr. App.), 99 S. W. 1002; but see Benson v. State (Tex. Cr. App.), 109 S. W. 168; Doyal v. State (Tex. Cr. App.), 102 S. W. 1123; Graf v. State (Tex. Cr. App.), 102 S. W. 1133; Gunning v. State (Tex. Cr. App.), 98 S. W. 1057.

Charging that the order had been published as required by law is sufficient. Covington v. State, 51 Tex. Cr. App. 48; 100 S. W. 368; Carnes v. State, 51 Tex. Cr. App. 437; 103 S. W. 394 (not necessary to allege that the county judge selected the paper in which the notice was given).

In subsequent cases an allegation that the county commissioners caused the order to be published in manner and form required by law, was held not necessarily fatal as alleging that the order was published by the county commissioners instead of by the county judge. Watson v. State, 52 Tex. Cr. App. 551; 107 S. W. 544; Pierson v. State (Tex. Cr. App.), 107 S. W. 546; Bengé v. State, 52 Tex. Cr. App. 361; 107 S. W. 832; Clark v. State (Tex. Cr. App.), 107 S. W. 1198; Jones v. State, 52 Tex. Cr. App. 519; 107 S. W. 849.

⁶ Williams v. State, 52 Tex. Cr. App. 430; 107 S. W. 825.

⁷ Woods v. State (Tex. Cr. App.), 75 S. W. 37.

⁸ Woods v. State (Tex. Cr. App.), 75 S. W. 37; Jones v. State, 67 Md. 256; 10 Atl. 216.

⁹ Wilson v. State (Tex. Cr. App.), 55 S. W. 68; Casey v. State (Tex. Cr. App.), 59 S. W. 684; Matkins v. State (Tex. Cr. App.), 62 S. W. 911.

the indictment is fatally defective.¹⁰ If the indictment allege that local option was adopted at a certain date, it need not allege that it was in force at the time the crime was alleged to have been committed thereafter.¹¹ If the indictment aver the sale took place on the day the election was held it is insufficient, for until the order of prohibition is published there can be no violation of the local option statute.¹² Of course, in charging a sale the indictment need not negative the fact that the sale was of liquor for sacramental or medicinal purposes, that being a defense;¹³ and the allegation that the order absolutely prohibited the sale of all intoxicating liquors does not render the indictment bad by reason of the fact that sales for such purposes are permitted by the statute.¹⁴ Unless the averments are sufficient to show that the local option law is in force, an indictment based on that law is fatally defective.¹⁵ If the violation of the law is a sale, then there must be a sale alleged to have taken place within the local option district.¹⁶

Sec. 863. Violations of local statute.

If an offense has been committed against a statute particularly applicable to the locality where the act was committed, then facts must be alleged which show that such particular statute has been violated, and it is not sufficient to allege facts showing a violation of a general statute, unless the facts alleged are also sufficient to show a violation of the local act.¹⁷ Thus, a general statute forbade a "sale" of spirituous, vinous,

¹⁰ *Matkins v. State* (Tex. Cr. App.), 58 S. W. 108.

¹¹ *Killman v. State*, 53 Tex. Cr. App. 570; 112 S. W. 92.

¹² *O'Reilly v. State* (Tex. Cr. App.), 85 S. W. 8.

¹³ *Williams v. State*, 37 Tex. Cr. App. 238; 39 S. W. 664; *Watson v. State*, 42 Tex. Cr. App. 13; 57 S. W. 101.

¹⁴ *Bateman v. State* (Tex. Cr. App.), 44 S. W. 290.

¹⁵ *Stewart v. State*, 35 Tex. Cr. Rep. 391; 33 S. W. 1081; *Lowery v. State* (Tex. Cr. App.), 34 S. W. 956; *Alford v. State*, 37 Tex. Cr. Rep. 386; 35 S. W. 657.

¹⁶ *Stephens v. State* (Tex. Cr. App.), 73 S. W. 1056.

¹⁷ *Camp v. State*, 27 Ala. 53; *Cost v. State*, 96 Ala. 60; 11 So. 435; *Guarreno v. State*, 148 Ala. 637; 42 So. 833.

or malt liquors, and a local statute, applying only to certain parts of a particular county, prohibited a sale or gift or other disposition of such liquors or "intoxicating bitters." It was charged that the accused "did sell, give away, or otherwise dispose of spirituous, vinous, or malt liquors, intoxicating bitters, or intoxicating drinks, without a license, and contrary to law" in such county, and it was held that no offense was charged because it could not be determined whether the offense was committed in that part of the county to which such local statute applied.¹⁸ Occasionally statutes prescribe a form alike applicable to local and general statutes, and when this is done such form may be used.¹⁹ If the sale of liquor be altogether prohibited in a town of a county, except in a dispensary, then a charge of a sale merely in the county without a license is not so defective as to require an arrest of the judgment.²⁰ And where both the local law and a general law is in force at the particular place where the illegal sale took place, a prosecution may be maintained under either act.²¹ But if the local law absolutely prohibits the sale of liquors in the locality, then a prosecution cannot be maintained for a violation of the general law in making an irregular sale.²² A local statute may, in part, regulate the sale of liquor and a general statute regulate in another aspect, and when such is the case care must be exercised in selecting the statute under which to bring the prosecution.²³ Where a statute concerning a county dispensary provided that the dispensary board should establish it "on the 1st of July, 1899, or as soon thereafter as possible," and that there should be no prosecution

¹⁸ Roberson v. State, 100 Ala. 123; 14 So. 869.

¹⁹ Roberson v. State, 100 Ala. 123; 14 So. 869; Mitchell v. State, 141 Ala. 90; 37 So. 407.

²⁰ Griffin v. State, 115 Ga. 577; 41 S. E. 997.

In this case it was held that even if the local law of the county was unconstitutional, an indictment for selling without a license

was sufficient, as against a motion in arrest of judgment.

²¹ Barker v. State, 118 Ga. 35; 44 S. E. 874; Smith v. State, 112 Ga. 291; 37 S. E. 441.

²² Barker v. State, 118 Ga. 35; 44 S. E. 874; Viefhaus v. State, 71 Ark. 419; 75 S. W. 585; Wells v. State, 118 Ga. 556; 45 S. E. 443.

²³ Smith v. State, 112 Ga. 291; 37 S. E. 441.

under the act until it was opened, it was held not necessary to allege, where the indictment charged the commission of the offense after that date, that the dispensary had been established, the fact that it had not being a defense.²⁴

Sec. 864. Unlawful nature of act.

Under no circumstances can it be merely alleged that the accused unlawfully committed a crime against the liquor statutes; as, for instance, that he unlawfully sold intoxicating liquor. The facts must be set out which show why the sale was unlawful. No amount of epithets will make a complaint good in the absence of a requisite allegation.²⁵ Thus, where one section of a statute prohibited the sale of liquors if they were "drunk on or about the premises," and another made it unlawful to carry on any business without a license, it was held insufficient to charge a sale without a license, contrary to law, for it was necessary to allege that the liquor sold was drunk on or about the premises, or that the accused "did engage in or carry on the business" of liquor selling.²⁶ Where it was a misdemeanor for a certain officer to be interested in the manufacture and sale of liquor, it was held not sufficient

²⁴ State v. Newcomb, 36 S. E. 147; 126 N. C. 1104 [citing State v. Downs, 116 N. C. 1064; 21 S. E. 689; Same v. George, 93 N. C. 567; Same v. Lanier, 88 N. C. 658; Same v. Heaton, 81 N. C. 542; Same v. Tomlinson, 77 N. C. 528; Same v. Norman, 13 N. C. 222; State v. Davis, 109 N. C. 780; 14 S. E. 55; Same v. Melton, 120 N. C. 591; 26 S. E. 933; State v. Ballard, 6 N. C. 186; State v. Fleming, 107 N. C. 905; 12 S. E. 131; distinguishing State v. Chambers, 93 N. C. 600].

But in this same State it is held that an indictment may be maintained under the general statute for retailing without a license.

State v. Smith, 35 S. E. 615; 126 N. C. 1057 [citing State v. Snow, 117 N. C. 778; 23 S. E. 323; Guy v. Board, 122 N. C. 471; 29 S. E. 771; Bennett v. Commissioners, 125 N. C. 468; 34 S. E. 632; Garsed v. City of Greensboro, 35 S. E. 254]. See also State v. Williams, 79 S. C. 101; 60 S. E. 229.

²⁵ State v. Burkett, 51 Kan. 175; 32 Pac. 925; People v. Gregg, 59 Hun, 107; 13 N. Y. Supp. 114; Cortland v. Howard, 1 N. Y. App. Div. 131; 37 N. Y. Supp. 843; Commonwealth v. Porter, 31 Leg. Int. 398; People v. Olmsted, 74 Hun, 323; 26 N. Y. Supp. 818.

²⁶ Ulmer v. State, 61 Ala. 208.

to allege that he was "engaged" in such traffic, the act charged not amounting to a crime under the statute.²⁷

Sec. 865. Violation of municipal ordinances.

Prosecutions for violations of municipal ordinances are of such a local character, or are so controlled by local statutes, that it is difficult to lay down any general rules of value. Usually the section of the ordinance must be set out verbatim, or its substance given, and then it must be followed by an allegation of facts which show its violation.²⁸ The existence of the municipality adopting the ordinance need not be averred, for of that fact judicial notice will be taken.²⁹ In many States statutes dispense with a setting out of the section violated and provide that it shall be sufficient to give the title of the ordinance and the section thereof violated. A complaint which complies with such a statute is sufficient.³⁰ Where a complaint alleged that the sale "was contrary to and in violation of an ordinance of said city, entitled," setting out the title, it was held that the existence of the ordinance at the time of the sale was sufficiently alleged.³¹ Where the charge was that the accused kept a room wherein intoxicating liquor was sold contrary to and in violation of the provisions of a particularly named ordinance, it was held that it did not allege a mere conclusion, but a fact.³² In some States statutes require municipal courts to take judicial notice of their ordinances, in which event the violated provisions need not be set out, and on appeal the court to which the appeal is taken will also take judicial notice of them.³³ But the facts which constitute a violation of the ordinance must be set out as fully, usually, and with as much certainty as in an indictment,³⁴

²⁷ *People v. Gregg*, 59 Hun, 107; 13 N. Y. Supp. 114.

²⁸ *Byars v. Mt. Vernon*, 78 Ill. 11.

²⁹ *State v. Graeter*, 6 Blackf. 105.

³⁰ *Braisted v. People*, 38 Colo. 54; 88 Pac. 150; *Frankfort v. Aughe*, 114 Ind. 77, 600; 15 N. E. 802.

³¹ *Meyer v. Bridgeton*, 37 N. J. L. 160.

³² *Brown v. Van Wert*, 4 Ohio Cir. Ct. Rep. 407.

³³ *Foley v. State*, 42 Neb. 233; 60 N. W. 574.

³⁴ *Cunningham v. Berry*, 17 Ore. 622; 22 Pac. 115.

showing a violation of the ordinance's provisions.³⁵ Like the rule regarding the following of the language of the statute, so here it usually will be sufficient to charge the offense in the language of the ordinance.³⁶

Sec. 866. Place as element of the offense.

It is elementary that the place where the alleged crime was committed must be stated in the indictment. This is true of an indictment concerning the carrying on of the liquor business in violation of a statute.³⁷ In a charge of a sale of liquor to be drunk upon the premises, a charge of a sale within the county to be drunk on the premises where sold is sufficient without the further averment that the sale was made in a room or building, or on premises connected with or adjoining the place where the liquor was sold.³⁸ And where the charge was that the accused sold liquor in a particular county without a license to be drunk in his house where it was sold, it was held that there was a sufficient allegation as to the house

³⁵ *Marietta v. Alexander* (Ga.), 12 S. E. 681.

³⁶ *Mankato v. Arnold*, 36 Minn. 62; 30 N. W. 305.

It has been held sufficient to state that the prosecutor has just cause to suspect and does suspect the accused committed the acts alleged he had committed. *Roberson v. Lambertville*, 38 N. J. L. 69; but in some jurisdictions this would not be permitted. See also *Akerman v. Lima*, 8 Ohio S. & C. P. Dec. 430.

³⁷ *Harris v. State*, 50 Ala. 127; *Commonwealth v. Desmond*, 103 Mass. 445; *Haftner v. State*, 51 Ala. 37; *Young v. Commonwealth*, 14 Bush, 161; *Arrington v. Commonwealth*, 87 Va. 96; 12 S. E. 224; *Grime v. Commonwealth*, 5 B. Mon. 263; *Louhrig v. State*

(Miss.), 3 So. 667; *State v. Peterson*, 38 Minn. 143; 36 N. W. 443; *Commonwealth v. Head*, 11 Gratt. 819; *Savage v. Commonwealth*, 84 Va. 619; 5 S. E. 565; *Holden v. State*, 41 Tex. Cr. App. 411; 55 S. W. 337; *Woodlock v. Dickie*, 6 R. & G. (N. S.) 86; 6 Can. L. T. 142; *Regina v. Young*, 5 Ont. Rep. 184a; *Smith v. State* (Tex. Cr. App.), 49 S. W. 373; *State v. Allen*, 63 Kan. 598; 66 Pac. 628; *Buck v. State*, 61 N. J. L. 525; 39 Atl. 919.

³⁸ *Regina v. Coulter*, 4 Manitoba, 309; *State v. Morgan* (Mo.), 115 S. W. 491; *Werneke v. State*, 49 Ohio, 202; *Donovan v. State*, 170 Ind. 123; 83 N. E. 744. *Contra*, *State v. Young*, 73 Mo. App. 602.

being located in the county of the sale.³⁹ In the case of a sale without a license, it is sufficient to allege that the sale took place in the county where the prosecution is instituted.⁴⁰ In case of a sale within a prohibited area of a church or schoolhouse, the sale must be prosecuted in that county wherein it took place, although such area lay in two or more counties.⁴¹ It is not necessary to set out the specific place in the county where the sale took place, although it be necessary to constitute the offense that it take place in some building.⁴² But here this is often insufficient, the statute requiring a specific statement as to the location of the building in which the sale took place. Thus, where the charge was that the accused on a particular date at "a certain frame building, used and occupied by the said A. J. Hagan [the accused], as a store, in Council Grove," did sell liquors, it was held that the place where the liquor was sold was not stated with sufficient certainty.⁴³ But a charge that the offense was committed within a certain city in a certain one-story frame building, known as W's store, was held sufficient.⁴⁴ An erroneous description added to a correct description will usually be

³⁹ *State v. Shearer*, 8 Blackf. 262; *Wrockledge v. State*, 1 Clarke (Ia.), 167; *State v. Muntz*, 3 Kan. 383; *Hagen v. State*, 4 Kan. 89; *Regina v. Parlee*, 23 Com. Pleas (Can.) 359; *Regina v. Cavanaugh*, 27 Com. Pleas (Can.) 537.

⁴⁰ *Zemhoff v. State*, 4 Greene (Ia.), 526; *Coleman v. State*, 145 Ala. 13; 40 So. 715; *State v. Roach*, 74 Me. 562; *Commonwealth v. Cummings*, 6 Gray, 487; *Commonwealth v. Baward*, 6 Gray, 488; *Commonwealth v. Kingman*, 14 Gray, 85; *Shuler v. State*, 125 Ga. 778; 54 S. E. 689; *State v. Young*, 70 Mo. App. 52; *White v. Commonwealth*, 107 Va. 901; 59 S. E. 1101; *State v. Burkhalter*, 118 La. 657; 43 So. 268.

⁴¹ *Butler v. State*, 89 Ga. 821; 15 S. E. 763; *Gilmore v. State*, 125 Ala. 59; 28 So. 382; *Kelty v. State*, 61 N. J. L. 407; 39 Atl. 711.

⁴² *State v. Becker*, 20 Iowa, 438; *Guarreno v. State*, 148 Ala. 637; 42 So. 833. *Contra*, *Commonwealth*, 11 Gratt. 819.

⁴³ *Hagan v. State*, 4 Kan. 89; *State v. Rohrer*, 34 Kan. 427; 8 Pac. 718.

⁴⁴ *West v. Columbus*, 20 Kan. 633; *Grimme v. Commonwealth*, 5 B. Mon. 263; *State v. Cox*, 82 Me. 417; 19 Atl. 857; *Adams v. State* (Ark.), 41 S. W. 423; *Kansas City v. Smith*, 57 Kan. 434; 46 Pac. 710; *State v. Walters*, 57 Kan. 702; 47 Pac. 839.

rejected as surplusage.⁴⁵ Where the charge was that the accused "sold to C spirituous liquor to be used in his dwelling house," it was construed to mean that the charge was the liquor was "to be used in the defendant's dwelling house."⁴⁶ Where it was averred that the accused was licensed to maintain a saloon in "the room in the first story of the building situate and numbered fourteen in Charter Street in said city," and that he "did then and there place and maintain upon said premises, so used as aforesaid, a certain screen, blind, shutter, curtain and partition, in such a way as to interfere with a view of the business conducted on said premises, and with a view of the interior of said premises," it was held that the premises were described with sufficient precision.⁴⁷ But it has been held that if it be unlawful to keep liquors in a house in one part of a county and not in another part, it is sufficient to merely aver that the house was located in the county, without specifying in what part of the county.⁴⁸ And where it was charged that the liquor was sold in the Ninth Ward of a certain city to be drunk in the house, store, shop and place of the vendor without giving the street or the number of the house, this was held sufficient.⁴⁹ But where it was unlawful to sell liquor "at or within three miles of Providence College," and the charge that the sale was made "at Nettleton" in violation of the statute applicable to such a sale, but there was no allegation that Nettleton was within three miles of the college or that the sale took place within that distance from it, the indictment was held bad.⁵⁰ In case of a charge of a violation of the local option law, it must be averred that the sale took place within the district wherein such law had been adopted.⁵¹ Where a statute forbade the

⁴⁵ *State v. Sterns*, 28 Kan. 154;
State v. Walters, 57 Kan. 702;
⁴⁷ *Pac.* 839; *Commonwealth v.*
Pray, 13 Pick. 359.

⁴⁶ *Commonwealth v. Stowell*, 9
Met. 569.

⁴⁷ *Commonwealth v. Gibbons*,
 134 Mass. 197. "At 83 and 85
 Market Street" covers "83½" of

the same street. *State v. Chico*
 (S. C.), 64 S. E. 306.

⁴⁸ *Commonwealth v. Martin*, 108
Mass. 29, *note*.

⁴⁹ *Schwab v. People*, 4 Hun, 520.
⁵⁰ *Ragan v. State*, 67 Miss. 332;
 7 So. 280.

⁵¹ *Young v. Commonwealth*,
 14 Bush, 161; *Cousins v. State*

sale of liquor within a certain distance of the main building of a State hospital, a charge of a sale within that distance of the State hospital was held bad.⁵² But under a statute forbidding gambling in a room where intoxicating liquors are sold, it is not necessary to assign to the room a specific location, except that it was located in the county.⁵³ Charging a sale "at" a hotel is equivalent to charging it "therein" or "on the premises thereof."⁵⁴ A charge of keeping open a bar within a certain school district in a city and county named, on a day when an election was held, is sufficiently definite as to the location of the bar.⁵⁵ In the case of a proceeding to have a place declared a nuisance and for its abolition, it is necessary to specifically describe it; but an allegation that the nuisance was "kept and maintained on lots 10 and 12, block 63, city of Ft. Scott, Kansas," was held sufficient.⁵⁶ Where a statute made it an offense to keep a dwelling as an inn for the purpose of the liquor traffic, a charge that the liquors were deposited in a dwelling house or inn known as "Jefferson Hotel," and being used for the purposes of the traffic, was held sufficient.⁵⁷ Where it was made an offense to solicit or receive orders in a prohibition district for the sale or delivery of liquors, it was held necessary to aver that the place of solicitation or delivery was within such a district, and merely alleging that it was within the county, when a part of a

(Tex. Cr. App.), 79 S. W. 549.

Where fines assessed for offenses committed within a city went to the city, though the prosecution was by the State, and fines without it but within the county went to the county or State, it was held necessary to specifically allege whether the offense occurred within or without the county. *Legori v. State*, 8 S. & M. 697.

⁵² *State v. Ritzman*, 8 Ohio S. & C. P. Dec. 685.

⁵³ *Utsler v. Territory*, 10 Okla. 463; 62 Pac. 287.

⁵⁴ *Regina v. Cavanagh*, 27 Com. Pl. (Can.) 537; see *Regina v. Parlee*, 23 Com. Pl. (Can.) 359.

⁵⁵ *Cranfill v. State* (Tex. Cr. App.), 92 S. W. 946; *Daxanbeklar v. People*, 93 Ill. App. 553.

⁵⁶ *State v. Walters*, 57 Kan. 702; 47 Pac. 839; *State v. Poull*, 14 N. D. 557; 105 S. W. 717; *State v. Brown*, 14 N. D. 529; 104 S. W. 1112; *Grom v. People*, 135 Ill. App. 453; *Hagan v. State*, 4 Kan. 89. *Contra*, *Howard v. State*, 6 Ind. 444.

⁵⁷ *State v. Bennett*, 95 Me. 197; 49 Atl. 867.

county might have adopted prohibition, was not sufficient.⁵⁸ Where it was alleged the accused used a certain drug store "with the intent to sell there intoxicating liquors, and then and there did sell the same," it was held that the words "then and there" sufficiently designated the drug store as the place of sale.⁵⁹ An allegation that the liquor was sold in a certain town is sufficient to show in what county it was sold, for the court will take judicial notice where the town was located.⁶⁰ If a city within a county has exclusive jurisdiction over prosecutions for illegal sales of liquor, then in a prosecution by the State it must be averred that the sale did not take place in such city.⁶¹ Where the name of the county and State appeared in the caption, and the accused was described "of the city of Concord in said county," and it was averred that the sale was made at "said Concord," this was held to be a sufficient averment that the sale was made in such county.⁶² So a charge that the accused made a sale of liquors "at the town of Marlborough, Ulster County, N. Y.," is sufficient as to the place of sale.⁶³ Where a statute made it an offense to give away liquor in a "public" place, it was held not necessary to allege that a sale without a license occurred in a "public place."⁶⁴ Upon a charge of keeping a saloon open there may be conviction, although it be shown in evidence that the accused had two saloons within the county.⁶⁵ Unless a sale must be made in connection with a particular building—as in a saloon, or a store or a dwelling house—it need not be alleged that it took place in a building, but it is sufficient to

⁵⁸ *Patterson v. State* (Tex. Cr. App.), 90 S. W. 31; *Buck v. State*, 61 N. J. L. 525; 39 Atl. 919; see also *Scott v. State*, 150 Ala. 59; 43 So. 181.

⁵⁹ *State v. Pinckney*, 111 Iowa, 34; 82 N. W. 450.

⁶⁰ *People v. Cramer*, 12 N. Y. Cr. Rep. 469; 47 N. Y. Supp. 1039.

⁶¹ *Buck v. State*, 61 N. J. L. 525; 39 Atl. 919.

On a charge of a sale to a minor, it is not necessary to aver

it took place on the accused's premises. *State v. Essman*, 112 Mo. App. 132; 85 S. W. 955.

⁶² *State v. Shaw*, 35 N. H. 217.

⁶³ *People v. Polhamus*, 8 N. Y. App. Div. 133; 40 N. Y. Supp. 491; *State v. Dixon*, 104 Iowa, 741; 74 N. W. 692.

⁶⁴ *King v. State*, 66 Miss. 502; 6 So. 188; *Picket v. State*, 22 Ohio St. 405.

⁶⁵ *State v. Merget*, 129 Mo. App. 46; 107 S. W. 1015.

charge that it took place in the county.⁶⁶ This is even true of a charge of keeping a saloon open on Sunday.⁶⁷ The caption of the indictment may be resorted to in order to ascertain where it is charged the sale took place. Thus, an indictment entitled, "The district court for the counties of Lyon and Lincoln, and State of Minnesota," charged that the sale was made at a certain town "in said county of Lincoln," and it was held that it sufficiently alleged the county and State where the sale was made.⁶⁸ And where the information was entitled, "State of Iowa, Clayton County," it was held unnecessary to aver in it that the liquors were in Clayton County.⁶⁹

Sec. 867. Time as an element of offense.

Time is not an element of the offense of selling without a license, but the date of the sale must be alleged,⁷⁰ though the proof of a sale at any time within the statute of limitations may be made.⁷¹ Whether or not an allegation that a sale took

⁶⁶ Commonwealth v. Stowell, 9 Met. 569; Commonwealth v. Clapp, 5 Gray, 97; People v. Aldrich, 104 Mich. 455; 62 N. W. 570; State v. Cottrill, 31 W. Va. 162; 6 S. E. 428; State v. Boggess, 36 W. Va. 713; 15 S. E. 423; State v. Hickok, 90 Wis. 161; 62 N. W. 934.

⁶⁷ People v. Rinsted, 90 Mich. 371; 51 N. W. 519.

⁶⁸ State v. Larake, 26 Minn. 526; 6 N. W. 339; 37 Am. Rep. 415.

On an indictment for selling liquors in District No. 9, proof cannot be given of a sale in No. 2, unless it be averred that that part of No. 2 in which the sale was made was part of No. 9. Prater v. Commonwealth, 3 Ky. L. Rep. (abstract) 695; Commonwealth v. Scruggs, 10 Ky. L. Rep. (abstract) 446.

⁶⁹ State v. Thompson, 44 Iowa, 399.

⁷⁰ Clark v. State, 34 Ind. 436; Savage v. Commonwealth, 84 Va. 582; 5 S. E. 563; Commonwealth v. Adams, 1 Gray, 481; People v. Olmsted, 74 Hun, 323; 26 N. Supp. 818. *Contra*, State v. Conega, 121 La. 522; 46 So. 614.

⁷¹ State v. Small, 31 Mo. 197; State v. Wambold, 72 Iowa, 468; 34 N. W. 213; Arrington v. Commonwealth, 87 Va. 96; 12 S. E. 224; Regina v. Collier, 12 Prac. Rep. (Can.) 316; State v. Bruce, 26 W. Va. 153; State v. Coval (W. Va.), 66 S. E. 740; State v. Gilmore, 9 W. Va. 641; Kerr v. Harker, 7 N. J. L. 349; Thurman v. State, 45 Tex. Cr. App. 569; 78 S. W. 937.

place "on or about" a given date is sufficient the cases are far from being harmonious. Statutes have often modified the common law rule—and even at common law it is an uncertain question—and so many decisions have been made upon such statutes until now it is often difficult to determine whether the decision is made to rest upon a statute or upon the common law. There are cases which hold that such an allegation is sufficient.⁷² But an allegation that the sale took place "on the — day of July," has been held fatal.⁷³ Statutes have so modified the rules of pleading as to permit a charge of a sale "on or about the months of January, February and March."⁷⁴ So a charge that the accused sold liquors "on the 6th, 7th, 8th and 9th day of June, and for thirty days previous to said 6th of June, and on said and every of said days," has been held sufficient.⁷⁵ But an allegation that the accused "did then and there" make a sale of liquor will not save the count of an indictment if no date has been used therein, although a specific date has been used in another count thereof.⁷⁶ If the indictment charge that the sale took place on "Thursday" of a particular date of the month, the allegation of the day of the week will be regarded as surplusage, especially if it conflict with the date of the month

⁷² Rawson v. State, 19 Conn. 292; Regina v. Collier, 12 Prac. Rep. (Can.) 316; Farrell v. State, 45 Ind. 371; State v. Schilling, 14 Iowa, 455; Runde v. Commonwealth (Va.), 61 S. E. 792; Smithers v. Commonwealth, 12 Ky. L. Rep. 636; State v. Nagley, 8 Kan. App. 812; 57 Pac. 554; see also State v. O'Keefe, 41 Vt. 691; Coleman v. State, 150 Ala. 64; 43 S. E. 715; Fish v. Manning, 31 Fed. 340; State v. Tuller, 34 Conn. 280; State v. Harp, 31 Kan. 496; 3 Pac. 432; Cohely v. State, 4 Iowa, 477; People v. Aro, 6 Cal. 607; 65 Am. Dec. 503; State v. Elliott, 34 Tex. 148; State v. McMickle, 34 Tex. 676; State v. Lavake, 26

Minn. 526; 6 N. W. 339; 37 Am. Rep. 415; Commonwealth v. Purdy, 147 Mass. 29; State v. Kennedy, 36 Vt. 563; Commonwealth v. Griffin, 3 Cush. 523; State v. Randolph (Mo. App.), 123 S. W. 60; State v. Randolph (Mo. App.), 123 S. W. 61.

⁷³ Clark v. State, 34 Ind. 436. *Contra*, *In re Savage*, 84 Va. 582; 5 S. E. 563; State v. Buck, 78 Me. 193; 3 Atl. 573.

⁷⁴ State v. Findley, 77 Mo. 338.

⁷⁵ New York City v. Mason, 4 E. D. Smith, 142; see Commonwealth v. Adams, 1 Gray, 481, and Commonwealth v. Traverse, 11 Allen, 260.

⁷⁶ State v. Bruce, 26 W. Va. 153.

given.⁷⁷ Upon a charge of keeping a tippling house for three months, no particular months need be averred, and any three consecutive months may be proven within the statute of limitations.⁷⁸ A charge that "on the 23d and 29th days of July, 1852," the defendant sold a specified amount of liquor charges but a single offense, and the charge is bad for uncertainty.⁷⁹ If an indictment allege a sale took place on an impossible date⁸⁰ or at a future date,⁸¹ or one so long past that the prosecution for the commission of the act is barred by the statute of limitations, it will be bad.⁸² If two dates be alleged, one before and the other after the indictment is returned, and other allegations of the indictment show that it relates to an act of the recent past, both dates may be disregarded and the indictment held good.⁸³ After the date of a commission of an offense has once been laid it need not be repeated.⁸⁴ Where the charge was that the accused had failed to close his saloon at 9 o'clock, it was held not necessary to aver nine o'clock in the evening was meant.⁸⁵ In case of a charge of a sale on Sunday, it was alleged that sales were made on every Sunday between January 1st and July 1st of a certain year, and for a long time prior thereto, and the action was dismissed because the complaint was vague and uncertain.⁸⁶ Where it was illegal to maintain screens in a saloon so the bar could not be seen, an allegation that "on or about the 25th of March, 1900, said day being Sunday," the accused so maintained a screen in his saloon, the indictment was held bad for uncertainty as to the time it was maintained.⁸⁷ A

⁷⁷ *State v. Fletcher*, 13 R. I. 522; *State v. Major*, 81 Mo. App. 289.

⁷⁸ *Smithers v. Commonwealth*, 12 Ky. L. Rep. 636.

⁷⁹ *Commonwealth v. Adams*, 1 Gray, 481.

⁸⁰ *Hutchinson v. State*, 62 Ind. 556; *Murphy v. State*, 106 Ind. 96; 5 N. E. 767; *Terrell v. State*, 165 Ind. 443; 75 N. E. 884.

⁸¹ *State v. Noland*, 29 Ind. 212; *Trout v. State*, 107 Ind. 578; 8 N. E. 618.

⁸² *Ulmer v. State*, 14 Ind. 52; *Hutchinson v. State*, 62 Ind. 556.

⁸³ *State v. Patterson*, 116 Ind. 45; 10 N. E. 289; 18 N. E. 270.

⁸⁴ *Turpin v. State*, 80 Ind. 148; see *State v. Bruce*, 26 W. Va. 123.

⁸⁵ *People v. Husted*, 52 Mich. 624; 18 N. W. 388.

⁸⁶ *Summit v. Hahr*, 66 N. J. L. 333; 52 Atl. 956.

⁸⁷ *State v. Slantz*, 27 Ind. App. 557; 61 N. E. 793. The court said: "As time is essential, it must be averred with certainty."

similar ruling on a like phrase concerning a sale on Sunday was held bad.⁸⁸ On a charge of sale on Sunday, the hour it took place need not be given.⁸⁹ Under one forbidding a sale of liquors for twelve hours immediately following 12 o'clock Saturday night, an indictment merely averring a sale on Sunday was held sufficient.⁹⁰ In some few instances statutes dispense with an allegation as to the date of the sale.⁹¹

Sec. 868. *Alleging a continuendo.*

It is permissible to charge a sale on a particular day and upon divers days continuously thereafter, in some States. This is where the offense is continuous, made up of a succession of acts. So the same is true of a prohibited traffic which is carried on from day to day. Thus, an indictment against one for presuming to be a common dealer or seller of liquors is not deficient as to the time by an averment of time of the offense "from the 1st day of November, 1835, and on divers days and times as well before as afterwards, and until the finding of this indictment."⁹² So a charge of keeping a

Slantz v. State, 27 Ind. App. 700; 61 N. E. 956. *Contra*, *Newman v. State*, 101 Ga. 534; 28 S. E. 1005; *Keith v. State*, 38 Tex. Cr. Rep. 678; 44 S. W. 847, 849.

⁸⁸ *Effinger v. State*, 47 Ind. 235; *Roy v. State*, 91 Ind. 417; see *Bowen v. State*, 28 Tex. App. 103; 12 S. W. 413.

⁸⁹ *State v. Heard*, 107 La. 60; 31 So. 384; *People v. McDonnell* (N. Y.), 108 N. Y. Supp. 749.

⁹⁰ *State v. Heard*, 107 La. 60; 31 So. 384.

⁹¹ *State v. McAnally*, 105 Mo. App. 333; 79 S. W. 990.

If dates be used, but it is not possible with certainty to determine when the sale took place, the indictment will be bad. *Thurman v. State*, 45 Tex. Cr. App. 569; 78 S. W. 937.

A statute dispensing with an

allegation of the time at which a sale was made has been held valid in New York, in a deposition upon which the information must be based. *People v. Shaver*, 37 N. Y. App. Div. 21; 55 N. Y. Supp. 701.

⁹² *State v. Cattle*, 15 Me. 473; *State v. Prater*, 59 S. C. 271; 37 S. E. 933; *Commonwealth v. Hoge*, 9 Gray, 292; *Commonwealth v. Snow*, 14 Gray, 20; *Commonwealth v. Kingman*, 14 Gray, 85; *Commonwealth v. Donnelly*, 14 Gray, 86, *note*; *State v. Ingalls*, 59 N. H. 88; *Our House v. State*, 4 Green (Ia.), 172; *Commonwealth v. Clark*, 145 Mass. 251; 13 N. E. 888; *Reason v. Commonwealth*, 5 Ky. L. Rep. (abstract) 428; *State v. Ely* (S. D.), 118 N. W. 687; *State v. Stevens* (N. D.), 123 N. W. 888.

nuisance on a day named "and on divers other days and times between that day and the day of finding and presentment of this indictment," is sufficiently certain as to the time.⁹³ An indictment for exposing for sale and selling liquors without a license "on the 1st day of June, A. D. 1894, and on divers other days and times between that day" and the date of filing the complaint, was held to charge a single offense only, extending from the day laid until the filing of the complaint.⁹⁴ So it has been held that an indictment for an unlawful selling may allege that sales were made "at divers times" between two dates.⁹⁵

Sec. 869. Purpose or object of sale.

In case of a sale of liquor it need not be averred that it was for the purpose of gain, unless that is a part of the definition of the offense.⁹⁶ If it is necessary to the commission of the offense that the liquor should be sold to be drunk on the premises or in the house, then it must be alleged that the

⁹³ Commonwealth v. Keefe, 9 Gray, 290; Commonwealth v. Walton, 11 Allen, 238; Commonwealth v. McIvor, 117 Mass. 238; Commonwealth v. Heney (Mass.), 9 N. E. 837; Commonwealth v. Rhodes, 148 Mass. 123; 19 N. E. 22; Dominick v. State, 27 Ohio Cir. Ct. Rep. 305.

⁹⁴ Commonwealth v. Manning, 164 Mass. 547; 42 N. E. 95.

Where the *continuendo* ran until a date after the indictment was found, it was rejected, but the indictment held to allege a sale on the date it was alleged to have begun to run. People v. Gilkinson, 4 Parker Cr. Rep. 26; State v. Munger, 15 Vt. 290; Dousey v. State, 23 Fla. 316; 2 So. 692; South v. Commonwealth, 79 Ky. 493; Commonwealth v. Bryden, 9

Met. 137; Commonwealth v. Rhodes, 148 Mass. 123; Commonwealth v. Kendall, 12 Cush. 414; Commonwealth v. Walton, 11 Allen, 238.

⁹⁵ People v. Polhamus, 8 N. Y. App. Div. 133; 40 N. Y. Supp. 491; State v. Cofran, 48 Me. 364; Commonwealth v. Hagerman, 10 Allen, 401; State v. Major, 81 Mo. App. 289. *Contra*, People v. Olmsted, 74 Hun, 323; 26 N. Y. Supp. 818.

⁹⁶ Anderson v. People, 63 Ill. 53. In this case was the curious condition that if the sale was made by the defendant, it need not be averred that it was made "for gain," but if the defendant permitted the sale to be made on his premises, then it must be alleged that it was made "for gain."

sale was for that purpose.⁹⁷ And where the statute provided that "who shall sell or barter any spirituous, vinous, or malt liquors to be drunk or suffered to be drunk in his house, out-house, yard, garden, or appurtenances thereto belonging" should be subject to a fine on conviction,⁹⁸ an indictment charging the defendant with selling intoxicating liquors without a license, and suffering it "to be drunk in and about the house where sold," was held insufficient, because it did not aver the house was the house of the seller. "It is not charged," said the court, "that it was suffered to be drunk in *his* house."⁹⁹ But it is not always necessary to allege that the liquor was *sold* to be drunk upon the premises or in the house where sold.¹ But a statute forbade a sale, without a license, to be drunk in, upon, or about the building or premises where sold, and it was said that the indictment should discriminate whether the liquor was sold to be drunk in a building, or upon or about adjoining lands.² If the offense is committed by a mere sale, regardless of the purpose to drink it on the premises where sold, then no allegation concerning such purpose or object is necessary.³ And where the local option law absolutely prohibited a sale of liquor within

⁹⁷ *State v. Freeman*, 6 Blackf. 248; *Eisenman v. State*, 49 Ind. 511; *Vanderwood v. State*, 50 Ind. 26, 295; *Commonwealth v. Dean*, 21 Pick. 334; *State v. Auberry*, 7 Mo. 304; *Layton v. State*, 49 Ind. 229; *State v. Williamson*, 19 Mo. 384; *Pickett v. State*, 22 Ohio, 405; *Bilbro v. State*, 7 Humph. 534.

But in Indiana it need not be alleged that the sale was for gain. *Stapf v. State*, 33 Ind. App. 255; 71 N. E. 165.

⁹⁸ Rev. Stat. Ind. 1881, § 5320.

⁹⁹ *Blough v. State*, 121 Ind. 355; 18 N. E. 682; *State v. Woolsey*, 92 Ind. 131; *Schilling v. State*, 116 Ind. 200; 18 N. E. 682; *Burke v. State*, 52 Ind. 522; *State*

v. Corll, 73 Ind. 535; *Schlicht v. State*, 56 Ind. 173; *Commonwealth v. Luddy*, 143 Mass. 563.

¹ *Wood v. State*, 9 Ind. App. 42; 36 N. E. 158. "Then and there did retail, with a view to its being drunk in a building which the said J. W. then and there kept and occupied as a shop, wherein said brandy was retailed," sufficiently describes the place. *Wrocklege v. State*, 1 Clarke (Ia.), 167; *Commonwealth v. Moulton*, 10 Cush. 404.

² *State v. Charlton*, 11 W. Va. 332; 27 Am. Rep. 603.

³ *Allen v. State*, 5 Wis. 329; *Commonwealth v. Young*, 15 Gratt. 664.

the territory to which it applied, it was held not necessary to aver that the sale was made "with the purpose of evading the law,"⁴ though previously it had been held that such a charge was necessary.⁵ It is not necessary to the commission of the offense that the liquor be actually drunk upon the premises where sold; it is the sale with the intent that it should be drunk there that constitutes the offense.⁶ A charge of a sale of liquor "to be drunk on the premises" is the same as a charge of a sale "with the intent to be drunk on the premises."⁷ Where the place of sale was described as "the dwelling house by the said A used and occupied," this was held to be a sufficient description;⁸ so was "a certain building then and there situate and in the possession and occupancy of the said A, erected on," etc.⁹ It should appear that the house or premises was located in the county, and, as a rule, that is a sufficient description of their location.¹⁰ So if it is a fact necessary to the commission of the offense that the liquor must be sold "as a beverage," it must be alleged that that was the purpose of the sale, or that it was "sold as a beverage," or "to be drunk as a beverage."¹¹ And a charge of a sale of whisky "as a beverage" is sufficient under a statute making it an offense to sell liquor "to be used as a

⁴ *McMillan v. State*, 18 Tex. App. 375.

⁵ *Stallworth v. State*, 16 Tex. App. 345.

⁶ *Eisenman v. State*, 49 Ind. 511.

⁷ *Bilbro v. State*, 7 Humph. 534.

⁸ *Commonwealth v. Moulton*, 10 Cush. 404.

⁹ *Hintermeister v. State*, 1 Iowa, 101.

¹⁰ *State v. Shearer*, 8 Blackf. 362; see *Schwab v. People*, 4 Hun, 520.

Upon a charge of a sale to a minor, it usually is not necessary to aver the liquor was sold to be drunk upon the premises. *State v. Essman*, 112 Mo. App. 132; 85 S. W. 955.

An averment that the accused was a druggist and permitted liquor to be drunk at and about his place of business, charges that the offense was committed at his drug store. *State v. Morgan*, 216 Mo. 550; 115 S. W. 491.

¹¹ *Dowdell v. State*, 58 Ind. 333; *Allman v. State*, 69 Ind. 387; *State v. Dunlap*, 81 Me. 389; 17 Atl. 313; *People v. Quinn*, 74 Mich. 632; 22 N. W. 604; *State v. Buckner*, 20 Mo. App. 420; *State v. Abbott*, 31 N. H. 434; *Commonwealth v. Porter*, 31 Leg. Int. 398; *State v. Hafsoos*, 1 S. D. 382; 47 N. W. 400.

beverage," for the word "beverage" implies the whisky was to be used as a beverage.¹² Upon a charge of a sale to a minor it need not be averred that the sale was made for the purposes of beverage,¹³ and the same is true of a sale to a drunkard.¹⁴ Under such a statute a charge that the accused "maliciously and willfully" sold the liquor is not sufficient to show it was sold "as a beverage."¹⁵ But where sales could only be made for "medical, scientific or mechanical purposes," a charge of a sale of liquor not made for such purposes is sufficient.¹⁶ A charge of an unlawful sale "by the drink" is equivalent to a charge that the accused sold it "as a beverage."¹⁷

Sec. 870. Description, kind and properties of liquors.

A sufficient description must be made of the liquors so as to show they were such as the statute describes or designates. If the statute forbids a sale or gift of vinous, malt or spirituous liquors, then it is necessary to aver that the sale or gift was of one of these kinds,¹⁸ but it is not necessary to aver that it might have been used as a beverage.¹⁹ And where a statute

¹² *People v. Hinchman*, 75 Mich. 587; 42 N. W. 1006; 4 L. R. A. 707.

¹³ *Commonwealth v. O'Leary*, 143 Mass. 95; 8 N. E. 887; *Commonwealth v. Murphy*, 155 Mass. 284; 29 N. E. 469.

¹⁴ *People v. Hamilton*, 101 Mich. 87; 59 N. W. 401.

¹⁵ *State v. Hafsoos*, 1 S. D. 400; 47 N. W. 400.

¹⁶ *State v. Shackle*, 29 Kan. 241.

¹⁷ *Commonwealth v. Kennan*, 10 Ky. L. Rep. (abstract) 723.

¹⁸ *State v. Witt*, 39 Ark. 216; *State v. Forman*, 66 N. J. L. 397; 52 Atl. 956; *State v. Gill*, 89 Minn. 502; 95 N. W. 449; *Wells v. State*, 118 Ga. 556; 45 S. E.

443; *People v. Myers*, 109 N. Y. App. Div. 143; 95 N. Y. Supp. 993; *People v. Squires*, 95 N. Y. Supp. 995; *Wong Sing v. Independence*, 47 Ore. 231; 83 Pac. 387; *People v. Myers*, 185 N. Y. 558; 77 N. E. 1193.

It is sufficient to follow the statute. *Commonwealth v. Morgan*, 149 Mass. 314; 21 N. E. 369; *State v. Spaulding*, 61 Vt. 505; 17 Atl. 844; *State v. O'Connell*, 99 Me. 61; 58 Atl. 59.

As to conflicting statements as to kind of liquor not sufficient to vitiate the indictment, see *Williams v. State*, 47 Ark. 230; 1 S. W. 149.

¹⁹ *State v. Carpenter*, 20 Ind. 219.

forbids the sale or gift of "intoxicating" liquor, then it is sufficient to aver a sale or gift of "intoxicating" liquor without describing or naming the particular kind of liquor it was, and under the allegation vinous, malt, spirituous or any other drinkable intoxicating liquor may be proven.²⁰ So

²⁰ *Fetter v. State*, 18 Ind. 388; *Donovan v. State*, 170 Ind. 123; 83 N. E. 744; *Downey v. State*, 20 Ind. 82; *State v. Carpenter*, 20 Ind. 219; *State v. Hannun*, 53 Ind. 335; *Leary v. State*, 39 Ind. 360; *Hooper v. State*, 56 Ind. 153; *State v. Dorr*, 82 Me. 341; 19 Atl. 861; *State v. McGinnis*, 30 Minn. 52; 14 N. W. 258; *Commonwealth v. Cowant*, 6 Gray, 482; *Maddox v. State*, 118 Ga. 32; 44 S. E. 806; *Commonwealth v. Ryan*, 9 Gray, 137; *State v. Packer*, 80 N. C. 439; *State v. Paige*, 78 Vt. 286; 62 Atl. 1017; *State v. Downs*, 116 N. C. 1064; 21 S. E. 689; *United States v. Gordon*, 1 Cranch C. C. 58; Fed. Cas. No. 15233; *State v. Blands*, 101 Mo. App. 618; 74 S. W. 3; *People v. Sweetser*, 1 Dak. 308; 46 N. W. 452; *Daniel v. State*, 149 Ala. 44; 43 So. 22; *State v. Mullinix*, 6 Blackf. 554; *State v. Mondy*, 24 Ind. 268; *State v. Hazelton*, 78 Vt. 467; 63 Atl. 305; *Frisbie v. State*, 1 Ore. 248; *State v. Witt*, 39 Ark. 216; *State v. Barr*, 78 Vt. 97; 62 Atl. 43; *State v. Teahan*, 50 Ind. 92; *Connell v. State*, 46 Ind. 446; *Plunkett v. State*, 69 Ind. 68; *Piper v. State*, 53 Tex. Cr. App. 496; 110 S. W. 898; *Buell v. State*, 72 Ind. 523; *Callahan v. State*, 2 Ind. App. 417; 28 N. E. 717; *State v. Whalen*, 54 Iowa, 753; 6 N. W. 552; *People Seeley*, 105 N. Y. App. Div. 149; 93 N.

Y. Supp. 982; *Foreman v. Hunter*, 59 Iowa, 550; 13 N. W. 659; *People v. Sweetser*, 1 Dak. 308; 46 N. W. 452; *State v. Sterns*, 28 Kan. 154; *State v. Brooks*, 33 Kan. 708; 7 Pac. 591; *Commonwealth v. Timothy*, 8 Gray, 480; *Commonwealth v. Bennett*, 108 Mass. 30; 11 Am. Rep. 304; *Neales v. State*, 10 Mo. 498; *State v. Kurtz*, 2 Mo. App. Rep'r. 913; *State v. Reynolds*, 47 Vt. 297; *Frickie v. State*, 39 Tex. Cr. App. 254; 45 S. W. 810; *Commonwealth v. Morgan*, 149 Mass. 314; 21 N. E. 369; *State v. Spaulding*, 61 Vt. 505; 17 Atl. 844; *Rose v. Commonwealth*, 106 Va. 850; 56 S. E. 151; *Commonwealth v. Ryan*, 14 Gray, 367; *Fletcher v. Commonwealth*, 106 Va. 840; 56 S. E. 149; *Savage v. Commonwealth*, 84 Va. 582; 5 S. E. 563; *Dansey v. State*, 23 Fla. 316; 2 So. 692; *Powell v. State*, 69 Ala. 10; *Boon v. State*, 69 Ala. 226; *Cochran v. State*, 26 Tex. 678; *State v. Whisner*, 35 Kan. 271; 10 Pac. 852; *Simpson v. State*, 17 Ind. 444; *State v. Rogers*, 39 Mo. 431; *Commonwealth v. Traylor* (Ky.), 45 S. W. 356; *Hardwick v. State*, 55 Tex. Cr. App. 140; 114 S. W. 832; *Stoner v. State* (Ga.), 63 S. E. 602; *DeGraff v. State* (Okla. Cr. App.), 103 Pac. 538; *Commonwealth v. Henderson*, 140 Mass. 303; 5 N. E. 832.

under a statute forbidding the sale or gift of "spirituous" liquors, it is sufficient to allege that the liquors sold or given away was "spirituous" liquor, and no particular kind of spirituous liquor need be named.²¹ But where a statute forbade the sale of "rum, brandy, or other spirituous liquor," an indictment merely alleging a sale of "spirituous" liquors was held insufficient because the particular kind of spirituous liquors was not named.²² Yet where the statute prohibited sales without a license of domestic liquors in any quantity whatever, and of imported liquors in any quantity less than the revenue laws of the United States permitted to be imported, it was held that the indictment charging a sale in a quantity less than such revenue laws permitted to be imported need not specify whether the liquors were imported or not.²³ Where a statute defined intoxicating liquor as liquor containing more than two per cent. by weight of alcohol, an indictment charging the unlawful keeping of ale, wine and rum for sale, also of "strong and malt and intoxicating liquors," was held not defective because it did not inform the accused whether the liquors kept were in fact intoxicating, or only deemed so by law.²⁴ And where the charge was a sale of "intoxicating or malt liquors," it was held to be a sufficient charge, the word "or" being deemed to show the intoxicating liquor was a malt liquor as distinguished from a spirituous liquor.²⁵ And where sales of "intoxicating liquor or cider" was forbidden, and then the statute prescribed a "substantial"

²¹ Commonwealth v. Odlin, 23 Pick. 275; Callahan v. State, 2 Ind. App. 417; 28 N. E. 717; State v. Heck, 23 Minn. 549; State v. Blaisdell, 33 N. H. 388; State v. Fox, 1 Harr. (N. J.) 152; Reed v. Territory, 1 Okla. Cr. App. 481; 98 Pac. 583.

The use of the word "spiritual" for "spirituous" will not vitiate an indictment. State v. Clark, 3 Ind. 451.

Under a statute forbidding a sale of spirituous liquor, it is not

enough to charge a sale of intoxicating liquor. McDuffie v. State, 87 Ga. 687; 13 S. E. 596.

²² State v. Raiford, 7 Post (Ala.), 101; DeGraff v. State (Okla. Cr. App.), 103 Pac. 538.

²³ State v. Crowell, 30 Me. 115.

²⁴ State v. McKenna, 16 R. I. 398; 17 Atl. 51.

²⁵ State v. Boncher, 59 Wis. 477; 18 N. W. 335; see also State v. Nerbovig, 33 Minn. 480; 24 N. W. 321.

form of indictment for sale of intoxicating liquor, but not of cider, an indictment in the statutory form, except that the words "cider and fermented liquors" were used for the words "intoxicating liquor," was a "substantial" compliance with the statutory form.²⁶ In charging the keeping of a liquor nuisance it is not necessary to aver that the liquors kept were not such as it was lawful to keep and sell.²⁷ An indictment for selling spirituous, vinous "or" malt liquors is bad for uncertainty.²⁸ But a charge of a sale of "intoxicating, spirituous, vinous, and malt liquors, and a mixture thereof," is good as to the "intoxicating, spirituous, vinous, and malt liquors."²⁹ Where an ordinance forbade the sale of "malt hop tea, hop tea tonic, ginger ale, American hop ale," a charge of a sale of a liquor unknown to the affiant, but which is similar to such liquors, was held sufficient.³⁰ Where a statute required an indictment to be direct and certain regarding the party and offense charged, and the particular circumstances of the offense, and a statute forbade the sale of spirituous, vinous and malt liquors in local option territory,

²⁶ *State v. Spaulding*, 61 Vt. 505; 17 Atl. 844; see *State v. Reiley*, 66 N. J. L. 399; 52 Atl. 1005.

²⁷ *Commonwealth v. Shea*, 115 Mass. 102.

In Alabama it was held that a charge that the accused "did sell, give, or otherwise dispose of spirituous, vinous, or malt liquors without a license and contrary to law" was sufficient to show a violation of the prohibitory law. *McClure v. State*, 148 Ala. 625; 42 So. 813.

²⁸ *Raubold v. Commonwealth*, 111 Ky. 433; 63 S. W. 781; 23 Ky. Law Rep. 735; *Locke v. Commonwealth (Ky.)*, 63 S. W. 795; 23 Ky. 740; *Commonwealth v. Jarvis*, 120 Ky. 334; 86 S. W. 556; 27 Ky. Law Rep. 712; *Barth*

v. State, 18 Conn. 432; *Osgood v. State*, 39 N. Y. 449; *Morgan v. Commonwealth*, 7 Gratt. 592; *Daniel v. State*, 149 Ala. 44; 43 So. 22. [See also *Smith v. State*, 19 Conn. 493; *Graham v. State*, 89 Ga. 121; 14 S. E. 892; *Com. v. Grey*, 2 Gray, 501; 61 Am. Rep. 476. *Contra*, see *Powell v. State*, 69 Ala. 10; *Cost v. State*, 96 Ala. 60; 11 So. 435; *Morgan v. Com.*, 7 Grat. 592; *Thomas v. Com.*, 90 Va. 92; 17 S. E. 788; *Cunningham v. State*, 5 W. Va. 508.]

²⁹ *Farris v. Commonwealth*, 111 Ky. 236; 63 S. W. 615; 23 Ky. Law Rep. 580; *Cockerell v. Commonwealth*, 115 Ky. 296; 24 Ky. L. Rep. 449; 73 S. W. 760.

³⁰ *Lincoln Center v. Linker*, 7 Kan. App. 282; 53 Pac. 787.

an indictment charging an unlawful and willful sale by retail of a beverage, liquid mixture, or decoction which caused or produced intoxication, was held sufficient although it failed to name the specific beverage sold.³¹ Where the charge was a sale of "spirituous liquors, to-wit, one pint of whisky," it was held that proof of any kind of spirituous liquor could be made, the fact that the kind of liquor was laid under a *videlicet* not restricting the proof to the particular liquor specified.³² But if the charge be that the liquor was a "spirituous" liquor, the charge cannot be supported by proof that it was an intoxicating liquor, for the term "intoxicating liquor" not only covers "spirituous liquor" but also "vinous liquor," or, perhaps (at least in some jurisdictions), "malt liquor."³³ Statutes frequently modify the rules with reference to allegations concerning the kind of liquors, by providing that the words "intoxicating liquors" shall apply to "alcoholic, vinous, spirituous and malt liquors," in which cases under an allegation of "intoxicating liquor" may be shown any kind of liquor coming within the statutory definition. Where a statute of this kind provided that the word "intoxicating" should include all liquors containing more than a certain percentage of alcohol, a charge of unlawfully keeping "strong and malt and intoxicating liquors" was held sufficient to inform the accused of keeping unlawfully liquors, in fact intoxicating, or at least such as were deemed by law

³¹ Commonwealth v. Jarvis, 120 Ky. 334; 86 S. W. 556; 27 Ky. Law Rep. 712.

³² Brugier v. United States, 1 Dak. 5; 46 N. W. 502. "In cases where there are two words or phrases," said the court, "as in this case—'spirituous liquor' and 'whisky'—the broader includes the latter. The statute does not use the word 'whisky,' but whisky is spirituous liquor. Proof, then, of the giving or selling of 'spirituous liquor,' the word being controlled by a *videlicet*, whatever

the allegation in the indictment might be—whether rum, gin, brandy, or whisky, or any other thing which is spirituous liquor—should be regarded as competent to sustain such charge in the indictment." See also State v. Brown, 51 Conn., and Cockerell v. Commonwealth, 115 Ky. 296; 73 N. W. 760; 24 Ky. L. Rep. 2149; State v. Watts, 101 Mo. App. 658; 74 S. W. 377.

³³ Brantly v. State, 91 Ala. 47; 8 So. 816.

to be "intoxicating."³⁴ Where the word "liquor" was omitted after the word "intoxicating" in that part of the indictment alleging that the accused had no license to sell at retail intoxicating liquors, but the clause was followed by the charge of a sale of "intoxicating liquor," it was held that the indictment was sufficient.³⁵

Sec. 871. Setting out name of liquors—Averments as to properties.

If a statute forbid a sale of a particular kind of liquor it is not necessary to set out its properties. Thus, under a statute forbidding the sale of "lager beer," it is not necessary to allege that it is an "intoxicating liquor."³⁶ And it is sufficient to allege that the accused sold "spirituous liquor, to-wit, one-half gallon of beer."³⁷ If a statute forbid the

³⁴State v. McKenna, 16 R. I. 398; 17 Atl. 51; see also People v. McDonnell, 108 N. Y. Supp. 749.

³⁵Walter v. State, 105 Ind. 589; 5 N. E. 735.

Under the Texas statute forbidding the sale of medicated bitters without a license, it must be averred they were capable of producing intoxication. Cousins v. State (Tex. Cr. App.), 79 S. W. 549.

Charge of unlawfully engaging in the business of a dealer in liquors, not necessary to aver the particular kind sold or that they were intoxicating. Brass v. State, 45 Fla. 1; 34 So. 307; Cæsar v. State, 50 Fla. 1; 39 So. 470.

Where a statute makes the sale of such liquors that if they are drunk to excess, the fact that they would intoxicate if drunk to excess, must be averred. Maddox v. State, 118 Ga. 32; 44 S. E. 806.

Under a statute charging the carrying on the business of a dealer in liquors, it need not be alleged they are intoxicating under Florida Gen. St. 1906, § 3968. Ladson v. State (Fla.), 47 So. 517.

In an indictment for adulteration of spirituous liquors, it need not be stated the kind of liquors sold. State v. Melton, 38 Mo. 368.

³⁶State v. Thornton, 63 N. H. 114; State v. Jenkins, 64 N. H. 375; 10 Atl. 699; State v. Houts, 36 Mo. App. 265; People v. Cox, 106 N. Y. App. Div. 299; 94 N. Y. Supp. 526; affirming 45 N. Y. Misc. Rep. 311; 92 N. Y. Supp. 125; State v. York, 74 N. H. 125; 65 Atl. 685; Commonwealth v. Knoerr, 3 Ky. L. Rep. (abstract) 624.

³⁷State v. Brown, 51 Conn. 1; Wilson v. State (Tex. Cr. App.), 55 S. W. 68.

sale of intoxicating liquor, then a charge of a sale of liquor by name must be followed by an allegation that it is intoxicating unless the court judicially knows the liquor named is intoxicating.³⁸ A charge of a sale of "one pint of liquor" to an habitual drunkard is not sufficient unless followed by an allegation that it is intoxicating,³⁹ and such is the case of a charge of a sale of "malt liquor" under a statute only making the sale of "intoxicating liquor" illegal.⁴⁰ But if a statute in words forbid a sale of "malt liquor," it need not be alleged it was intoxicating.⁴¹ A charge of keeping open a place on election day where intoxicating liquors are sold is not sufficient under a statute making it illegal to keep open a place where spirituous, vinous or malt liquors are sold.⁴² Under a statute forbidding a sale of intoxicating liquors without a license, a charge of a sale of "whisky" is sufficient, for the court judicially knows whisky is intoxicating.⁴³ And the same is true of a sale of "ale,"⁴⁴ but not of a sale of "beer"⁴⁵ unless the word "beer" is included in a statutory definition of intoxicating liquor.⁴⁶ Where a statute forbids a sale of "fermented or distilled" liquor, a charge of a sale of intoxicating liquor, "to-wit, one quart of whisky," is sufficient;⁴⁷ but a mere charge of a sale of "intoxicating liquor" would not be sufficient.⁴⁸ Where a statute forbids a sale of "spirituous liquor," a charge of a sale of "rum, brandy, and gin" is a sufficient allegation that the liquor sold was "spirituous."⁴⁹

³⁸ *Butler v. State*, 25 Fla. 347; 6 So. 67.

³⁹ *Ward v. State*, 48 Ind. 293.

⁴⁰ *Shaw v. State*, 56 Ind. 188.

⁴¹ *State v. Jenkins*, 64 N. H. 375; 10 Atl. 699.

⁴² *Weisbrodt v. State*, 5 Ohio St. 192; 33 N. E. 603.

⁴³ *Carmon v. State*, 18 Ind. 450; *Tefft v. Commonwealth*, 8 Leigh. 72; *Schlicht v. State*, 56 Ind. 173; *State v. Jones*, 3 Ind. App. 121; 29 N. E. 274; *Butler v. State*, 25 Fla. 347; 6 So. 67; *Rutherford v.*

State, 48 Tex. Cr. App. 431; 90 S. W. 172; *State v. Kennard*, 74 N. H. 76; 65 Atl. 376.

⁴⁴ *Garst v. State*, 68 Ind. 101.

⁴⁵ *State v. Brown*, 51 Conn. 1.

⁴⁶ *Welsh v. State*, 126 Ind. 71; 25 N. E. 883; 9 L. R. A. 664.

⁴⁷ *State v. Williamson*, 21 Mo. 496; *State v. Dengolensky*, 82 Mo. 44.

⁴⁸ *State v. Effinger*, 44 Mo. App. 81.

⁴⁹ *State v. Munger*, 15 Vt. 290.

A charge of several kinds of liquor collectively may be made, as "wine, rum and whisky."⁵⁰

Sec. 872. Charging quantity of liquor sold, when necessary.

In all allegations with reference to the quantity sold the statutes making the sale an offense must be carefully considered, for it will be seen by an examination of them a sale of one quantity may be illegal while of another quantity it will not be. As a general rule, especially in sales without a license, the quantity sold must be stated.⁵¹ This is particularly true where different penalties are prescribed for different amounts sold, as where there is one penalty for a sale of a quart or less and another for a sale of over a quart.⁵² In some instances it must be alleged that the sale was by retail.⁵³ If it be alleged that the quantity sold is unknown that will excuse the setting out of the amount.⁵⁴ It has been held that an indictment for keeping a dramshop should state the quantity sold.⁵⁵ Upon a charge of a sale of less than a certain amount, it is not necessary to aver that the sale was made at one time.⁵⁶ Where the proceeding is against a whole-

⁵⁰ Hancock v. State, 114 Ga. 439; 40 S. E. 317.

As to averment that the liquor, if drunk to excess, would intoxicate, see Maddox v. State, 118 Ga. 32; 44 S. E. 806.

A statute providing that "in any indictment for the unlawful sale of spirituous liquors it shall not be necessary to specify the variety," but the accused, on application before trial, may obtain a statement of the particular variety expected to be proven, is constitutional. Kiefer v. State, 87 Md. 562; 40 Atl. 377.

⁵¹ Manville v. State, 58 Ind. 63; Blasdel v. Hewit, 3 Caines, 137; Hubbard v. State, 11 Ind. 554; Commonwealth v. Dean, 21 Pick. 334; State v. Zeitler, 63 Ind. 441;

Smith v. State, 23 Ind. 132; Quinn v. State, 123 Ind. 59; 23 N. E. 977; Neales v. State, 10 Mo. 498; Blakely v. State, 57 Miss. 680; State v. Ryan, 30 Mo. App. 159.

⁵² State v. Clayton, 32 Ark. 185; State v. Hazell, 100 N. C. 471; 6 S. E. 404; State v. Sutton, 100 N. C. 474; 6 S. E. 687.

⁵³ Boyle v. Commonwealth, 14 Gratt. 674.

⁵⁴ Kilborn v. State, 9 Conn. 634.

⁵⁵ Neales v. State, 10 Mo. 498.

⁵⁶ Mullen v. State, 96 Ind. 304; Walter v. State, 105 Ind. 389; 5 N. E. 735.

In Virginia it has been held that, under a charge of selling a precise quantity of liquor, to be drunk where sold, proof of retail-

salor for selling at retail it is generally sufficient to allege a sale of an amount less than can be sold under a wholesale license, and then aver that the sale was without a license, for a wholesaler selling at retail makes a sale without a license authorizing such sale.⁵⁷

Sec. 873. Charging sale of "less than" a specified quantity.

Where a statute makes it an offense only when "less than" a specified quantity—as "less than a quart," as many statutes have done in the past—is sold, the amount sold must be alleged to be less than such quantity, though it is not necessary to allege the precise quantity, although this is frequently done.⁵⁸ And where a statute forbids a sale of less than a particular amount, a charge of a sale of a specific quantity within the prohibition—as where a sale of less than a quart is forbidden and the charge is of a sale of a pint—it is not necessary to allege that the amount was less than the statute permits to be sold—as a pint was sold and no more—upon the theory that the express mention of the quantity sold is an exclusion of any other quantity.⁵⁹ But there are cases—some of which

ing any quality, to be drunk where sold, is sufficient. *Brock v. Commonwealth*, 6 Leigh. 634.

⁵⁷ *State v. Scampini*, 77 Vt. 92; 59 Atl. 201; see *State v. Kiley*, 36 Ind. App. 513; 76 N. E. 184; *Ca-hill v. State*, 36 Ind. App. 507; 76 N. E. 182; *Peters v. Eaton Circuit Judge*, 153 Mich. 467; 117 N. W. 68; 15 Det. L. N. 462; *Tatum v. Commonwealth (Ky.)*, 59 S. W. 32; 22 Ky. L. Rep. 927.

⁵⁸ *Zarresseller v. People*, 17 Ill. 101; *State v. Zeitler*, 63 Ind. 441; *Grupe v. State*, 67 Ind. 327; *State v. Mondy*, 24 Ind. 268; *State v. Wilkson*, 36 Mo. App. 373; *Blakely v. State*, 57 Miss. 680; *State v. Chambless*, 45 Ark. 349; *Commonwealth v. Risner (Ky.)*, 47 S. W. 213; *People v. Myers*, 185 N. Y.

558; 77 N. E. 1193; affirming 109 N. Y. App. Div. 143; 95 N. Y. Supp. 993; *Wong Sing v. Independence*, 47 Ore. 231; 83 Pac. 387; *Cousins v. State (Tex. Cr. App.)*, 79 S. W. 549; *People v. McDonnell (N. Y.)*, 108 N. Y. Supp. 749.

⁵⁹ *Willard v. State*, 4 Ind. 407. This was the rule adopted early in Indiana. Afterwards it was held that a charge of a sale of a pint without alleging the amount sold was less than a quart was not sufficient. *Stuckman v. State*, 21 Ind. 160; *Wood v. State*, 21 Ind. 276; *Grupe v. State*, 67 Ind. 327; *Urbahns v. State*, 72 Ind. 602; *Arbintrode v. State*, 67 Ind. 267; 33 Am. Rep. 86; but subsequently the court reverted to the old rule.

have just been cited—which hold that the amount sold, though there is named a quantity within the prohibition of the statute, must aver that it was less than the amount that might be legally sold—as less than a quart.⁶⁰ An allegation that the quantity sold was less than a quart—where a quart can be sold—is sufficient without alleging the precise quantity and that no more than that was sold.⁶¹ But where the charge was a sale of less than five gallons, “to-wit, one pint,” and the statute merely forbid a sale of less than one gallon, the indictment was held bad, the *videlicet* not being sufficient to save it.⁶² Where a statute prohibits a sale “in less quantity than a quart at a time,” without a license, it is not necessary, on a charge of a sale of less than a quart, to charge that the sale was made “at one time.”⁶³

Brown v. State, 103 Ind. 133; 2 N. E. 296.

Other cases follow the early Indiana case. State v. Lavake, 26 Minn. 526; 6 N. W. 339; 37 Am. Rep. 415; State v. Bach, 36 Minn. 234; 30 N. W. 764; State v. Wyman, 42 Minn. 182; 43 N. W. 1116; Commonwealth v. Bartholomew (Ky.), 33 S. W. 840; Commonwealth v. Eaton, 9 Pick. 165; Commonwealth v. Pearson, 23 Pick. 280, *note*.

⁶⁰ Commonwealth v. Odlin, 23 Pick. 275; People v. Bradt, 46 Hun 445; 10 N. Y. Supp. 157; 7 N. Y. Cr. Rep. 444; State v. Shaw, 13 N. C. 198; State v. Fanning, 38 Mo. 409; State v. Arbogast, 24 Mo. 363.

⁶¹ State v. Mondy, 24 Ind. 268; State v. Jocks, 54 Ind. 412; Redding v. Commonwealth, 3 B. Mon. 339; Haskill v. Commonwealth, 3 B. Mon. 342; State v. Wilkinson, 36 Mo. App. 373; State v. Baldwin, 56 Mo. App. 423; Reams v. State, 23 Ind. 111; McCarl v.

State, 23 Ind. 127; Smith v. State, 23 Ind. 132; State v. Owen, 15 Mo. 506; State v. Lavake, 26 Minn. 526; 6 N. W. 339; 37 Am. Rep. 415; State v. Bach, 36 Minn. 234; 30 N. W. 764; State v. Wynan, 42 Minn. 182; 43 N. W. 1116; People v. Myers, 185 N. Y. 558; 77 N. E. 1193, affirming 109 N. Y. App. Div. 143; 95 N. Y. Supp. 995; People v. Squires, 95 N. Y. Supp. 995; People v. Walsh, 95 N. Y. Supp. 996; State v. Badworth (Minn.), 116 N. W. 486.

Contra, State v. Sills, 56 Mo. App. 408; State v. Stephens, 1 Mo. App. Rep. 500.

⁶² State v. Greenhagen, 36 Mo. App. 24; State v. Baskett, 52 Mo. 389; State v. Hazell, 100 N. C. 471; 6 S. E. 404; State v. Sutton, 100 N. C. 474; 6 S. E. 687; State v. Ryan, 30 Mo. App. 159.

⁶³ Mullen v. State, 96 Ind. 304; Walter v. State, 105 Ind. 589; 5 N. E. 735.

A charge that the accused sold

Sec. 874. Charging sale of a "drink" or "one glass."

A charge of a sale of "a drink" of liquor has been held to be insufficient under a statute prohibiting sales of less than a given quantity.⁶⁴ But there are cases under a statute making it an offense to sell less than a particular amount, and where the quantity sold is not a necessary ingredient of the offense, holding a charge of a sale of a "glass" of liquor to be sufficient, as where it was illegal to sell in any quantity.⁶⁵

Sec. 875. When quantity sold need not be alleged.

There are many statutes which make it an offense to sell intoxicating liquor in any quantity whatsoever, either for a particular purpose, to a particular person or for a particular use. In all such instances quantity is not a material part of the offense and the amount sold need not be alleged.⁶⁶ Such is often the case of a sale of liquor to be drunk upon the premises,⁶⁷ or of a sale on Sunday,⁶⁸ or of a sale to an intoxicated person,⁶⁹ or to a minor.⁷⁰ And on a charge of keeping intoxicating liquors with intent to sell them, it is not

"one-half pint of intoxicating liquor, the same being a less quantity than a quart," is sufficient to charge a sale of less than a quart. *Quinn v. State*, 123 Ind. 59; 23 N. E. 977.

⁶⁴ *Cool v. State*, 16 Ind. 355; *Haven v. State*, 17 Ind. 455.

⁶⁵ *State v. Rust*, 35 N. H. 438; *State v. Reed*, 35 Me. 489; 58 Am. Dec. 727; *New Gloucester v. Bridgham*, 28 Me. 60; *Wrockledge v. State*, 1 Iowa 167; *State v. Peak*, 9 Kan. App. 436; 58 Pac. 1034.

⁶⁶ *Block v. State*, 66 Ala. 493; *Commonwealth v. Eaton*, 9 Pick. 165; *Commonwealth v. Brown*, 12 Met. 522; *Commonwealth v. Churchill*, 2 Met. 118; *Plunkett v. State*, 49 Ind. 68; *Commonwealth v. Greenwell*, 8 Ky. L. Rep. 609;

State v. Kuhn, 24 La. Ann. 474; *White v. State*, 11 Tex. App. 476; *Allen v. State*, 5 Wis. 329; *Commonwealth v. Brown*, 12 Met. 522; *Commonwealth v. Odlin*, 23 Pick. 275; *Commonwealth v. Conant*, 6 Gray 482; *Commonwealth v. Ryan*, 9 Gray 137; *Commonwealth v. Clark*, 14 Gray 367.

⁶⁷ *State v. Corll*, 73 Ind. 535 (overruling *State v. Zeitler*, 63 Ind. 441); *Commonwealth v. Brown*, 12 Met. 522.

⁶⁸ *McCuen v. State*, 19 Ark. 636.

⁶⁹ *Berry v. State*, 67 Ind. 222; *Brow v. State*, 103 Ind. 133; 2 N. E. 296.

⁷⁰ *Payne v. State*, 74 Ind. 203. (Overruling *Grupe v. State*, 67 Ind. 327, and *Arbintrode v. State*, 67 Ind. 267.)

necessary to allege the quantity kept.⁷¹ And the same is true of an illegal manufacture of liquor for sale.⁷²

Sec. 876. Price paid for liquors.

In charging a sale of liquor the price for which it was sold must be alleged or the indictment will be defective.⁷³ But here statutes occasionally dispense with an allegation concerning the price paid, the allegation that the accused "sold" the liquor being sufficient.⁷⁴ And even where it has been held necessary to aver the price, it has been held that the omission is cured by the verdict.⁷⁵ But where an information is based upon an affidavit, a failure to aver the price in the affidavit cannot be cured by the information.⁷⁶ It has been held that an allegation that the liquor was sold by the accused was a sufficient allegation as to the price to admit proof of what it actually was, on the theory that the sale was for its market price.⁷⁷ So where it was charged that the accused bartered one pint of liquor for a pool check, it was held not necessary to allege the value of the check.⁷⁸ And where a statute provided that no indictment should be quashed for a failure to state the price of any matter or thing in any case where the value or price was not of the essence of the offense, it was held that an indictment was not bad for a failure to set out

⁷¹ State v. Teahan, 50 Conn. 92.

⁷² Commonwealth v. Clark, 14 Gray 367.

⁷³ Divine v. State, 4 Ind. 240; State v. Lockstand, 4 Ind. 572; Snyder v. State, 5 Ind. 194; Se-gur v. State, 6 Ind. 451; State v. Downs, 7 Ind. 237; Hubbard v. State, 11 Ind. 554; Cool v. State, 15 Ind. 355; State v. Jocks, 54 Ind. 412; Neales v. State, 10 Mo. 498.

⁷⁴ State v. Fanning, 38 Mo. 359; State v. Donner, 21 Wis. 274; State v. Pischel, 16 Neb. 608; 20 N. W. 848; 21 N. W. 468; State

v. Hines, 13 R. I. 10; State v. Rogers, 39 Mo. 431; O'Connor v. State, 45 Ind. 347; Farrell v. State, 45 Ind. 371; Clare v. State, 5 Clarke (Iowa), 509; State v. Ladd, 15 Mo. 430; State v. Fanning, 38 Mo. 359; Howell v. State, 124 Ga. 698; 52 S. E. 649; Shuler v. State, 125 Ga. 778; 54 S. E. 689.

⁷⁵ Hare v. State, 4 Ind. 241.

⁷⁶ State v. Downs, 7 Ind. 237.

⁷⁷ State v. Muntz, 3 Kan. 383; Taylor v. State, 126 Ga. 557; 55 S. E. 474.

⁷⁸ Forkner v. State, 95 Ind. 406.

the price of a sale of liquor to a minor, the essence of the offense being the placing of liquor within the control of a minor.⁷⁹ Where it is necessary to allege a price, a charge that the accused "did sell, barter and give away" liquor, the first three words may be deemed surplusage and a good charge of a gift remains.⁸⁰ It is not necessary to aver that the sale was "for gain."⁸¹

Sec. 877. Designating purchaser, necessary.

Hopeless confusion exists in the cases on the question of the necessity of naming the purchaser of the liquor. There is a long line of cases that it is necessary.⁸² The reason for this requirement has been stated thus: "The statute makes each

⁷⁹ *State v. Allen*, 12 Ind. App. 528; 40 N. E. 705.

⁸⁰ *Eagan v. State*, 53 Ind. 162.

⁸¹ *Stapf v. State*, 33 Ind. App. 255; 71 N. E. 165.

⁸² *Commonwealth v. Dean*, 21 Pick. 334; *Dreschel v. State*, 35 Tex. Cr. Rep. 580; 34 S. W. 934; *Dorman v. State*, 34 Ala. 216; *State v. Walker*, 3 Har. (Del.) 547; *Myers v. People*, 67 Ill. 503; *State v. Allen*, 32 Iowa 491; *Blodgett v. State*, 3 Ind. 403; *Wilson v. Commonwealth*, 14 Bush 159; *State v. Burgess*, 4 Ind. 606; *Commonwealth v. Bengel*, 13 Ky. L. Rep. 591; *Neales v. State*, 10 Mo. 498; *Martin v. State*, 30 Neb. 507; 46 N. W. 618; *State v. Martin*, 108 Mo. 117; 18 S. W. 1005, affirming 44 Mo. App. 45; *State v. Harris*, 47 Mo. App. 558; *State v. Cassity*, 49 Mo. App. 300, 302; *Ellington v. State* (Tex. Cr. App.), 86 S. W. 330; *State v. Quinn*, 49 Mo. App. 602; *Roberson v. Lambertville*, 38 N. J. L. 69; *State v. Stamey*, 71 N. C. 202; *State v.*

Schroeder, 3 Hill (S. C.) 61; *State v. Steedman*, 8 Rich. L. 312; *State v. Burchard*, 4 S. D. 548; 57 N. W. 491; *State v. Doyle*, 11 R. I. 574; *State v. Plainfield*, 44 N. J. L. 118; *Weston v. Territory*, 1 Okla. Cr. App. 407; 98 Pac. 360; *Capritz v. State*, 1 Md. 569; *State v. Faucett*, 4 Dev. & B. L. 107; *Dixon v. State*, 21 Tex. App. 517; 1 S. W. 448; *State v. Stuckey*, 2 Blackf. 289; *McLaughlin v. State*, 45 Ind. 388; *Stewart v. State*, 25 Ohio Cir. Ct. Rep. 438; *Herron v. State*, 17 Ind. App. 161; 46 N. E. 540; *State v. Ridgway*, 73 Ohio St. 31; 76 N. E. 95; *State v. Fromer*, 14 Ohio Cir. Ct. Rep. 289; 6 Ohio Dec. 374; *Queen v. McGlashun*, 9 East Dist. Ct. Rep. 9; *Mitchell v. State* (Okla.), 101 Pac. 1100; *Eppstein v. State*, 11 Tex. App. 480; *Cousineau v. State*, 10 Mo. 501; *Wilson v. Commonwealth*, 14 Bush 159; *State v. Schweiter*, 27 Kan. 499; *State v. Farming*, 38 Mo. 410.

act of selling a crime. It is proper that the act be so described as to identify it from other acts of a similar kind as near as practicable. And this can be best done by giving the name of the vendee, if known, or if unknown, so alleged.”⁸³ Another court assigned these reasons: “How is he to know what particular sale he is to answer for, unless the indictment in some way identifies the sale complained of by the State as a violation of law? Must he come prepared to prove the legality of each of the thousands of sales he has made? To require this would be unreasonable and oppressive. It is not unreasonable to devolve upon the State the not difficult duty of informing the accused which one of the sales made by him is complained of as unlawful.”⁸⁴ Similar language was used by another court: “An offense charged should be described with certain sufficiency to inform the defendant of the particular thing with which he is charged. Otherwise he cannot know how to prepare his defense. Such certainty is also requisite that he may conveniently avail himself of an acquittal or conviction, in bar of a subsequent prosecution for the same matter.”⁸⁵ If the sale is to the agent of a person, then it must be charged that the sale was to the principal if the principal was disclosed.⁸⁶ But in New Hampshire it is laid down that the sale may be charged to have been made to the agent.⁸⁷ It has been held that the Christian name of the buyer is not necessary,⁸⁸ and where the complaint was by “J S” for a sale to “said J,” this was held sufficient.⁸⁹ The

⁸³ State v. Pischel, 16 Neb. 608; 21 N. W. 468.

⁸⁴ Dixon v. State, 21 Tex. App. 517; 1 S. W. 448.

⁸⁵ State v. Schmail, 25 Minn. 368. See Nelson v. United States, 30 Fed. 112.

⁸⁶ Commonwealth v. O’Leary, 143 Mass. 95; 8 N. E. 887; Commonwealth v. McGuire, 11 Gray, 460; Commonwealth v. Very, 12 Gray, 124; Kemp v. State, 120 Ga. 157; 47 S. E. 548; Cornett v.

Commonwealth (Ky.), 64 S. W. 415; 23 Ky. L. Rep. 773.

⁸⁷ State v. Wentworth, 35 N. H. 442; Hall v. State, 87 Ga. 233; 13 S. E. 634.

⁸⁸ State v. Brown, 31 Me. 520; State v. Rudolph, 3 Hill L. (S. C.) 257.

⁸⁹ Commonwealth v. Melling, 14 Gray 388.

See also State v. Carver, 12 R. I. 285, and Commonwealth v. Certain Intoxicating Liquors, 142 Mass. 470; 8 N. E. 421.

use of the name of the purchaser by which he is usually known when the sale was made is sufficient.⁹⁰ The occupation and residence of the purchaser need not be given.⁹¹ Upon a charge of a sale to "J S and divers other persons," the words "divers other persons" will be regarded as surplusage, and a conviction under such an indictment is no bar to a prosecution for selling to "X Y and divers other persons," on the same day even.⁹² But a charge of a sale to "divers persons" is not sufficient for as many offenses were committed as there were persons, so that it is necessary to insert the name of one particular purchaser.⁹³ Where the offense charged is for selling liquor without a physician's prescription, and the statute required the name of the person to whom the prescription was given to be set out in the prescription, it was held that the name of the vendee must be given.⁹⁴ Another phase of this question is where the defendant is charged with selling as agent of another—as a traveling agent, for instance. In such an instance the name of his principal must be given.⁹⁵

Sec. 878. Designating purchaser, not necessary.

On the other hand, there is abundance of authority that it is not necessary to set forth the name of the purchaser or vendee nor to give any excuse for not setting it forth.⁹⁶ The

⁹⁰ Commonwealth v. Trainor, 123 Mass. 414.

⁹¹ State v. Hines, 13 R. I. 10.

⁹² State v. Cassety, 1 Rich. L. (S. C.) 90; People v. Hasen, 35 N. Y. Misc. Rep. 590; 72 N. Y. Supp. 205; People v. Huffman, 24 N. Y. App. Div. 233; 48 N. Y. Supp. 482.

Such an indictment is said to be bad. State v. Delancey, 76 N. J. L. 462; 69 Atl. 958.

⁹³ Yost v. Commonwealth, 6 Ky. L. Rep. 110; State v. Stucky, 2 Blackf. 289.

⁹⁴ State v. Martin, 108 Mo. 117; 18 S. W. 1005, affirming 44 Mo.

App. 45; State v. Harris, 47 Mo. App. 558; State v. Major, 81 Mo. App. 289.

⁹⁵ State v. Higgins, 53 Vt. 193.

⁹⁶ State v. Bailey, 43 Ark. 150; Commonwealth v. Schoenhutt, 3 Phila. 20; 15 Leg. Int. 4; McCuen v. State, 19 Ark. 630; People v. Sweetser, 1 Dak. 308; 46 N. W. 452; State v. Parnell, 16 Ark. 506; 63 Am. Dec. 72; State v. Moceli, 49 Kan. 142; 30 Pac. 189; Lea v. State, 64 Miss. 201; 1 So. 51; Wheeler v. State, 4 Ga. App. 325; 61 S. E. 409; Osgood v. People, 39 N. Y. 449; People v. Polhemus, 8 N. Y. App. Div.

reasons for this have judicially been stated as follows: "As the *gravamen* of the misdemeanor is the selling of liquor without a license, the person of the party purchasing is not an

133; 40 N. Y. Supp. 491; Lincoln Center v. Linker, 5 Kan. App. 242; 47 Pac. 174; Johnson v. State, 40 Ark. 453; Jordan v. State, 22 Fla. 528; State v. Curtright (Mo.), 114 S. W. 1146; Carter v. State, 68 Ga. 826; Carmody v. People, 17 Ill. 158; Junction City v. Webb, 44 Kan. 71; 23 Pac. 1073; State v. Kuhn, 24 La. Ann. 474; State v. Brown, 41 La. Ann. 771; 6 So. 638; State v. Spain, 29 Mo. 415 (overruling Neale v. State, 10 Mo. 430); State v. Fanning, 38 Mo. 359; State v. Ladd, 15 Mo. 430; State v. Jaques, 68 Mo. 260; State v. Rogers, 39 Mo. 431; People v. Adams, 17 Wend. 475; Commonwealth v. Dove, 2 Va. Cas. 26; State v. Pendergast, 20 W. Va. 672; State v. Chiswell, 36 W. Va. 659; 15 S. E. 412; State v. Bielby, 21 Wis. 204; State v. Gummer, 22 Wis. 441; State v. Becker, 20 Iowa 438; State v. Burks, 33 Kan. 708; 7 Pac. 591; United States v. Gordon, 1 Cranch, C. C. 58; Fed. Cas. No. 15233; Hill v. Dalton, 72 Ga. 314; State v. Caldwell (Miss.), 17 So. 372; State v. Ford, 47 Mo. App. 601; State v. Houts, 36 Mo. App. 295; Hornberger v. State, 47 Neb. 40; 66 N. W. 23; State v. Dellaire, 4 N. D. 312; 60 N. W. 988; State v. Doyle, 15 R. I. 527; 9 Atl. 900; State v. Weeks, 7 Humph. 522; State v. Hickerson, 3 Heisk. 375; State v. Staley, 3 Lea 565; Mansfield v. State, 17 Tex. App. 468;

State v. Munger, 15 Vt. 290; Commonwealth v. Smith, 1 Gratt. 553; State v. Ferrell, 30 W. Va. 363; 5 S. E. 155; Commonwealth v. Schoenhult, 3 Ohio 20; Commonwealth v. Baird, 4 S. & R. 141; State v. Bailey, 43 Ark. 150; Cochran v. State, 26 Tex. 678; State v. Heldt, 41 Tex. 220; Riley v. State, 43 Miss. 397; Dansey v. State, 23 Fla. 316; 2 So. 692; Halstead v. Commonwealth, 5 Leigh. 724; Rice v. People, 38 Ill. 435; Coleman v. State, 150 Ala. 64; 43 So. 715 (by statute); State v. Burkholter, 118 La. 657; 49 So. 268; State v. Potter, 125 Mo. App. 465; 102 S. W. 668; Langan v. People, 32 Colo. 414, 76 Pac. 1048; Lincoln Center v. Linker, 7 Kan. App. 282; 47 Pac. 174; Runde v. Commonwealth (Va.), 61 S. E. 792; State v. Heibel, 116 Mo. App. 43; 90 S. W. 758; State v. Back, 99 Mo. App. 34; 72 S. W. 466; Hancock v. State, 114 Ga. 439; 40 S. E. 317; People v. McBride, 234 Ill. 146; 84 N. E. 865; Shuler v. State, 125 Ga. 778; 54 S. E. 689; Newman v. State, 101 Ga. 534; 28 S. E. 1005; State v. Williams, 11 S. D. 64; 75 N. W. 815; Wells v. State, 118 Ga. 556; 45 S. E. 443; Parmenter v. United States, 6 Ind. Ter. 530; 98 S. W. 340; Rose v. Commonwealth, 106 Va. 850; 56 S. E. 151; Fletcher v. Commonwealth, 106 Va. 840; 56 S. E. 149.

essential ingredient of the charge.⁹⁷ The statute makes no discrimination of grade or degree of the offense, based on the age, sex, or personality in any way of the persons to whom the liquors are sold. Hence, the name of the buyer is a matter of no essential importance in this part of the indictment.⁹⁸ It contains a special averment of the date of the offense charged, and that is sufficient to guard the accused against a second prosecution for the same offense."⁹⁹ It has also been judicially declared that, "The offense complained of works no injury upon the individual rights of the person to whom the sale was made, and none are supposed to be violated, and hence the designation of such person by name is in no way material to constitute the offense."¹ It seems to us that the reasoning of those two last cases is not sound. The indictment hinged upon the fact of a sale, and all the elements of a sale should be charged and not conclusions that one was made. As well might it be held that the accused committed murder, or "with a gun then and there loaded with powder and leaden ball" he committed murder. No one for an instance would think such a charge sufficient. In a number of States statutes dispense with the necessity of alleging the name of the purchaser, and these statutes have been held valid.² Where the charge is of a sale to one of a particular class of persons—as to a minor or to an habitual drunkard—then there are far stronger reasons why the name of the vendee should be given, and it is required even in States where a charge of a sale generally need not set forth the name of the purchaser.³ It is

⁹⁷ But is not this statement mere assumption?

⁹⁸ But is this true? It seems to us a mere assumption to say so.

⁹⁹ *State v. Brown*, 41 La. Ann. 771; 6 So. 638. Of course, the last sentence is a mere assertion.

¹ *State v. Bielby*, 21 Wis. 204.

² *State v. Whisner*, 35 Kan. 271; 10 Pac. 852; *State v. Schweifer*, 27 Kan. 499; *Contra*, *State v. Jeffcoat*, 54 S. C. 196; 32 S. E. 298; *State v. Couch*, 54 S. C. 256; 32

S. E. 408; *People v. McBride*, 234 Ill. 146; 84 N. E. 865; *People v. Shaver*, 37 N. Y. App. Div. 21; 55 N. Y. Supp. 701.

In the United States Federal Court it has been held that the omission to name the purchaser is not sufficient cause for a reversal, though possibly it would be in the trial court sufficient cause for quashing or setting aside the indictment.

³ *Myers v. People*, 67 Ill. 503.

quite evident though, that there are quite a number of offenses consisting of a series of sales necessary to constitute the offense where it would not only be impossible to set forth the names of the purchasers, or where sales are not always essential to the commission of the offense. Such is the crime of "pursuing the business" of liquor selling without a license. One sale does not necessarily constitute the offense, although it may be sufficient under the circumstances under which it is made from which the conclusion can be drawn that the defendant was "pursuing the business" of liquor selling.⁴ So upon a charge of keeping liquors for sale without a license, the names of purchasers need not be set out, for the offense is the "keeping for sale" and not the "sale" of liquors.⁵ And so of "trading" in liquors.⁶ So where it was an offense to sell liquor to a slave, it was not necessary to set out the name of the owner of the slave.⁷ In an indictment for suffering liquor to be drunk upon the premises the name of the person so permitted to drink it need not be set out.⁸ And so of a sale of adulterated liquor.⁹ But upon a charge of a sale to a minor, the name of the minor must be given, or it be alleged that his name is unknown.¹⁰ A statute dispensing with an allegation as to who was the purchaser is constitutional.¹¹

⁴ Mansfield v. State, 17 Tex. App. 468; State v. Muse, 4 Dev. & B. (N. C.) 319; State v. Del-
laire, 4 N. D. 312; 60 N. W. 688;
State v. Doyle, 15 R. I. 527; 9
Atl. 900; Hipes v. State, 18 Ind.
App. 426; 48 N. E. 12.

An early decision in Missouri
holds that on a charge of keep-
ing a dramshop it is necessary
to allege to whom the liquor was
sold. Neales v. State, 10 Mo. 498,
but that case has been overruled in
State v. Spain, 29 Mo. 415.

⁵ Hornberger, 47 Neb. 40; 66 N.
W. 23; State v. Ford, 49 Mo. App.

601; Donovan v. State, 170 Ind.
123; 83 N. E. 744.

Contra, State v. Teasdale, 145
N. C. 422; 58 S. E. 998.

⁶ State v. Weeks, 7 Humph. 522;
Mansfield v. State, 17 Tex. App.
468.

⁷ Commonwealth v. Smith, 1
Gratt. 553.

⁸ State v. McAnally, 105 Mo.
App. 333; 79 S. W. 990.

⁹ Leothall v. Smith, 15 N. S. W.
L. R. 277.

¹⁰ Trometer v. District of Colum-
bia, 24 App. D. C. 242.

¹¹ People v. McBride, 234 Ill.
146; 84 N. E. 865.

Sec. 879. How purchaser described—Name unknown.

In those States where the name of the purchaser must be alleged, then it will be sufficient to use the name by which he is commonly known, or, if he is commonly known by two names, then by either of them, or if he be known by one name but his true name is not that one, then his true name may be used.¹² But if the name of the purchaser be unknown, then it may be alleged that his name is unknown to the grand jurors.¹³ The allegation that the name of the purchaser is unknown "by" the grand jurors is equivalent to alleging that it is unknown "to" them.¹⁴ And an allegation that the liquor was sold "to certain persons whose names are unknown," supports a verdict of a sale to one unknown person, no objection to the allegation having been made until after verdict found.¹⁵ Some of the cases hold, in addition to alleging that the name of the purchaser was unknown to the grand

¹² *Henry v. State*, 113 Ind. 304; 13 N. E. 593.

¹³ *State v. Stucky*, 2 Blackf. 289; *State v. Carter*, 7 Humph. 158; *Commonwealth v. Hitchins*, 5 Gray 482; *McLaughlin v. State*, 45 Ind. 338; *Ashley v. State*, 92 Ind. 559; *Capritz v. State*, 1 Md. 569; *Commonwealth v. Griffin*, 105 Mass. 175; *State v. Schmail*, 25 Minn. 368; *State v. Pischel*, 16 Neb. 608; 21 N. W. 468; *Martin v. State*, 30 Neb. 421; 46 N. W. 618; *Roberson v. Lambertville*, 38 N. J. L. 69; *Flanagan v. Plainfield*, 44 N. J. L. 118; *State v. Fawcett*, 20 N. C. 239; *Commonwealth v. Pfaff*, 17 Pa. Co. Ct. Rep. 302; 5 Pa. Dist. Rep. 59; 26 Pitts. L. J. (N. S.) 254; *Commonwealth v. Powers*, 17 Pa. Co. Ct. Rep. 304; *State v. Doyle*, 11 R. I. 574; *State v. Baughmer*, 5 S. D. 461; 59 N. W. 736; *State v. Carter*, 7 Humph. 158; *State v.*

Harris, 2 Sneed 224; *Nixon v. State*, 21 Tex. App. 517; 1 S. W. 448; *Martin v. State*, 31 Tex. Cr. Rep. 27; 19 S. W. 434; *State v. Higgins*, 53 Vt. 191; *State v. Bodeckar*, 11 Wash. 417; 39 Pac. 645; *State v. Dowdy*, 145 N. C. 432; 58 S. E. 1002; *State v. Toler*, 145 N. C. 440; 58 S. E. 1005; *Shelling v. Commonwealth*, 11 Ky. L. Rep. (abstract) 675.

Where an indictment charged a sale to persons unknown, it was held proper to show a sale to one person alone. *People v. Seeley*, 105 N. Y. App. Div. 149; 93 N. Y. Supp. 982.

¹⁴ *Commonwealth v. Griffin*, 105 Mass. 175.

¹⁵ *Commonwealth v. Early*, 161 Mass. 186; 36 N. E. 794; *People v. Bradley*, 58 Hun 601; 11 N. Y. Supp. 594; *Stewart v. State*, 25 Ohio Cir. Ct. Rep. 438.

jurors, the indictment must give a description of him¹⁶ by which he may be identified, or tending to identify him;¹⁷ but the great majority of the cases hold that the mere allegation that he is unknown is sufficient. If the name of the purchaser was actually known to the grand jurors, or the person making the affidavit on which the prosecution is founded actually knew the name of the purchaser, it has been held that the prosecution must fail;¹⁸ but, on the other hand, the contrary has been held.¹⁹

Sec. 880. Negating defense and exceptions.

Where an offense is created by statute and exception is made, either by another statute or by another and substantive clause of the same statute, it is not necessary for the prosecution, either in the indictment or by evidence, to show that the defendant does not come within the exception; but that is for the defendant to prove the exception and which he may do under the plea of not guilty.²⁰ But this rule must be carefully

¹⁶ State v. Schmail, 25 Minn. 368.

¹⁷ Dixon v. State, 21 Tex. App. 517; 1 S. W. 448; Martin v. State, 31 Tex. Cr. Rep. 27; 19 S. W. 434.

¹⁸ Blodget v. State, 3 Ind. 403; Stone v. State, 30 Ind. 115.

¹⁹ People v. Bradley, 58 Hun 601; 11 N. Y. Supp. 594.

See Dutton v. State, 2 Ind. App. 488; 28 N. E. 995.

²⁰ Archbold's Crim. Prac. & Plead. (8th ed.), p. 361; State v. Maddox, 74 Ind. 105; State v. Wadsworth, 30 Conn. 55; Russell v. State, 50 Ind. 174; Commonwealth v. Hill, 5 Gratt. 682; Alexander v. State, 48 Ind. 394; State v. Mullins, 67 Ark. 422; 55 S. W. 211; Crawford v. State, 155 Ind. 592; 57 N. E. 931; Metzger v. People, 14 Ill. 101; United

States v. Cook, 17 Wall. 168; State v. Buskirk, 18 Ind. App. 629; 48 N. E. 872; Foster v. Hazen, 12 Barb. 547; Faribault v. Hulett, 10 Minn. 30; Regina v. White, 21 Up. Can. Pr. 354; Toledo, etc. R. Co. v. Pence, 68 Ill. 524; McKeown v. Lambe, 20 Rev. Leg. 232; Vavasour v. Ormrod, 6 B. & C. 530; People v. Hazen, 35 N. Y. Misc. Rep. 590; 72 N. Y. Supp. 205; Steel v. Smith, 1 Barn. & Ald. 94; Smith v. Adrain, 1 Mich. (Man.) 495; Commonwealth v. Murphy, 2 Gray, 510; Griffin v. Commonwealth, 7 Ky. L. Rep. (abstract), 300; State v. Hall, 2 Bailey (S. C.) 151.

"The rule is that when the exception is in the enacting clause it must be negated in the pleading, but when it is in a subsequent section, or in a separate proviso

observed so as not to extend its provisions to those instances to which it does not, though perhaps seemingly, apply. Thus, if the negative clause, or proviso or exception, describes the offense, and does not merely afford an excuse, then it must be met by an allegation, regardless of the position it holds in the statute.²¹ So where a statute provided that "no person shall sell intoxicating liquor except," setting out when it might be sold, it was held that the indictment must set out and negative every exception.²² The same rule was followed on a statute making it an offense to sell liquor without a physician's prescription or a regular practitioner's. Here it was held that the indictment must not only negative the fact that the accused made the sale without a physician's prescription, but also without the prescription of a regular practitioner.²³ But where a proviso provided that the statute should not apply to an incorporated city or town, it was held not necessary to aver that the offense was not committed in a city or town, for if it was committed in either of them that was a defense to be brought forward by the accused.²⁴ And where in its first section a statute forbade the sale of intoxicating liquors, yet in the proviso of another section allowed the sale of "wine

in the same section, it need not be." *Tomlinson v. Bainake*, 163 Ind. 112; 70 N. E. 155; *United States v. Britton*, 107 U. S. 670; 2 Sup. Ct. 512; *State v. McGlynn*, 34 N. H. 422; *Ex parte Fedderwitz*, 130 Cal. xviii; 62 Pac. 935.

²¹ *State v. Miller*, 24 Conn. 523; *Thweatt v. State* (Tex. Cr. App.), 95 S. W. 917; *State v. Abhey*, 29 Vt. 60; 67 Am. Dec. 754; *Kiefer v. State*, 87 Md. 562; 40 Atl. 377; *State v. Keen*, 34 Me. 500; *Tigner v. State*, 119 Ga. 114; 45 S. E. 1001; *State v. Lane*, 33 Me. 536; *Fleeks v. State*, 47 Tex. Cr. App. 327; 83 S. W. 381; *State v. Buford*, 10 Mo. 703; *State v. Russell*, 69 Minn. 499; 72 N. W. 837; *Commonwealth v.*

Burding, 12 Cush. 506; *State v. Curley*, 33 Iowa 359; *People v. Shuler*, 136 Mich. 161; 98 N. W. 986; 10 Det. L. N. 1004; *Commonwealth v. Hill*, 5 Gratt. 682; *Kinser v. State*, 9 Ind. 543; *Commonwealth v. Young*, 15 Gratt. 664; *Bruttor v. State*, 4 Ind. 601; *State v. Thompson*, 2 Kan. 432.

²² *State v. O'Donnell*, 10 R. I. 472; *Hirn v. State*, 1 Ohio St. 15; *Regadenz v. State*, 171 Ind. 387; 86 N. E. 449; *State v. Brown*, 31 Me. 522; *Commonwealth v. Greenwell*, 8 Ky. L. Rep. (abstract) 609.

²³ *Thompson v. State*, 37 Ark. 408.

²⁴ *State v. Tamler*, 19 Ore. 528; 25 Pac. 71.

manufactured of pure juice of the grape cultivated in the State, or beer, ale, or cider," it was held not necessary in charging an offense as defined in the first section, to aver the liquor sold was not of the excepted class.²⁵ So where a statute required saloons to be closed by nine o'clock in the evening, but power was given in a proviso to a town to extend the time until ten o'clock, it was held not necessary to aver that the town had not extended the time.²⁶ If a statute is limited to a designated class of persons, then there are no exceptions to be negatived nor to be pleaded by the accused as an excuse.²⁷ And where it was unlawful to employ female waiters in a saloon, but by a proviso the statute did not apply to the employment of the keeper's wife and daughters, it was held not necessary to aver that the females employed in contravention of its terms were not the wife or daughters of the defendant.²⁸ Where an indictment charged a violation of a wine law regulating sales, it was held not necessary to allege that local option had not been adopted in the territory where the sale took place, which would have been a complete defense to the offense as charged, though it might have been a violation of such law.²⁹ If by a proviso in a section forbidding a sale or gift of liquor, a sale or gift is permitted in certain instances, it need not be negatived that the particular sale was not one of those instances.³⁰ And where a proviso permits hotel keepers to sell liquors to *bona fide* registered guests on Sundays, it need not be alleged that the person to whom liquor was sold on Sunday was such a guest.³¹ So where a statute prohibited the keeping of intoxicating liquor as authorized by it, but declaring that it shall not apply to certain sales of cider and native wine, it was held not necessary to aver that the liquor

²⁵ Becker v. State, 8 Ohio St. 391; State v. Shaw, 35 N. H. 217.

²⁶ People v. Richmond, 59 Mich. 570; 26 N. W. 770; State v. Wade, 34 N. H. 495.

²⁷ Bode v. State, 7 Gill (Md.) 326; State v. Beneke, 9 Iowa 203.

²⁸ Walter v. Commonwealth, 88 Pa. 137; 32 Am. Rep. 429.

²⁹ State v. Mullins, 67 Ark. 422; 55 S. W. 211.

³⁰ Sims v. State, 135 Ala. 61; 33 So. 162.

³¹ Lehman v. District of Columbia, 19 App. D. C. 217.

sold was not cider or native wine.³² But a statute requiring all licensees "to close their places of business (hotel excepted) at 11 o'clock at night" requires the pleader to negative the exception.³³ Occasionally statutes provide that it shall not be necessary to negative exceptions in them, and these are controlling.³⁴

Sec. 881. Negating authority to sell.

Where only town agents could sell intoxicating liquors in a town, an allegation that the accused unlawfully kept a shop used for the sale of intoxicating liquors was held sufficient to negative his authority to sell.³⁵ And where the indictment was against A and B jointly, an allegation that A and B were not agents of the town imported that neither of them was such agent.³⁶ Under some of the statutes it is not necessary to aver that the accused was not a town agent at the time of the sale, that being a matter of defense;³⁷ but if it is, an allegation that he sold liquor "without being duly appointed and authorized

³² State v. Paige, 78 Vt. 286; 62 Atl. 1017; Kemp v. State, 120 Ga. 157; 47 S. E. 548; State v. Barton, 138 N. C. 575; 50 S. E. 214; Hancock v. State, 114 Ga. 439; 40 S. E. 317.

Contra, Commonwealth v. Petranich, 183 Mass. 217; 66 N. E. 807.

³³ State v. Jarvis, 67 Minn. 10; 69 N. W. 474.

³⁴ State v. Donahue, 120 Iowa 154; 94 N. W. 503; State v. Brown (Iowa), 109 N. W. 1011.

Negative allegation as to closing saloon, but not building in which saloon was located. State v. Russell, 69 Minn. 499; 72 N. W. 837.

Upon a charge of a sale in local option territory it need not be alleged the sale was not legal, for if legal, that is a matter of de-

fense. Ikard v. State (Tex. Cr. App.), 79 S. W. 32. But see State v. Handler, 178 Mo. 38; 76 S. W. 984.

For an illustration as to sufficiency of an allegation of exception, see State v. Scampini, 77 Vt. 92; 59 Atl. 201.

As a rule it is not necessary to aver that the sale was not by a druggist, even though such a person might lawfully sell without a license. *Ex parte* Fedderwitz, 130 Cal. xviii; 62 Pac. 935; Regadanz v. State, 171 Ind. 387; 86 N. E. 449.

³⁵ State v. Lang, 63 Me. 215.

³⁶ State v. Wadsworth, 30 Conn. 59.

³⁷ Commonwealth v. Tuttle, 12 Cush. 502; State v. Taylor, 73 Mo. 52.

therefor," is a sufficient showing of a want of authority to make the sale.³⁸ It is necessary, however, in nearly all such States to allege that the defendant was not the agent of the town to make the sale,³⁹ though it is not necessary to allege that he was not the agent of any other town, where the statute limits his authority to sell in a particular town.⁴⁰ Where a statute provided that "no person shall be allowed to manufacture any ale or become a common seller thereof without being duly appointed" for that purpose, an indictment charging that the accused "did presume to be and was a common seller of ale without being duly appointed by the town council of C an agent of said town of C for the sale of ale," was held to charge that he was not appointed agent according to the provisions of the statute under which the indictment was brought.⁴¹ But, as a rule, upon a charge of keeping a house or tenement "used for illegal sale and illegal keeping of intoxicating liquor," it is not necessary to distinctly negative the accused's authority to sell or keep intoxicating liquors,⁴² and, in fact, it has been held that an allegation of a lack of authority to keep liquors for sale in such house was not necessary.⁴³ Nor,

³⁸ Commonwealth v. Murphy, 2 Gray 510; Commonwealth v. Wilson, 11 Cush. 412; Commonwealth v. Lafontaine, 3 Gray 479; Commonwealth v. McSherry, 3 Gray 481, *note*; Commonwealth v. Clapp, 5 Gray, 97; Commonwealth v. Conant, 6 Gray 482; Commonwealth v. Keefe, 7 Gray 332; Commonwealth v. Roland, 12 Gray 132; Commonwealth v. Boyle, 14 Gray 3; Commonwealth v. Clark, 14 Gray 367; Commonwealth v. Dunn, 14 Gray 401; Commonwealth v. Chisholm, 103 Mass. 213; Commonwealth v. Lynn, 107 Mass. 214; Commonwealth v. Grady, 108 Mass. 412; Commonwealth v. Dunn, 111 Mass. 425; Commonwealth v. Fredericks, 119 Mass. 199; Common-

wealth v. Chadwick, 142 Mass. 595; 8 N. E. 589; Commonwealth v. Crosley, 162 Mass. 515; 39 N. E. 278; Norton v. State, 65 Miss. 297; 3 So. 665; West v. State, 70 Miss. 598; 12 So. 903; Harris v. State (Miss.), 12 So. 904; State v. Sutton, 25 Mo. 303; State v. Barker, 3 R. I. 280.

³⁹ State v. Savage, 48 N. H. 484.

⁴⁰ State v. Shaw, 35 N. H. 217.

⁴¹ State v. Johnson, 3 R. I. 94; Commonwealth v. Clark, 14 Gray 367.

⁴² Commonwealth v. Edds, 14 Gray 406.

⁴³ Commonwealth v. Martin, 108 Mass. 29, *note*; Commonwealth v. Brussie, 145 Mass. 117; 3 N. E. 378.

in such an instance, is it necessary to negative an authority to sell the liquor, for the offense is the keeping of the tenement with the illegal intent and not the sale.⁴⁴ Where a statute made it an offense to receive liquors for the purpose of conveying it to a purchaser and thus completing an intended sale, it is not necessary that authority of the purchaser should be negatived because his intention with regard to the liquor is immaterial.⁴⁵

Sec. 882. Negating special authority.

Under many of the statutes sales which would be otherwise illegal are rendered legal by reason of the consent of someone in authority to make the sale. Such was frequently the case of sales to slaves previous to the abolition of slavery, where the consent or authority of the master to make the sale was necessary. In one case the averment on this point was a charge of a sale "to one Henry, a slave, the property of M H, a certain commodity, namely, one gallon of whisky, without the consent of the master, owner or overseer of said slave, either verbally or in writing, expressing the article permitted to be sold, first had and obtained," and this was held a sufficient showing of lack of permission or authority to make the sale.⁴⁶ But in a subsequent case in the same State a charge of a sale "without the consent of the master, overseer or agent of such slave" was held fatally defective.⁴⁷ Where a sale to a minor was illegal "without the consent of the parent, guardian, master or other person having the legal charge" of him, the omission of the words "master" and "legal" was held not to render the indictment bad.⁴⁸ But where a sale to a minor was illegal if made without the written consent of his parent or guardian, a charge of a sale without the written consent of the parent alone was deemed bad.⁴⁹ Yet where the sale

⁴⁴ Commonwealth v. Bennett, 108 Mass. 30; 11 Am. Rep. 304.

⁴⁵ Commonwealth v. Locke, 114 Mass. 288.

⁴⁶ Lindsay v. State, 19 Ala. 560. See Commonwealth v. Kenner, 11 B. Mon. 1.

⁴⁷ Agee v. State, 25 Ala. 67.

⁴⁸ Weed v. State, 55 Ala. 13; Page v. State, 84 Ala. 446; 4 So. 697; Freiberg v. State, 94 Ala. 91; 10 So. 703.

⁴⁹ State v. Emerick, 35 Ark. 324; McDaniel v. State (Tex. Cr.

was illegal "without the written consent or order of the parent," an omission of the words "or order" was held not to render the indictment bad.⁵⁰ And the same ruling was made where the indictment alleged a sale without the written consent of the "mother" when the statute required the written consent of the "parent."⁵¹ Where the written permission to sell to a slave must have been given by his owner, a charge of a lack of such permission from another person was held insufficient.⁵² Alleging a sale to a slave "who then and there did not have a written order," where the statute required a sale "upon the written order" of his master, was not sufficient.⁵³ Nor was a charge of a sale to a slave "without the written consent of master, mistress, overseer or employer of said negro slave," under a statute requiring an indictment to set forth the facts "in plain and intelligible words."⁵⁴ But the allegation "without the written order of the parent or guardian" of a minor is sufficient.⁵⁵ Where verbal permission is all that is required to make the sale legal, a charge of a sale without a written permission is insufficient.⁵⁶

Sec. 883. Negating licenses.

Where sales may be lawfully made under a license, then, in order to convict a vendor of liquor who has no license, it is necessary to allege that at the time of the sale he did not then have a license authorizing him to make the sale at the place where made, unless the statute provides that a sale is absolutely prohibited at the particular place where made. The

App.), 20 S. W. 1108; *Shackleford v. State* (Tex. Cr. App.), 22 S. W. 26; *Blevins v. State* (Tex. Cr. App.), 23 S. W. 688.

⁵⁰ *Mogler v. State*, 47 Ark. 109; 14 S. W. 473.

⁵¹ *Newman v. State*, 63 Ga. 533; *Heyman v. State*, 64 Ga. 437.

But where the evidence showed the father was dead, it was held too late to object to the indict-

ment on this point. *Reich v. State*, 63 Ga. 616.

⁵² *State v. Boice, Cleves* (S. C.) 77.

⁵³ *Franklin v. State*, 12 Md. 236.

⁵⁴ *State v. Schwartz*, 25 Tex. 764.

⁵⁵ *Parkinson v. State*, 14 Md. 184; 74 Am. Dec. 522.

⁵⁶ *Taylor v. State*, 7 Humph. 510.

indictment must negative that the defendant had a license.⁵⁷ But in those instances where the offense can be committed by a licensee as well as by an unlicensed person, an allegation concerning a license is unnecessary. Such is the case of a sale to a minor,⁵⁸ or on Sunday.⁵⁹ Nor is it necessary in case of a charge of keeping a liquor nuisance.⁶⁰ So where it is an offense to sell liquors to be used or consumed on the premises or about them, a reference to the fact that the accused had no license is not necessary.⁶¹ But where a statute prohibited sales of liquor "except as authorized in this act," it was held necessary to negative the existence of the license because the exception was in that part of the section creating the offense.⁶² If the pleader undertakes to enumerate all the instances in which a sale may be made with-

⁵⁷ *Howe v. State*, 10 Ind. 423; *State v. Watson*, 5 Blackf. 155; *Vogel v. State*, 31 Ind. 64; *Commonwealth v. Thurlow*, 24 Pick. 374; *Commonwealth v. Shaw*, 5 Cush. 522; *Commonwealth v. Byrnes*, 126 Mass. 248; *Smith v. State (Ala.)*, 46 So. 753; *Fredricks v. Passaic*, 42 N. J. L. 87; *State v. Horan*, 25 Tex. Supp. 371; *Commonwealth v. Hampton*, 3 Gratt. 590; *State v. Savage*, 48 N. H. 484; *Koopman v. State*, 61 Ala. 70; *State v. Carpenter*, 20 Ind. 49; *Ex parte Woodhouse*, 3 Low Can. Rep. 92; *Regina v. Haggard*, 30 Upp. Can. Rep. 152; *State v. Holder*, 133 N. C. 709; 45 S. E. 862; *Jefferson v. People*, 101 N. Y. 19; 3 N. E. 797; *Commonwealth v. Hayes*, 125 Mass. 209; *Commonwealth v. Hanley*, 121 Mass. 377; *State v. Lunsford*, 150 N. C. 862; 64 N. E. 745; *Commonwealth v. Burke*, 121 Mass. 39; *Commonwealth v. Thayer*, 8 Met. 525; *Commonwealth v. Stowell*, 9 Met. 572;

Commonwealth v. Baker, 10 Cush. 405; *Commonwealth v. Stegala*, 3 Ky. L. Rep. (abstract) 687; *South v. Commonwealth*, 79 Ky. 493; 3 Ky. L. Rep. 276; *State v. Cain*, 8 W. Va. 720; *State v. Schmidt*, 34 Kan. 399; 8 Pac. 867; *Commonwealth v. Lattinville*, 120 Mass. 385.

⁵⁸ *Vogel v. State*, 31 Ind. 64; *Johnson v. State*, 74 Ind. 197; *State v. Gowgill*, 75 Ind. 599.

⁵⁹ *Lehritter v. State*, 42 Ind. 383; *Hulsman v. State*, 42 Ind. 500; *Ginz v. State*, 44 Ind. 218; *Stein v. State*, 50 Ind. 21.

⁶⁰ *State v. Teissedre*, 30 Kan. 476; 2 Pac. 650; *Commonwealth v. Harvey*, 16 B. Mon. 1; *Commonwealth v. Allen*, 15 B. Mon. 1; *State v. Collins*, 11 Iowa 141.

⁶¹ *Commonwealth v. Shaw*, 5 Cush. 522; *Commonwealth v. Luddy*, 143 Mass. 563; 10 N. E. 448.

⁶² *Commonwealth v. Byrnes*, 126 Mass. 248.

out a license, and does not allege that the sale was without a license, then he must enumerate all such instances or the indictment will be bad.⁶³ An allegation in an indictment against the defendant and another that such other had no license is defective.⁶⁴ But here it will be found that statutes dispense with such an allegation, leaving the fact of license a matter of defense for the accused to bring forward.⁶⁵ Yet where a statute provides that it should be unlawful for any person to sell liquor "except a person duly licensed therefor," it is necessary to set up that the accused had no license.⁶⁶ This is particularly true where the statute gives a form of indictment and declares that it shall be sufficient, in which no provision is made for an allegation concerning a license.⁶⁷ And upon a charge of a sale of liquor without a license it need not be alleged that the owner of the liquor had no license, for if the accused acted as the agent of a licensed owner that is a defense for him to bring forward.⁶⁸

Sec. 884. Sufficiency of negation of license.

What will be a sufficient allegation as to the lack of a license, or, in other words, as to the negation of a license, largely depends upon the language of the statute under which it is drawn, but, as a rule, the courts permit a broad allegation that the sale was "without a license and contrary to law" to suffice.⁶⁹ Of course, this is true where the form of

⁶³ *State v. Holder*, 133 N. C. 709; 45 S. E. 862.

⁶⁴ *State v. Holder*, 133 N. C. 709; 45 S. E. 862.

⁶⁵ *State v. Devers*, 38 Ark. 517; *Glass v. State*, 45 Ark. 173; *State v. Collins*, 11 Iowa 141; *Commonwealth v. Harvey*, 16 B. Mon. 1; *Commonwealth v. Allen*, 15 B. Mon. 1; *State v. Adams*, 6 N. H. 532; *Jefferson v. People*, 101 N. Y. 19; 3 N. E. 797.

⁶⁶ *Commonwealth v. Harvey*, 16 B. Mon. 1; *Commonwealth v. Allen*, 15 B. Mon. 1.

⁶⁷ *O'Connor v. State*, 45 Ind. 347; *Farrell v. State*, 45 Ind. 371.

⁶⁸ *State v. Devers*, 38 Ark. 517. It has been held that a charge the accused unlawfully sold liquor was sufficient without making any statement concerning a license. *State v. Polk*, 69 Atl. 1006.

⁶⁹ *Elam v. State*, 25 Ala. 53; *Powell v. State*, 69 Ala. 10; *Boon v. State*, 69 Ala. 226; *Sills v. State*, 76 Ala. 92; *McCreary v. State*, 73 Ala. 480; *Hardison v.*

an indictment is provided for in the statute or code.⁷⁰ In all these instances the negation of the license was held sufficient: "Without first obtaining a license therefor from the authorities authorized to grant license."⁷¹ Was "not then and there licensed according to the laws of Indiana, in force at the time, to sell intoxicating liquor at retail."⁷² "Not being then and there licensed according to law."⁷³ "He, the said H, not then and there having a license, under the State law, to sell intoxicating liquor."⁷⁴ "Not under pretense of keeping a tavern."⁷⁵ On a charge that the defendants presumed to be, and were, common sellers of liquors "to be used in their dwelling house by them used and occupied, without being first licensed therefor according to law."⁷⁶ "Did presume to be a retailer of wine, brandy, rum, and other spirituous liquors, in less quantity than twenty-eight gallons, and that delivered and carried away all at one time, without first being licensed as a retailer of wine and spirits, according to law."⁷⁷ "Not being first duly licensed according to law as an innholder, and without any authority or license therefor duly obtained according to law to sell intoxicating liquors."⁷⁸ "Without

State, 95 Ga. 337; 22 S. E. 681; *Elbow Lake v. Holt* (Minn.), 72 N. W. 564; *Scott v. State*, 150 Ala. 59; 43 So. 181.

An exception used where none is necessary will not invalidate the indictment. *Scott v. State*, 150 Ala. 59; 43 So. 181.

Where the license was issued by the selectmen of the town, it was held not necessary to allege that there were selectmen. *State v. Adams*, 68 N. H. 532.

⁷⁰ *Bogan v. State*, 84 Ala. 449; 4 So. 355.

⁷¹ *Hardison v. State*, 95 Ga. 337; 22 S. E. 681.

⁷² *State v. Buckner*, 52 Ind. 278.

⁷³ *Coverdale v. State*, 60 Ind. 307.

⁷⁴ *Howell v. State*, 4 Ind. App. 148; 30 N. E. 714.

⁷⁵ *Webster v. Commonwealth*, 7 Dana 215, after verdict on charge of keeping a tippling house.

⁷⁶ *Commonwealth v. Tower*, 8 Met. 527.

The allegation applied to the sale and not to the occupation of the house, and negatived a license to each of them, both severally and jointly.

⁷⁷ *Commonwealth v. Sloan*, 4 Cush. 52.

⁷⁸ *Commonwealth v. Baker*, 10 Cush. 405.

The words relating to him as licensed as an innholder were rejected as surplusage.

having first obtained a license therefor from the county commissioners.”⁷⁹ “Without having a grocer’s license, dramshop keeper’s license, an innkeeper’s license, or any legal authority to sell.”⁸⁰ “Without having a license for the purpose continuing in force, contrary to the form,” etc.⁸¹ “Not being a licensed taverner or retailer,” good as to two defendants.⁸² “Not having a license to sell wine and spirituous liquors.”⁸³ “Without having obtained a license therefor as a tavern keeper, or without being in any way authorized to sell the same as aforesaid.”⁸⁴ “Without license first had and obtained.”⁸⁵ “Not having a license to sell said liquors, as aforesaid.”⁸⁶ “Not having a license to sell distilled spirituous liquors.”⁸⁷ “Not having a license then and there to sell,” but omitting “and certificate.”⁸⁸ “Without a license so to do,” equivalent to the statutory words “without a State license therefor.”⁸⁹ Where the lack of license arises by implication, it is sufficient without a direct charge.⁹⁰ “He, the said defendant, then and there not being licensed according to law to vend spirituous liquors by retail.”⁹¹ “Not then and there having a license under the State law to sell intoxicating liquors,” omitting “in quantities less than a quart,” where sales over a quart are permitted.⁹² “Without then and there having any license, appointment, or authority therefor, first duly had and obtained as required by law in this Commonwealth, and without then and there having any

⁷⁹ State v. Nerborig, 33 Minn. 480; 24 N. W. 321.

⁸⁰ State v. Hornbeak, 15 Mo. 478; State v. Owen, 15 Mo. 506.

⁸¹ State v. Wishon, 15 Mo. 503.

⁸² State v. Burns, 20 N. H. 550.

⁸³ State v. Blaisdell, 33 N. H. 388.

⁸⁴ People v. Gilkinson, 4 Parker Cr. Rep. 26.

⁸⁵ State v. Hines, 13 R. I. 10. Charges the lack of a license when sale is made.

⁸⁶ State v. Munger, 15 Vt. 290.

Charges lack of license at time of sale and not when indictment found.

⁸⁷ State v. Clark, 23 Vt. 293. Good after verdict.

⁸⁸ Beer’s Case, 5 Gratt. 674.

⁸⁹ State v. Riffe, 10 W. Va. 794.

⁹⁰ State v. Tall, 56 Wis. 577; 14 N. W. 596.

⁹¹ State v. Watson, 5 Blackf. 155.

⁹² State v. Ashcraft, 11 Ind. App. 406; 39 N. E. 199.

legal authority whatever.”⁹³ “Without having first duly procured, according to law, from the probate judge of the county of Cloud, Kansas, a permit to sell intoxicating liquors.”⁹⁴ “With exposing for sale intoxicating liquor without having a license therefor in force, and with exposing and keeping for sale without having a license therefor in force” covers a case of sale without a license.⁹⁵ In the following instances the negation of license was held insufficient: “Sold to the complainant spirituous liquor in a less quantity than twenty-eight gallons, without being first duly licensed as a retail dealer of wine and spirits according to law.”⁹⁶ “Without a license according to law,” under a statute making the retailing of spirits “without paying the tax and obtaining the certificate according to section 14.”⁹⁷ “Not having procured a license therefor from the commissioners of the county,” when an appeal could have been taken from their refusal to grant a license to the circuit court, and such court grant it.⁹⁸ “Did unlawfully transact the business of selling malt liquor in less quantities than five gallons at a time, not having a valid license to transact such business,” where the statute prohibited the doing of an act without a license, and not the transacting of business.⁹⁹

Sec. 885. Negation of legal purpose or circumstances.

Where liquors may be sold for certain purposes without a license, then, as a rule, it must be averred upon a charge of a sale without a license that the sale was not for any of the excepted purposes. Such is the case where the exceptions are made in the body of the section forbidding a sale without a

⁹³ *Commonwealth v. Dun*, 14 Gray 401; *Commonwealth v. Wilson*, 11 Cush. 412.

⁹⁴ *State v. Tulip*, 9 Kan. App. 454; 60 Pac. 659.

The word “duly” took the place of “no” as to permit.

⁹⁵ *State v. Constantino*, 76 Vt. 192; 56 Atl. 1101.

⁹⁶ *Commonwealth v. Roberts*, 1 Cush. 505.

⁹⁷ *Commonwealth v. Young*, 15 Gratt. 664.

⁹⁸ *Meier v. State*, 57 Ind. 386; *Henderson v. State*, 60 Ind. 296; *O'Brien v. State*, 63 Ind. 242; *State v. Webster*, 5 Halst. (N. J.) 293.

⁹⁹ *State v. Buskirk*, 18 Ind. App. 629; 48 N. E. 872. See also *State v. Constantino*, 76 Vt. 192; 56 Atl. 1101.

license and not in a proviso to it.¹ So where sales were prohibited "except such as shall be compounded and intended to be used as medicine," a complaint to recover the penalty for sale without a license must negative such exception.² But where in a proviso it is permitted to sell liquors for such purposes, then it is not necessary to allege that the sales were of liquors not for such purposes.³ Thus, a statute making it unlawful to sell liquor without a county license, but in a proviso territory of incorporated towns of one thousand inhabitants were excepted, it was held not necessary to allege that the sale was not in such territory.⁴ So where a subsequent statute excluded a town from the operation of a previous statute requiring a license for the entire county it need not be alleged that the accused did not live within such town.⁵ Where a statute forbade a sale of less than five gallons, and also forbade a sale of liquor to be drunk on the premises, an indictment for a sale of less than five gallons need not allege that the sale was of liquor to be drunk on the premises.⁶ And where a sale of "ardent spirits" is alleged it is not necessary to allege that the liquor sold was not for medicine.⁷ But where an ordinance forbids the sale of liquor without a license "except such as shall be compounded and intended to be used as a medicine," it must be alleged that the sale was not of liquor for a medicine.⁸ Exceptions made in a subsequent section need not be negated.⁹

¹ *Brutton v. State*, 4 Ind. 601; *Lemon v. State*, 4 Ind. 603; *Peterson v. State*, 7 Ind. 560; *Kinser v. State*, 9 Ind. 543; *Prohibitory Amendment Cases*, 24 Kan. 700; *Hirn v. State*, 1 Ohio St. 15; *State v. Scarlett*, 38 Ark. 563; *Johnson v. State*, 60 Ga. 634.

² *Roberson v. Lambertville*, 38 N. J. L. 69.

³ *Nelson v. United States*, 30 Fed. 112; *Throckmorton v. Commonwealth (Ky.)*, 35 S. W. 635.

⁴ *State v. Thompson*, 2 Kan. 432; *State v. Towler*, 19 Ore. 528; 25 Pac. 71; 9 L. R. A. 853.

⁵ *Howard v. Commonwealth (Ky.)*, 33 S. W. 1115; *Commonwealth v. Burding*, 12 Cush. 506; *State v. Buford*, 10 Mo. 703.

⁶ *State v. Ford*, 47 Mo. App. 601. See also *State v. Wade*, 34 N. H. 495.

⁷ *State v. Townley*, 3 Har. (N. J.) 311.

⁸ *Roberson v. Lambertville*, 38 N. J. L. 39.

⁹ *State v. Joyner*, 81 N. C. 534; *State v. Duggan*, 15 R. I. 403; 6 Atl. 787; *State v. Freeman*, 17 Vt. 523.

Sec. 886. Sufficiency of negation of particular license or license for particular purposes.

Instances given in the two preceding sections were of licenses to retail liquors generally, but there are many instances where something more must be alleged than the mere charge that the sale was "without a license" to make the sale. Thus, where a statute provided, "Nor shall any person, without having first procured such license, sell or barter any intoxicating liquor to be drunk, or suffered to be drunk in his house, outhouse, yard, garden, or the appurtenances thereto belonging," it was held that an indictment which merely alleged that the accused sold intoxicating liquor to be drunk in any of the places named in the statute, or that he had no license to sell such liquor to be drunk in such places, but failed to allege that he had no license to sell such liquor to be drunk "on the premises" was not sufficient.¹⁰ So where the council of an incorporated town or city could grant a license, an allegation of a sale "in the town of Jackson, Neosho County, and State of Kansas, without taking out and then having a license as grocer, dramshop keeper, or tavern keeper," was held not sufficient.¹¹ So where one is licensed as a "taverner" he cannot be convicted on a charge alleging a sale "without being licensed as an innholder."¹² Where a sale under a tavern license was legal, a negative allegation that the sale was without a grocer's, dramshop keeper's or innkeeper's license was held not sufficient.¹³ If a license may be procured in two ways, then the negation must cover both of them.¹⁴ If a distinction obtains between spirituous and malt liquors, then a charge of a sale of "ale" without a license to sell spirituous liquors is bad.¹⁵ The use of the phrase "without first having obtained a license therefor" has no application to an indict-

¹⁰ *Burke v. State*, 52 Ind. 461.

¹¹ *State v. Pittman*, 10 Kan. 593; *State v. Pitzer*, 23 Kan. 250.

¹² *Commonwealth v. Thayer*, 5 Met. 246.

¹³ *State v. Haden*, 15 Mo. 447.

¹⁴ *State v. Webster*, 5 Halst.

(N. J.) 293; *Meier v. State*, 57 Ind. 386; *Henderson v. State*, 60 Ind. 296; *O'Brien v. State*, 63 Ind. 242.

¹⁵ *Fleming v. New Brunswick*, 47 N. J. L. 231.

ment for unlawful sale of liquors where the penalty is imposed for the non-payment of the occupation tax.¹⁶ Where sales may be made on certain days under a license generally, without reference to the place, an allegation that one was made without having a "license to keep an inn or house of public entertainment" is too narrow.¹⁷ But where cities and towns could grant licenses to sell liquors in quantities of less than one gallon, to be drunk on the premises, and also licenses for sale of any quantity not to be drunk on the premises, an indictment for selling liquor, not to be drunk on the premises, without having obtained a license, not stating the quantity, was held to negative the having of a license to sell in any quantity and was sufficient.¹⁸ So where it was made an offense to sell "without a license or permit," and the word "permit" was used to indicate a pharmacist's license, a charge of a sale "without having first obtained a license therefor," omitting the words "or permit," was held sufficient.¹⁹ Under a Colorado statute licenses to sell liquors could not be issued for a place within five miles of a railroad grading camp, nor a sale made within that distance, but a proviso in the statute excepted an incorporated city or town, and it was held not necessary to aver that a sale claimed to have been made within five miles of a railroad grading camp was not made within a city or town.²⁰

Sec. 887. Negations as to physicians and druggists.

Where physicians and druggists sell liquors it is usually not necessary to aver that the vendor of the liquor without a license was not a physician or druggist.²¹ But this is not

¹⁶ *State v. Terry*, 35 Tex. 366.

¹⁷ *State v. Sommers*, 3 Vt. 156.

¹⁸ *Sires v. State*, 73 Wis. 251;

41 N. W. 81.

¹⁹ *Neuman v. State*, 76 Wis. 112;
45 N. W. 30.

²⁰ *Langan v. People*, 32 Colo.
414; 76 Pac. 1048; *Parker v. State*,
99 Md. 189; 57 Atl. 677; *Hicks*
v. State (Ga.), 32 S. E. 665; *Tig-*

ner v. State, 119 Ga. 114; 45 S.
E. 1001.

As to sufficiency of an exception
alleged, see *Guarreno v. State*, 148
Ala. 637; 42 So. 833.

²¹ *Bogan v. State*, 84 Ala. 449;
4 So. 255; *State v. Mercer*, 58
Iowa 182; 12 N. W. 269; *State*
v. Corcoran, 70 Minn. 12; 72 N.
W. 732; *Surratt v. State*, 45

a universal rule, for the statute excepting physicians or druggists may be so drawn as to require a negating of the exception as to them.²² So where a statute prohibits a sale, except upon the prescription of a physician, it must be negated that the sale was upon a prescription of a physician.²³ And if the statute forbids sales except upon the prescription of a regular practitioner or a graduated physician, the indictment must negative the prescription of both a regular practitioner and a graduated physician.²⁴ So where a physician was forbidden to prescribe liquor for a person except he was "actually sick," it was held necessary to negative that the person receiving the prescription was actually sick.²⁵ Where a statute provided that it should not apply to "druggists who sell liquors for chemical, scientific, medicinal or sacramental purposes only, and in strict compliance with law," an averment that the defendant was not then and there a druggist was not a sufficient negative allegation.²⁶ Nor was an allegation that the accused was not "a druggist, nor a person whose business was at that time to sell drugs and

Miss. 601; *State v. Taylor*, 70 Mo. 52; *State v. Jaques*, 68 Mo. 260; *State v. Hale*, 72 Mo. App. 78; *State v. Moore*, 107 Mo. 78; 16 S. W. 937; *Parker v. State*, 99 Md. 189; 57 Atl. 677; *Beaume! v. State*, 26 Fla. 71; 7 So. 371; *People v. Robbins*, 70 Mich. 130; 37 N. W. 924; *People v. Sullivan*, 83 Mich. 355; 47 N. W. 220; *People v. Rall*, 135 Mich. 510; 98 N. W. 3; 10 Det. L. N. 858.

²² *Throckmorton v. Commonwealth*, 18 Ky. L. Rep. 130; 35 S. W. 635; *People v. Haas*, 79 Mich. 449; 44 N. W. 928; *Gamble v. State* (Tex. Cr. App.), 57 S. W. 95; *State v. McBride*, 64 Mo. 364; *Holt v. State*, 62 Neb. 134; 86 N. W. 1073; *State v. McAdoo*, 80 Mo.

216; *People v. Telford*, 56 Mich. 541; 23 N. W. 213; *Commonwealth v. Porter*, 31 Leg. Int. 398; *Surratt v. State*, 45 Mo. 601; *Williamson v. State*, 41 Tex. Cr. App. 461; 55 S. W. 568.

²³ *Dean v. State*, 100 Ala. 102; 14 So. 762; *Staples v. State*, 114 Ind. 194; 16 N. E. 521; *Throckmorton v. Commonwealth*, 18 Ky. L. Rep. 130; 35 S. W. 635; *State v. Harris*, 47 Mo. App. 558; *State v. Stamey*, 71 N. C. 202.

²⁴ *Thompson v. State*, 37 Ark. 408.

²⁵ *Frank v. Commonwealth* (Ky.), 15 S. W. 877; 13 Ky. L. Rep. 833.

²⁶ *People v. Haas*, 79 Mich. 449; 44 N. W. 428.

medicines.”²⁷ Where a statute made it an offense for a physician to sell liquor for other than medicinal purposes, it was held that an indictment was bad which did not aver that the sale was for other than medicinal purposes.²⁸ If the exception as to druggists is contained in a proviso or different statute or section from that defining the offense, then the exception need not be negated.²⁹ Where it is an offense for a physician to give a prescription for intoxicating liquors “to be used otherwise than for medicinal purposes,” it is necessary to negative that they were not to be so otherwise used.³⁰ Where the statute required a druggist to sell only upon a prescription given by a “regularly registered physician,” a negative allegation that it was not made upon a prescription given by a “regular registered physician” was held enough, the objection because the word “regularly” was not used being “too attenuated for practical use.”³¹ Where the charge is a sale without a permit or license it need not be alleged that the accused was not a registered pharmacist nor an assistant pharmacist in the employ of a druggist if such a person in certain instances may make sales.³² The same rule applies to a physician where by a subsequent section he can sell liquors.³³ Where a statute makes it an offense for a physician to give a prescription to a person unless he is actually sick and without a personal examination of him, it

²⁷ *People v. Decarie*, 80 Mich. 578; 45 N. W. 491; *People v. Aldrich*, 104 Mich. 455; 62 N. W. 570; *People v. Gault*, 104 Mich. 575; 62 N. W. 724.

²⁸ *State v. McAdoo*, 80 Mo. 216; *State v. Searlett*, 38 Ark. 563; *State v. Abbott*, 32 N. H. 434.

²⁹ *State v. Beneke*, 9 Iowa 203; *Beaume v. State*, 26 Fla. 71; 7 So. 371; *Townley v. State*, 18 N. J. L. 311; *State v. Duggan*, 15 R. I. 403; 6 Atl. 787.

³⁰ *State v. Davis*, 126 Mo. App. 235; 102 S. W. 1103.

³¹ *State v. Bradford*, 2 Mo. App. Repr. 425; 79 Mo. App. 346.

³² *Durein v. State*, 208 U. S. 613; 28 Sup. Ct. 567; 52 L. Ed. —, affirming 70 Kan. 1; 80 Pac. 987; 78 Pac. 152; *People v. Taylor*, 110 Mich. 491; 68 N. W. 303.

³³ *Oglesby v. State*, 121 Ga. 602; 49 S. E. 706.

Contra, *Fleeks v. State*, 47 Tex. Cr. App. 327; 83 S. W. 381.

must be alleged that he was not actually sick and that the accused made no personal examination of him.³⁴

³⁴ *Stovall v. State*, 37 Tex. Cr. App. 337; 39 S. W. 934; *Commonwealth v. O'Neal*, 11 Ky. L. Rep. (abstract) 678. See also *People v. Crotty*, 22 N. App. Div. 77; 47 N. Y. Supp. 845.

As to averment that a druggist had no license or permit to sell, see *Williamson v. State*, 41 Tex. Cr. App. 491; 55 S. W. 568; *Holt v. State*, 62 Neb. 134; 86 N. W. 1073.

An averment of a sale "without taking out and having a permit therefor as provided by law, and then and there not being lawfully and in good faith engaged in the business of a druggist" was held not sufficiently direct and certain as to the offense charged. *State v. Knoby*, 6 Kan. App. 334; 51 Pac. 53.

Under the Kansas statute charging a druggist with a sale of liquor to one whom he "had good reason to believe desired the same to use as a beverage," charges no offense. There should be added to such a charge that the purchaser did not desire the liquors to use in one of the methods permitted by law, and did not so use them; for the offense consists not in what the vendor may or may not believe about the transaction. *State v. Shinn*, 63 Kan. 638; 66 Pac. 650.

A statute in one section required liquor dealers to give bonds before commencing business; another section defined a retail dealer; and

still another provided that the general provisions of the act should not apply to druggists, but required them to give a druggist's bond. An indictment charged that on a given day the defendant sold liquor, he being a person whose business consisted in part of the sale of drugs and medicine, and the liquor not being sold for medicinal purpose. It was held that he could not be convicted as a retailer because there was no averment he had given a bond, nor of making a sale as a druggist. *Peter v. Eaton Circuit Court* (Mich.), 117 N. W. 68; 15 Det. L. N. 462.

An indictment that a prescription was issued on a certain day to a certain person and was for intoxicating liquor, is sufficient notice to the defendant of the prescription he is charged with illegally issuing. *State v. Manning*, 87 Mo. App. 78.

Under Louisiana Acts, 1886, No. 85, p. 124, it must be averred the defendant physician aided in evading the liquor law "with intent to assist others to evade the payment of a license required" by the statute of the State or by any parochial or municipal ordinance. *State v. Breaux*, 122 La. 514; 47 So. 876.

Under Kentucky Acts, 1879, ch. 1496, pars. 5 and 8, facts must be alleged showing bad faith. *Commonwealth v. Green*, 80 Ky. 178; 3 Ky. L. Rep. 659.

Sec. 888. Negative averments as to kind of liquor or package.

As a rule, it is not necessary to aver that the liquors sold were not imported liquors in the original packages, that being a matter of defense.³⁵ And where one section of a statute forbade the sale of wine without a license, and another section provided the penalty for such a sale of such liquor without the license, but, in a proviso provided that a sale of native wine should not subject the vendor to the penalty of the section, it was held not necessary to aver that the wine sold was not native wine.³⁶

Sec. 889. Manufacturing liquor.

Where a statute prohibits the manufacture of intoxicating liquor within the State, it is not necessary to aver, on a charge of manufacturing liquor within such State, that it was manufactured for sale either within or without the State, nor with intent to sell it, nor the kind nor quantity manufactured, it being sufficient to allege a manufacturing of intoxicating liquor within the State.³⁷

Sec. 890. Transportation of liquor.

In drafting an indictment upon a statute prohibiting the transportation of liquor into the State care must be used to follow the language of the statute. Thus, if it be an offense to transport intoxicating liquors into a State with intent to sell them, a mere charge of transportation without alleging

³⁵ State v. Gurney, 37 Me. 149; State v. Brown, 31 Me. 520; State v. McGlynn, 34 N. H. 422; Commonwealth v. Hart, 11 Cush. 130; Commonwealth v. Edwards, 12 Cush. 187; Commonwealth v. Purttle, 11 Gray, 78; Commonwealth v. Waters, 11 Gray, 81; Commonwealth v. Gagne, 153 Mass. 205; 26 N. E. 449; 10 L. R. A. 442; Commonwealth v.

Gagne, 153 Mass. 211; 26 N. E. 571, 852; Commonwealth v. Gay, 153 Mass. 211; 26 N. E. 571, 852; State v. Fuller, 33 N. H. 259; State v. Blaisdell, 33 N. H. 388; State v. Crowell, 30 Me. 115.

³⁶ Baker v. State, 8 Ohio St. 391.

³⁷ Commonwealth v. Clark, 14 Gray, 367; Johnson v. State (Ga.), 66 S. E. 148.

such intent states the commission of no offense.³⁸ Under such a statute the place from which and to which the liquor was transported must be given, and alleging that it was transported "from place to place" is not sufficient.³⁹ And where the statute makes it an offense to "knowingly" transport intoxicating liquors from place to place, it must be alleged that the accused knew the liquors were intoxicating, and the allegation is not supplied by an allegation that the liquor was carried with intent that it should be sold in violation of law.⁴⁰ A charge that the accused "did bring into said city intoxicating liquor, with intent then and there, in said S, to sell the same himself, in violation of law," sufficiently alleges that the liquor was transported into and not through the city to a place beyond it;⁴¹ and an allegation of transporting liquor from place to place within a city sufficiently shows that the offense was committed in such city.⁴² Where one section of a statute prohibited transportation of liquors "from place to place within the State," providing a penalty, and another statute prohibited "handling contraband liquors in the nighttime," providing another penalty, an indictment charging the defendant "in the nighttime, did transport alcoholic liquors" contrary to law, does not charge an offense under the latter section but under the first, the words "in the nighttime" being surplusage.⁴³ In a prosecution for the offense of transporting liquors into a State it is not necessary to aver they were not in the original packages.⁴⁴ Under a statute making it an offense to receive for conveyance liquors unlawfully sold or intended for unlawful sale, a charge that the defendant

³⁸ *State v. Murch* (Me.), 7 Atl. 115; *Commonwealth v. Intoxicating Liquors*, 138 Mass. 506.

³⁹ *State v. Lashus*, 79 Me. 541; 11 Atl. 604; *Commonwealth v. Reily*, 9 Gray, 1.

⁴⁰ *State v. McDonough*, 84 Me. 488; 24 Atl. 944.

⁴¹ *Commonwealth v. Keefe*, 143 Mass. 467; 9 N. E. 840.

⁴² *Commonwealth v. Hutchin-*

son, 6 Allen, 595; *Commonwealth v. McLaughlin*, 108 Mass. 477.

⁴³ *State v. Pickett*, 47 S. C. 101; 25 S. E. 46; *State v. Arnold*, 80 S. C. 383; 61 S. E. 891.

⁴⁴ *Commonwealth v. Waters*, 11 Gray, 81.

A charge in Iowa of carrying around liquor with the unlawful intent to give to a minor is sufficient. *State v. Smith*, 135 Iowa, 523; 113 N. W. 336.

received the liquors, "said liquors being intended for illegal sale, and said liquors having been sold" contrary to the statute, is sufficient.⁴⁵ So where a statute prohibited persons from delivering liquors in local option territory, but permitting individuals to bring into it on their own persons or as their personal baggage such liquors, and also providing in a proviso that its provisions shall not apply to licensed physicians or druggists to whom carriers may deliver them, a charge is sufficient which alleges that accused was a common carrier, an incorporated or joint stock company, and that it brought into and delivered liquor in a local option territory to another who was not a physician or druggist.⁴⁶

Sec. 891. Keeping liquor for illegal sale.

Where a statute prohibits the keeping of liquor for the purpose of sale it is sufficient to charge the commission of the offense in the language of such statute, as, that the accused kept the liquors "for the purpose of sale."⁴⁷ Where the charge was that the accused "did keep, and was concerned, engaged, and employed in owning and keeping intoxicating liquors to sell," it was held that only one offense was charged, and that there was no difference between a charge that the accused "kept intoxicating liquor to sell" and kept it "with intent to sell" it.⁴⁸ As a rule, it must be averred it

⁴⁵ Commonwealth v. Locke, 114 Mass. 288.

⁴⁶ Adams Express Co. v. Commonwealth (Ky.), 112 S. W. 577; 33 Ky. L. Rep. 967.

A charge that defendant kept certain intoxicating liquors in its express office in B, "which said liquors were brought into said town of B by said defendant, in violation of the provisions" of a particularly specified statute, is not sufficient, being too uncertain. Commonwealth v. Certain Intoxicating Liquors, 138 Mass. 506.

Upon a charge of unlawfully carrying liquors from one place to another in a city, where it is unlawful to sell them, it is no defense that it was unlawfully sold in another city to the consignee. Commonwealth v. McLaughlin, 108 Mass. 477.

⁴⁷ State v. Mohr, 53 Iowa, 261; 5 N. W. 183; Commonwealth v. Gilland, 9 Gray, 3; State v. Paige, 78 Vt. 286; 62 Atl. 1017.

⁴⁸ Vaughan v. State, 5 Clarke (Ia.), 369; Commonwealth v. Gilland, 9 Gray, 3.

was intended for sale in the State where kept.⁴⁹ Where the keeping must be with an intent to sell the liquor in the State, the intent must be averred, and merely alleging that the accused had possession of it and it was intended for unlawful sale is not sufficient.⁵⁰ A charge that the liquor was kept on deposit by the accused, or by some other person with his consent, for unlawful sale is bad for uncertainty.⁵¹ The name of the owner must usually be given, or it be alleged that he was unknown.⁵² A statute charging that the accused "unlawfully did expose and keep for sale intoxicating liquors, with intent unlawfully to sell the same within this Commonwealth," is insufficient to charge an offense under a statute providing that "no person shall sell, or expose, or keep for sale, spirituous or intoxicating liquors, except as authorized in this act."⁵³ But a charge under this statute that the accused "did keep intoxicating liquors, with the intent to sell the same in this Commonwealth," is sufficient.⁵⁴ Where the mere keeping of liquor within the State is an offense, it is not essential to aver it was kept to be sold within the State,⁵⁵ and it has been held not necessary to allege who is the owner of it.⁵⁶ A charge of keeping "for the purpose of sale, and not for the purpose of exportation" is not the equivalent of a charge that they "were kept for sale, and not for sale for exportation."⁵⁷ Under a statute forbidding the keeping of liquor on the premises "for the purposes of sale and delivery," an indictment alleging a keeping "for the purpose of sale," without the words "and delivery" is sufficient where the form is pre-

⁴⁹ Barnett v. State, 36 Me. 198; State v. Learned, 47 Me. 426; State v. Robinson, 33 Me. 564; Commonwealth v. Gillan, 148 Mass. 15; 18 N. E. 368. It must be averred in what county they were kept. State v. Suitor, 78 Vt. 391; 63 Atl. 182. *Contra*, Commonwealth v. Purtle, 11 Gray, 78.

⁵⁰ State v. Miller, 48 Me. 576; State v. Learned, 47 Me. 426.

⁵¹ State v. Moran, 40 Me. 129.

⁵² State v. Robinson, 33 Me. 564.

⁵³ Commonwealth v. Byrnes, 126 Mass. 248.

⁵⁴ Commonwealth v. Sprague, 128 Mass. 75; Commonwealth v. Purtle, 11 Gray, 78.

⁵⁵ State v. Perkins, 63 N. H. 368; State v. Guinness, 16 R. I. 401; 16 Atl. 910; Cohen v. State (Ga.), 65 S. E. 1096.

⁵⁶ Lincoln v. Smith, 27 Vt. 328.

⁵⁷ State v. Campbell, 12 R. I. 147.

scribed by statute.⁵⁸ A charge of a keeping and also a sale has been held to be a charge of but one offense.⁵⁹ As the keeping of liquors is a continuing offense, it may be alleged with a *continuendo*.⁶⁰ Where a statute provided that "no person shall sell, or expose or keep for sale, spirituous or intoxicating liquors, except as authorized in this act," an indictment was set aside which merely charged that the accused "unlawfully did expose and keep for sale intoxicating liquors, with intent unlawfully to sell the same within this Commonwealth," because it did not negative authority to sell them.⁶¹ Under a charge of keeping liquors in a particular building for sale, proof of a keeping in another building may be made, and there will be no fatal variance.⁶² It is not necessary to charge to whom liquors kept for illegal sale were sold,⁶³ nor how they were kept for sale.⁶⁴ It must be alleged that the accused had possession of the liquor.⁶⁵ Where the statute requires the indictment to describe the place where the liquors were kept, it is not necessary to describe it with the certainty required before a search warrant can be issued to search a building.⁶⁶ Upon a charge of having liquors in possession for the purpose of selling or giving away contrary to law, it is not necessary to aver how the liquors came into the possession

⁵⁸ State v. Murphy, 15 R. I. 543; 10 Atl. 585.

⁵⁹ State v. Becker, 20 Iowa, 438; State v. Baughman, 20 Iowa, 497; Vaughn v. State, 5 Clarke (Ia.), 369.

⁶⁰ Commonwealth v. Heasey (Mass.), 9 N. E. 837.

⁶¹ Commonwealth v. Byrnes, 126 Mass. 248; State v. Bennett, 95 Me. 197; 49 Atl. 867.

⁶² Commonwealth v. Kern, 147 Mass. 595; 18 N. E. 566; see State v. Bennett, 95 Me. 197; 49 Atl. 867.

⁶³ Dalrymple v. State, 26 Ohio Cir. Ct. Rep. 562; Rottman v. State, 64 Neb. 875; 88 N. W. 857.

In Ontario under such a charge a sale may be shown. Regina v. Bennett, 3 Ont. 45.

⁶⁴ State v. Sutor, 78 Vt. 391; 63 Atl. 182; State v. Paige, 78 Vt. 286; 62 Atl. 1017.

⁶⁵ *Ex parte* Grigg, 4 Vict. L. R. 146.

Partners indicted for keeping liquor must be convicted severally and not as a partnership. *Ex parte* Howard, 25 N. B. 191.

As a local option law repealing statute forbidding the keeping of liquor for sale, see Hamilton v. State (Ohio), 84 N. E. 601.

⁶⁶ Peterson v. State, 69 Neb. 875; 90 N. W. 964.

of the defendant.⁶⁷ But an averment that the defendant was "unlawfully" in possession of liquors in a particularly described building in his control, for the purpose of keeping, running and operating a place where intoxicating liquors were sold in violation of law, does not charge that he was found in possession of liquors for the purpose of illegal sales, the word "unlawful" not being sufficient to show that his possession was in violation of law.⁶⁸

Sec. 892. Carrying on the liquor business—Common seller.

In charging the illegal carrying on of the liquor business without having a license therefor, or without having paid the tax required, the best method is to follow the language of the statute.⁶⁹ Under such a statute a single act does not constitute the offense, so that an allegation charging that the accused "did distil" liquor without a license is not sufficient. To constitute the offense the occupation must have been pursued for some length of time.⁷⁰ And an indictment for carrying on the business of selling "intoxicating bitters" states no offense under a statute requiring a license for carrying on the business of selling "vinous, spirituous or malt liquors."⁷¹ If no license can be authorized in a county—if local option has been adopted—then an indictment for carrying on the business of selling liquors in such county without a license is fatally defective, because the statute requiring a license for such business has no application to such an instance.⁷² Under a statute requiring a license "for keeping or conducting a bar-room, saloon or other place where vinous or malt liquors are

⁶⁷ *Gulf Port v. Martin* (Miss.), 50 So. 502.

⁶⁸ *Barnhardt v. State*, 171 Ind. 428; 86 N. E. 481.

⁶⁹ *Allred v. State*, 89 Ala. 112; 8 So. 56; *In re Clisham*, 105 Cal. 674; 39 Pac. 37; *People v. Pargin*, 74 Mich. 34; 41 N. W. 852; *Carr v. State*, 5 Tex. App. 153; *Eppstein v. State*, 11 Tex. App. 480; *State v. Martin*, 34 Ark. 340;

State v. Woodward, 25 Vt. 616; *Hafer v. State*, 51 Ala. 37; *State v. McIlvenna*, 21 S. D. 489; 113 N. W. 878.

⁷⁰ *Johnson v. State*, 44 Ala. 414; *State v. Bartley*, 92 Me. 422; 43 Atl. 19.

⁷¹ *Allred v. State*, 89 Ala. 112; 8 So. 56.

⁷² *Cost v. State*, 96 Ala. 60; 11 So. 435.

sold to be drunk upon the premises," an indictment charging the accused with carrying on "the business of selling liquor" will not lie.⁷³ It is generally not necessary in a charge for carrying on the liquor business to allege the particular liquor sold, the name of the purchaser, nor that the accused had a place of business;⁷⁴ and an indictment alleging that the accused without a license "did engage in and manage the business of a dealer" in intoxicating liquor is sufficient under a statute providing that "any person who shall carry on or conduct any business for which a license is required, without first obtaining a license therefor shall be guilty of a misdemeanor."⁷⁵ And a charge that the accused "did presume to be a common seller of intoxicating liquors by retail, and did sell to persons unknown," has been held sufficient under a statute making it an offense to be or to presume to be a common seller of such liquors.⁷⁶ It has been held that it is not necessary to set forth particular instances of selling,⁷⁷ and it has also been held necessary under like statutes.⁷⁸ An allegation that the accused "did presume to be, and was, a retailer of spirituous liquors in less quantity than" a specified quantity, "and that he delivered and carried away all at one time, and did then and there sell and retail" a specified quantity of spirituous liquors to a person named, has been held sufficient.⁷⁹ The charge of being a common seller may be

⁷³ *In re Clisham*, 105 Cal. 674; 39 Pac. 37.

⁷⁴ *Dansey v. State*, 23 Fla. 316; 2 So. 692.

⁷⁵ *Roberts v. State*, 26 Fla. 360; 7 So. 861.

⁷⁶ *State v. Cottle*, 15 Me. 473; *Commonwealth v. Pray*, 13 Pick. 359; *Commonwealth v. Odlin*, 23 Pick. 275; *Commonwealth v. Thurlow*, 24 Pick. 374; *Goodhue v. Commonwealth*, 5 Met. 553; *State v. Johnson*, 3 R. I. 94; *State v. Barker*, 3 R. I. 280; *Commonwealth v. Kendall*, 12 Cush. 414.

⁷⁷ *Commonwealth v. Pray*, 13

Pick. 359; *Commonwealth v. Odlin*, 23 Pick. 275; *People v. Breidenstein*, 65 Mich. 65; 31 N. W. 623; *Commonwealth v. Hart*, 11 Cush. 130; *Commonwealth v. Kendall*, 12 Cush. 414; *Commonwealth v. Edwards*, 4 Gray, 1; *Commonwealth v. Wood*, 4 Gray, 11; *State v. Williams*, 11 S. D. 64; 75 N. W. 815.

⁷⁸ *Commonwealth v. Thurlow*, 24 Pick. 374; *People v. Heffron*, 53 Mich. 527; 19 N. W. 170.

⁷⁹ *Goodhue v. Commonwealth*, 5 Met. 553; *Commonwealth v. Kimball*, 7 Met. 304; *Commonwealth*

alleged with a *continuendo*, or from day to day, or on divers days, between certain given dates.⁸⁰ It is not necessary to use the word "common" as defining the accused as a "seller" if other language be used conveying that meaning;⁸¹ nor in charging a sale need it be alleged what particular kind of spirituous liquor was sold, or to whom it was delivered, or who carried it away, even though the statute specifies that the liquor sold must be less than a certain quantity carried away at one time.⁸² It has been held that an averment that the accused on a day named "and from that day to the day of finding this indictment, was, without being duly authorized and appointed thereto, according to law, a common seller of spirituous and intoxicating and mixed liquors, part of which were spirituous and intoxicating, contrary," etc., was sufficient.⁸³ So was an averment that the accused, at a certain time and place "was without being duly authorized or appointed thereto, according to law, a common seller of intoxicating liquors, against the peace of the Commonwealth and contrary to the form of the statute in such case made and provided."⁸⁴ So a charge that the accused sold intoxicating liquors to be used as a beverage without having first paid to the county treasurer the annual tax, and without having the receipt and notice of the tax posted in the place where the liquors were sold, sufficiently shows that the accused is a common seller under the Michigan statute.⁸⁵ If a statutory form be prescribed, allegations in excess of such form may be regarded as

v. Wilcox, 1 Cush. 503; People v. Webster, 2 Doug. (Mich.) 92.

⁸⁰ Commonwealth v. Tarver, 8 Met. 527; Commonwealth v. Kendall, 12 Cush. 414; State v. Stinson, 17 Me. 154; State v. Churchill, 25 Me. 306; State v. Nutt, 28 Vt. 598.

⁸¹ Commonwealth v. Leonard, 8 Met. 529.

⁸² Commonwealth v. Wilcox, 1 Cush. 503.

⁸³ Commonwealth v. Kendall, 12 Cush. 414; Commonwealth v. Ba-

ker, 2 Gray, 78; Commonwealth v. Edwards, 4 Gray. 1; Commonwealth v. Wood, 4 Gray, 11; Commonwealth v. Jones, 8 Gray, 415.

⁸⁴ Commonwealth v. Hoyer, 11 Gray, 462.

⁸⁵ People v. Paquin, 74 Mich. 34; 41 N. W. 852; People v. Breidenstein, 65 Mich. 65; 31 N. W. 623; Luton v. Palmer, 69 Mich. 610; 37 N. W. 701; People v. Scott, 90 Mich. 376; 51 N. W. 520; People v. Quinn, 74 Mich. 632; 42 N. W. 604.

surplusage.⁸⁶ It should be observed that the county where the business is carried on must be given,⁸⁷ as well as the time.⁸⁸ Two persons may be jointly indicted as common sellers, and if the indictment be dismissed as to one, the other may be convicted on the joint charge.⁸⁹

Sec. 893. Screens maintaining—Obstructing view.

Statutes are in force that require an unobstructed view from the street of rooms in which liquors are sold, usually during the hours when sales are prohibited. The object of such statutes is to secure an observance of the law when sales may not be made. Such statutes always apply to licensed places, not to non-licensed places, for in the latter instances sales cannot be made under any circumstances. In charging a violation of such a statute it must be alleged the room was used, at the time alleged, for the sale of intoxicating liquors, and it is not enough to merely allege that it was occupied at such time for the purpose of selling intoxicating liquors at retail to be drunk on the premises, thought it is not necessary to allege a sale was made to any particular person.⁹⁰ A charge that the obstruction was "on or about" a certain day, "which was Sunday," is not sufficient because it does not directly allege that the obstruction was on a Sunday when a sale could not be made.⁹¹ A statute of Indiana provides that "any room where intoxicating liquors are sold by virtue of a license issued under the law of the State of Indiana for the sale of spirituous, vinous, malt or other intoxicating liquors in

⁸⁶ State v. Woodward, 25 Vt. 616.

⁸⁷ Harris v. State, 50 Ala. 127; Commonwealth v. Jones, 7 Gray, 415; see also Allen v. State (Tex. App.), 13 S. W. 998.

⁸⁸ Commonwealth v. Woods, 9 Gray, 131; Commonwealth v. Kingman, 14 Gray, 85; Commonwealth v. Snow, 14 Gray, 2^a

⁸⁹ Commonwealth v. Colton, 11 Gray, 1.

As to sufficiency of a charge of offering and exposing liquors for sale under New York Code in violation of the liquor laws (Laws, 1897, p. 233, c. 312), see People v. Seeley, 183 N. Y. 544; 76 N. E. 1102; affirming 105 N. Y. App. Div. 149; 93 N. Y. Supp. 982.

⁹⁰ Hipes v. State, 18 Ind. App. 426; 18 N. E. 426.

⁹¹ State v. Slentz, 27 Ind. App. 558; 61 N. E. 956.

less quantities than a quart⁹² at a time, with permission to drink the same upon the premises, shall be situated upon the ground floor or basement of the building where the same are sold, and in a room fronting the street or highway upon which such building is situated, and said room shall be so arranged, either with window or glass door as that the whole of said room may be in view from the street or highway, and no blinds, screens or obstructions to the view shall be arranged or placed so as to prevent the entire view of said room from the street or highway upon which the same is situated during such days and hours when the sales of such liquors are prohibited by law.”⁹³ Under this statute in charging an obstruction of the room by screens during unlawful hours it is necessary to allege that the room was in the basement of the ground floor of the building and fronted on a public highway or street, with a glass window or door in front, or otherwise show that it was such a room as might lawfully be used for the sale of intoxicating liquors under a State license.⁹⁴ Where the offense is committed by obstructing the view, whether made by a licensed or non-licensed person, then it is not necessary to aver a violation of the conditions of the license, where a statute makes it an offense to violate such conditions.⁹⁵ The Michigan statute in 1895⁹⁶ required all curtains, screens and partitions that obstructed the view from the sidewalk, street or alley “of the bar” to be removed during prohibited hours. An indictment charging that the accused “obstructed the view from the street, sidewalk and alley by not removing said curtains that obstructed the view from the street, sidewalk and

⁹² The statute has no application to a depot warehouse from which liquor is sold at wholesale to dealers. *Teagarden v. State*, 39 Ind. App. 15; 79 N. E. 211.

⁹³ *Burns R. S.* 1908, § 8327.

⁹⁴ *Slentz v. State*, 27 Ind. App. 700; 61 N. E. 956; see also *State v. Mathis*, 18 Ind. App. 608; 48 N. E. 645; *State v. Mathis*, 20 Ind. App. 699; 48 N. E. 1109.

⁹⁵ *Commonwealth v. Costello*, 133 Mass. 192.

In Massachusetts it is necessary to aver that the licensing board had required the defendant to remove the blinds. *Commonwealth v. Brothers*, 158 Mass. 200; 33 N. E. 386.

⁹⁶ 3 How. Ann. St. § 2283, f. 4.

alley," was sufficient, the words "said curtains" being construed to refer to a previous part of the indictment where it was alleged that the curtains obstructed the view "of the bar."⁹⁷ A charge that the accused placed and maintained "a certain screen, blind, shutter, curtain *and* partition," so as to interfere with the view of the bar is not bad for duplicity.⁹⁸ A charge that sales were made in a room improperly constructed is not necessary; for the offense is the maintenance of the room in a manner prohibited by law.⁹⁹ Where the offense consists of obstructing the "bar or place in the room where liquor is sold" it is not enough to charge that the accused by curtains obstructed the view of the saloon room from the sidewalk; it must be alleged he obstructed the view of the "bar or place in said room" where liquors were sold.¹ It is not necessary to aver the defendant had sold liquors in violation of law or that he had violated the conditions of his license.²

Sec. 894. Sale without first giving bond.

Where a statute required a retailer of liquors to give a bond and take an oath not to sell adulterated liquor, an indictment charging a failure to give the bond, but saying nothing about taking the oath, is sufficient, for the omission to do either is an offense.³ So a charge that the accused "did then and there unlawfully sell spirituous liquors, to-wit, one pint of brandy, for the sum of one dollar to one M, without then and there having taken and subscribed an oath and given a bond, as required by law of all persons before selling or offering to sell such liquor," is sufficient.⁴ But it is not necessary that the indictment name the purchaser or give the price or particular kind of liquor sold.⁵

⁹⁷ *People v. Kennedy*, 105 Mich. 75; 62 N. W. 1020.

⁹⁸ *Commonwealth v. Gibbons*, 134 Mass. 197; *Commonwealth v. Keefe*, 143 Mass. 467; 9 N. E. 840.

⁹⁹ *State v. Wickmire*, 16 Ind. App. 348; 45 N. E. 195.

¹ *People v. Schimmell*, 141 Mich.

310; 104 N. W. 670; 12 Det. L. N. 406.

² *Commonwealth v. Costello*, 133 Mass. 192; *State v. Cain*, 9 W. Va. 559.

³ *State v. Crowley*, 37 Mo. 369.

⁴ *State v. Hayes*, 38 Mo. 367; *State v. Melton*, 38 Mo. 368.

⁵ *State v. Rogers*, 39 Mo. 431.

Sec. 895. Keeping open at prohibited times.

Where a statute forbids the keeping open of a place where intoxicating liquors are sold at certain times it is the fact of keeping the place open that constitutes the crime, and the purpose with which it was kept open is immaterial.⁶ And where it is unlawful to keep a saloon open on the Sabbath, the day of the month and year should be given, and, as a matter of safety, added thereto that such day was the Sabbath, and the fact that it was also alleged that the saloon was kept open in the nighttime of such day will not vitiate the indictment.⁷ Charging that the saloon was kept open on a particular day of the month, without alleging that such day was a Sabbath or the first day of the week, commonly called Sunday, is not sufficient, although the day mentioned is in fact the Sabbath or Sunday.⁸ Facts must be alleged to show that the accused had

⁶ *Fant v. People*, 45 Ill. 259; *State v. Donaldson*, 12 S. D. 259; 81 N. W. 299; *O'Neil v. State*, 116 Ga. 839; 43 S. E. 248; *People v. Talbott* (Mich.), 99 N. W. 688.

⁷ *Kroer v. People*, 78 Ill. 294; *People v. Hobson*, 48 Mich. 27; 11 N. W. 771; *People v. Wheeler*, 96 Mich. 1; 55 N. W. 371; *State v. Peterson*, 38 Minn. 143; 36 N. W. 443; *State v. Olson*, 38 Minn. 150; 36 N. W. 446; *State v. Sannerud*, 38 Minn. 229; 36 N. W. 447; *Frasier v. State*, 5 Mo. 536; *Jordan v. Nicolin*, 84 Minn. 367; 87 N. W. 915.

⁸ *Gilbert v. State*, 81 Ind. 565; *Gilbert v. Commonwealth*, 3 Lack. Jur. 374.

"Under the indictment, the State was at liberty to prove the sale of cigars on any Sunday within six months preceding the time of the return of the indictment into court, as the precise time of the sale was immaterial, provided it was not fixed at so remote a

period as to make it barred by the statute of limitations; but the *gravamen* of the offense evidently intended to be charged was the unlawful engagement by the appellant on Sunday, in his usual vocation of selling cigars. To make out that offense, it was necessary to confine the proof to some particular Sunday within a time not barred by the statute. In order that proof might have been so limited at the trial, it was necessary that the indictment should have charged that the sale was on some day known as and commonly called Sunday." *Gilbert v. State*, 81 Ind. 565; *Pancake v. State*, 81 Ind. 93.

A charge that accused gave away liquor on a specified election day, "on or about a certain day" was held sufficient. *Keith v. State*, 38 Tex. Cr. App. 678; 44 S. W. 847. *Contra*, *State v. Schell* (S. D.), 117 N. W. 505; *State v. Fairchild* (S. D.), 117 S. W. 506. (A

the power to keep the place closed, and this requirement is usually satisfied by an allegation that he was "then and there the owner" or proprietor of such place, or "then and there had the control thereof."⁹ And where the statute is limited to licensed places (and such is usually the case) it is necessary to aver that the accused had a license to sell liquors in the place he kept open on the Sabbath.¹⁰ Where a statute required saloons to be closed after 9 o'clock "at night," a charge that the accused did not close his saloon at 9 o'clock, but kept it open till after 11 o'clock "in the afternoon," was held sufficient and not defective by a failure to use the words "at night" after "9 o'clock," and it was not vitiated by the use of the words after 11 o'clock, "in the afternoon," it being an impossible time.¹¹ Statutes not infrequently require saloons to be kept closed on election days, and in a charge for the violation of such a statute it must be averred for what purpose the election was held.¹² But the detail of facts to show it was a lawful election need not be set out, as that notice of the election had been duly given,¹³ it usually being sufficient to allege that the election was "held by lawful authority."¹⁴ Of course, the election must be held in the county where the saloon is located.¹⁵ The statement that it was held to elect certain officers is sufficient, and if more be stated than that the

statute permitting it to be alleged that the alleged act was committed "on or about" a particular time has no application to an instance of this kind.)

⁹ *People v. Hobson*, 48 Mich. 27; 11 N. W. 771; *People v. Wheeler*, 96 Mich. 1; 55 N. W. 371; *State v. Gluck*, 41 Minn. 553; 43 N. W. 483.

¹⁰ *State v. Peterson*, 38 Minn. 143; 36 N. W. 443; *State v. Olson*, 38 Minn. 150; 36 N. W. 446; *State v. Sannerud*, 38 Minn. 229; 36 N. W. 447; *Atkinson v. State*, 33 Ind. App. 8; 70 N. E. 560.

¹¹ *People v. Husted*, 52 Mich. 624; 18 N. W. 388.

¹² *Hoskey v. State*, 9 Tex. App. 202; *Newman v. State*, 101 Ga. 534; 28 S. E. 1005.

¹³ *Janks v. State*, 29 Tex. App. 233; 15 S. W. 815.

¹⁴ *Janks v. State*, 29 Tex. App. 233; 15 S. W. 815; *Gieb v. State*, 31 Tex. Cr. Rep. 514; 21 S. W. 190; *Steinberger v. State*, 35 Tex. Cr. Rep. 492; 34 S. W. 617.

¹⁵ *Janks v. State*, 29 Tex. App. 233; 15 S. W. 815; *Miller v. State*, 44 Tex. Cr. App. 99; 69 N. W. 522.

election was held, it will not be a variance.¹⁶ Where a statute made it an offense for the proprietor of a saloon "to permit any person * * * to go into" his saloon "upon days and hours when the sale of" liquors was prohibited by law, an indictment charging that the defendant did "unlawfully suffer, permit and allow" persons in his saloon during prohibited hours was held not insufficient by reason of the words "suffer and allow," they being mere surplusage.¹⁷ On a charge of illegally keeping a saloon open, a sale need not be averred.¹⁸ Where it is an offense to admit persons to a bar-room, it must be charged that the persons admitted were admitted to such room, and it is not enough to charge they were admitted to any other room.¹⁹ Under a statute forbidding a licensee to permit persons, except members of his family, to enter his saloon on Sunday, or during any time when he could not sell liquors, it was held sufficient to allege that he was the holder of a license to retail liquors, and while being engaged in the sale of intoxicating liquors under such license, he "did then and there permit" certain persons, naming them, "who were not then and there members of his family, to go and enter into said room where intoxicating liquors were then and there sold, the said day being the first day of the week, commonly called Sunday."²⁰ Under a

¹⁶ *Steinberger v. State*, 35 Tex. Cr. App. 492; 34 S. W. 617.

¹⁷ *Botkins v. State*, 36 Ind. App. 179; 75 N. E. 298.

"A conviction should state clearly which offense is found, as this may affect future consequences and proceedings against the licensed person." *Patterson's Licensing Acts* (19th Ed.), 504, citing *Newman v. Bendyshe*, 10 A. & E. 11; 2 P. & D. 340; *Rex v. North*, 6 D. & Ry. 143; *Cotterill v. Lempriere*, 24 Q. B. Div. 634; 59 L. J. M. C. 133; 54 J. P. 583.

"Did keep his bar open and allow parties to frequent and re-

main in the same, contrary to law," was held clearly bad. *Regina v. Haggard*, 30 Up. Can. 152; *Regina v. Parlee*, 23 C. P. (Can.) 359; *Regina v. Cavanagh*, 27 C. P. (Can.) 537.

¹⁸ *Amio v. People*, 122 Ill. App. 398; *State v. Clemmensen*, 92 Minn. 191; 99 N. W. 640; see also *People v. McDonnell* (N. Y.), 108 N. Y. Supp. 749.

¹⁹ *People v. Lupton*, 52 N. Y. Misc. Rep. 336; 103 N. Y. Supp. 172.

²⁰ *Atkinson v. State*, 33 Ind. App. 8; 70 N. E. 560.

statute prohibiting places where liquors are kept for sale, "either at retail or wholesale," to be kept closed on Sunday, it need not be alleged whether they were kept for sale at "retail" or "wholesale."²¹

Sec. 896. Keeping place for unlawful sale of liquors—Tippling house.

In charging the keeping of a place for the sale of liquors, without a license so to do, the statute must be closely observed,²² and a decision in one State can scarcely be relied upon in another because of the various shades of difference between the statutes. Thus, where the offense was the keeping of a grocery for the retail of liquors, a charge that the accused kept a grocery and did retail liquors was held insufficient; because the offense created by the statute was the keeping of a grocery for the retail of liquors, not either the keeping of it or the retailing of the liquors.²³ In such instances it is usually not necessary to aver the particular kind of liquors kept.²⁴ If the place must be kept for the purpose of selling liquors, then such purpose must be alleged, but this may be done in the language of the statute.²⁵ And where the statute was that "if any person * * * by agent or otherwise, shall keep any house" for the retail of liquor, without a license, it was held not necessary to aver the particular house in question was kept "by an agent," because of the words "or otherwise."²⁶ Where a statute

²¹ *People v. Talbot*, 120 Mich. 486; 79 N. W. 688; 6 Det. L. N. 242.

²² *State v. Adams*, 16 Ark. 497; *Commonwealth v. Davenport*, 2 Allen, 299; *State v. Hoard*, 123 Ind. 34; 23 N. E. 972; *Commonwealth v. Kimball*, 7 Gray, 328; *State v. McGough*, 14 R. I. 63; *Commonwealth v. Purdy*, 147 Mass. 29; 16 N. E. 745; *State v. Price*, 75 Iowa, 243; 39 N. W. 291.

²³ *Hensley v. State*, 1 Eng.

(Ark.), 252; *Volmer v. State*, 34 Ark. 487; *Woods v. Commonwealth*, 1 B. Mon. 74; *Our v. Commonwealth*, 9 Dana, 9; *Bush v. Republic of Texas*, 1 Tex. 455.

²⁴ *Barth v. State*, 18 Conn. 432. *Contra*, *Cousineau v. State*, 10 Mo. 501.

²⁵ *Barth v. State*, 18 Conn. 432; *Commonwealth v. Kimball*, 7 Gray, 332, *note*; *Commonwealth v. Gray*, 13 Gray, 26.

²⁶ *Rawson v. State*, 1 Conn. 292.

makes it an offense in the owner or keeper of a place to sell liquor in it without a license, it is not sufficient to merely allege that the defendant sold liquor in a place, specifying it;²⁷ but a charge that accused retailed liquors in a house has been held a sufficient allegation that he kept the house;²⁸ and so is one, in the absence of a motion to make more specific, charging that the accused maintained a place where "whisky, lager beer, and other intoxicating liquors" were kept for sale.²⁹ So a charge "that defendant did then and there, in said house, keep a tippling house, without having first obtained a license then and there to keep a tavern" is good.³⁰ A mere charge of a sale of liquors is not sufficient to show the keeping of a tippling house without a license,³¹ and upon an averment of keeping an unlicensed place it is usually necessary to aver and prove a sale therein.³² But where the offense was committed by keeping a tippling house, a charge that the accused "did keep a drinking house and tippling shop, contrary to the form of the statute," was held sufficient.³³ Under such a statute no allegation of sale is necessary.³⁴ But under such a statute a charge that the accused kept and maintained "a building occupied by himself as a saloon and shop, and resorted to for the illegal sale of intoxicating liquors," alleges the commission of no offense.³⁵ Under the Massachusetts statute³⁶ it is sufficient to aver that the building described was "used for the illegal sale and keeping of intoxicating liquors;" it is not necessary to aver more distinctly that the keeping was illegal, nor is it necessary to aver that the sale

²⁷ *State v. Nickerson*, 30 Kan. 545; 2 Pac. 654.

²⁸ *Morrison v. Commonwealth*, 7 Dana, 218.

²⁹ *Topeka v. Raynor*, 8 Kan. App. 279; 55 Pac. 509.

³⁰ *Commonwealth v. Turner*, 4 B. Mon. 4; *Commonwealth v. Riley*, 14 Bush, 44.

³¹ *Herine v. Commonwealth*, 13 Bush, 295.

³² *Braswell v. Commonwealth*, 5

Bush, 544; *State v. Hadlock*, 43 Me. 282.

³³ *State v. Casey*, 45 Me. 435; *State v. Collins*, 48 Me. 217; *State v. Rollins*, 77 Me. 380.

³⁴ *State v. Dorr*, 82 Me. 157; 19 Atl. 157, *Anderson v. Van Buren*, 130 Mich. 695; 90 N. W. 692; 9 Det. L. N. 222.

³⁵ *State v. Dodge*, 78 Me. 439; 6 Atl. 875.

³⁶ St. 1855, c. 405, § 1.

or the keeping was without appointment of law.³⁷ Where a statute prohibits the "maintaining" a tenement house for the illegal sale or keeping of liquor, the offense is the maintaining of the house, so that it is not necessary to aver by whom it is used.³⁸ So where a statute makes it an offense for anyone in control of a house to permit it to be used for the illegal sale of liquor, an allegation that the accused knowingly permitted "a certain shop" to be used for such purpose was held sufficient.³⁹ A statute provided that every person who shall let any building or tenement for certain purposes shall be guilty of maintaining a nuisance. An indictment charging that the accused, being the owner of a particularly described building, permitted its use as a grogshop, knowing at the time it was being used for that purpose, was held insufficient on the ground that it only inferentially and argumentatively charged the building was actually used for such illegal purpose. Under the same statute a charge that the accused, being the owner of a building, did let it with the intent that the tenant should during the time of the lease maintain the same as a grogshop, was held insufficient; because there was no averment that the intent was ever carried out, and also because there was a failure to state when the tenancy was to begin or that the tenant ever took possession of the building within the period charged in the indictment.⁴⁰ An allegation that the accused "is guilty of keeping and maintaining a certain tenement" for illegal sale of liquor is equivalent to an allegation that he "did keep and maintain a certain tenement" with like illegal purpose.⁴¹ A charge that the accused

³⁷ Commonwealth v. Kimball, 7 Gray, 328.

³⁸ Commonwealth v. Sampson, 113 Mass. 191; Commonwealth v. Hersey, 144 Mass. 297; 11 N. E. 116.

³⁹ State v. Wiseman, 97 Me. 90; 53 Atl. 875; Commonwealth v. Bartley, 138 Mass. 181.

⁴⁰ State v. Worden, 27 R. I. 484; 63 Atl. 486.

⁴¹ Commonwealth v. Gallagher, 145 Mass. 104; 13 N. E. 359.

For a sufficient form under Ohio Act of May 1, 1854, see Miller v. State, 3 Ohio St. 475; Kern v. State, 7 Ohio St. 411; and under an ordinance of the City of Yankton, S. D., see Yankton v. Douglass, 8 S. D. 441; 66 N. W. 923.

A *continuendo* alleging a keeping is usually surplusage. Bur-

kept a place where various kinds of intoxicating liquors were sold and stored for sale is not bad for duplicity, as it charges only one offense, which is the keeping of the place in violation of the statute.⁴² A statute providing that without a license no person shall "engage in the business of keeping a tavern" will not admit of a charge that the accused "did keep" such a place, there being a difference between engaging in the business of keeping a tavern and actually keeping one.⁴³ If the statute forbid the keeping of a saloon "used as a place of resort," then these quoted words, or similar ones, must be used, for the mere keeping of the saloon is not the offense created by the statute.⁴⁴ And so a statute making it an offense to "keep or expose for sale" intoxicating liquors is not sufficiently covered by an allegation charging the accused with "keeping an open bar," or even with "keeping a public bar for the sale of intoxicating liquors."⁴⁵ So if a statute forbids sales without a license, a charge that the defendant kept "a saloon or a place of public resort where intoxicating liquors were sold in violation of law" must fail.⁴⁶ It is an offense at common law to keep a disorderly liquor shop, so that a charge that the defendant kept such a shop, setting

ner v. Commonwealth, 13 Gratt 778.

Under an early Vermont statute an indictment for keeping a bar-room had to allege it was "used as a place of resort." State v. Stone, 54 Vt. 550.

⁴² Anderson v. Van Buren Circuit Judge, 130 Mich. 695; 90 N. W. 692; 9 Det. L. N. 222; Commonwealth v. Foss, 14 Gray, 50.

The usual rules with reference to negating defenses prevails. Anderson v. Van Buren, 130 Mich. 695; 90 N. W. 692; 9 Det. L. N. 222; Hamilton v. State, 78 Ohio St. 76; 84 N. E. 601; Commonwealth v. Eds, 14 Gray, 406.

The prosecution is not bound to furnish a bill of particulars of the testimony on which it relies. People v. Congdon, 137 Mich. 133; 100 N. W. 266; 11 Det. L. N. 236; Westbrook v. State (Miss.), 25 So. 491; not even on a charge of being a common seller. Lauer v. District of Columbia, 11 App. D. C. 453.

⁴³ Pettibone v. State, 19 Ala. 586.

⁴⁴ State v. Stone, 54 Vt. 550.

⁴⁵ Commonwealth v. Hickey, 126 Mass. 250.

⁴⁶ State v. Gumber, 37 Wis. 298; Volmer v. State, 34 Ark. 487.

out the particular disorderly acts therein is sufficient.⁴⁷ A charge that the accused kept a tippling house without a license therefor, wherein intoxicating liquors were sold, to be drunk in and about the same, which house he then and there kept in a disorderly manner, is sufficient;⁴⁸ and a charge of keeping such a house "not under pretense of keeping a tavern" is good, at least after verdict.⁴⁹ It is not necessary to set forth the acts making the house a "tippling house," that term having a well defined meaning in law.⁵⁰

Sec. 897. Maintaining liquor nuisance.

There is not much difference between the keeping of a place for illegal sales of liquor and the maintenance of a liquor nuisance. Statutes of the latter character are of more recent origin than those of the former, and are more severe and strict in their terms. Under an early Iowa statute the charge had to be made that the accused had sold liquors at the place or

⁴⁷ *State v. Hoard*, 123 Ind. 34; 23 N. E. 972.

Of course, if the defendant be known by two names, an indictment under either is sufficient; and proof of the other will not show a variance. *Commonwealth v. Jacobs*, 152 Mass. 276; 25 N. E. 463.

An offense may be laid in several counts. *State v. Doyle*, 15 R. I. 527; 19 Atl. 900; *State v. Brady*, 16 R. I. 51; 12 Atl. 238.

⁴⁸ *Shilling v. State*, 5 Ind. 443.

⁴⁹ *Webster v. Commonwealth*, 7 Dana, 215.

⁵⁰ *Commonwealth v. Riley*, 14 Bush, 44; *Allen v. Commonwealth*, 10 Ky. L. Rep. (abstract) 280; *Commonwealth v. Neff*, 9 Ky. L. Rep. (abstract) 442; *Long v. Commonwealth*, 5 Ky. L. Rep. (ab-

stract) 428; *Pearce v. Commonwealth*, 5 Ky. L. Rep. 407.

In Kentucky it was held necessary, on a charge of keeping a tippling house, to aver the liquors were sold in a house. *Commonwealth v. Graves*, 16 Ky. L. Rep. (abstract) 272; *Herine v. Commonwealth*, 13 Bush, 295; *Fitch v. Commonwealth*, 4 Ky. L. Rep. 339.

Under a statute making it an offense to keep, run or operate a place where liquors are sold in violation of law, a charge that accused was found unlawfully in possession of liquors in a designated building in his possession for the purpose of keeping, running and operating a place where liquors are illegally sold, is not sufficient. *Barnhardt v. State*, 171 Ind. 428; 86 N. E. 481.

kept them there for the purpose of sale.⁵¹ A charge that the accused committed the offense "by using and keeping a room and place for the purpose of selling, and by selling there, therein" intoxicating liquors was held sufficient.⁵² On alleging that he did "unlawfully establish, keep, use and maintain a certain building and place in which he owned and kept intoxicating liquors, with intent to sell and give the same away, contrary to and in violation of the laws of Iowa, and did at the aforesaid times and place so unlawfully sell and give away such intoxicating liquors," charges more than that he kept and sold them contrary to law; it is a sufficient charge that he kept, used and maintained a place with intent to sell contrary to law, and also maintained a place in which he kept liquors, with intent to sell them in like manner.⁵³ Where one section of a statute related to the illegal manufacture of liquors, another provided for the punishment of anyone selling liquor without a permit, a third made it an offense to mix liquors and sell them, and a fourth prohibited all persons keeping liquors within the State, or to permit the same to be sold therein, a charge under a fifth section providing that whoever shall erect or use any building or place for any of the purposes specified in the sections just enumerated should be deemed guilty of keeping a nuisance, an indictment was held sufficient, though it did not charge the liquors were kept for sale or sold in a place to which persons desiring to buy resorted, because not a necessary element of the offense.⁵⁴ A charge of erecting a building for the purpose of selling liquor and with the intent to keep them with intent to unlawfully sell them, and therein selling them, is not bad for duplicity, for it charges only one offense, the keeping of a nuisance.⁵⁵ But a charge of

⁵¹ *State v. Hass*, 22 Iowa, 193. As to recent statutes in Illinois, see *Johnson v. People*, 44 Ill. App. 642.

⁵² *State v. Freeman*, 27 Iowa, 333; *State v. Howarth*, 70 Iowa, 157; 30 N. W. 389; *State v. Rupperty*, 70 Iowa, 160; 30 N. W. 391; see *State v. Kruse* (N. D.),

124 N. W. 385; *State v. O'Neal* (N. D.), 124 N. W. 68.

⁵³ *State v. Price*, 75 Iowa, 243; 39 S. W. 291.

⁵⁴ *State v. McEnturff*, 87 Iowa, 691; 55 N. W. 2.

⁵⁵ *State v. Niers*, 87 Iowa 723; 54 N. W. 1076; *State v. Nield*, 4 Kan. App. 626; 45 Pac. 623.

maintaining a nuisance in two separate buildings is bad for duplicity.⁵⁶ Where a statute makes it an offense to knowingly let premises to be used as a liquor nuisance, it is sufficient to charge that the accused "a certain room knowingly let to and permitted to be used by one C O, for the illegal sale and keeping for sale of intoxicating liquors."⁵⁷ Under a Massachusetts statute a charge that the accused during a specified time and in a designated town "a certain tenement, there situate, used for illegal keeping and sale of intoxicating liquors, knowingly and unlawfully did keep and maintain" is sufficient.⁵⁸ A charge that the accused kept and maintained "a certain tenement [describing it] then and there used for the illegal keeping of intoxicating liquors, said tenement, so used as aforesaid, being then and there a common nuisance," sufficiently alleges that the tenement was used for the illegal purposes named therein.⁵⁹ A charge that the accused unlawfully kept a place where intoxicating liquors were sold is sufficient to show the sales were unlawful.⁶⁰ Where a statute declared "all buildings, places, or tenements" used for the illegal sale of liquors to be nuisances, a charge that the accused kept "a certain nuisance, to-wit, a tenement used for the illegal sale of intoxicating liquors," was held to sufficiently charge the offense of keeping a nuisance.⁶¹ A charge that the accused "did willfully, unlawfully and habitually sell and suffer and permit the said liquors then and there so sold by him by virtue of such license, to be drunk on or about the said premises when so sold as aforesaid," was held not to

⁵⁶ *State v. Wester*, 67 Kan. 810; 74 Pac. 239.

⁵⁷ *State v. Pierce* (Me.), 15 Atl. 68.

⁵⁸ *Commonwealth v. Davenport*, 2 Allen 299; *Commonwealth v. Quinn*, 12 Gray 178; *Commonwealth v. Kelly*, 12 Gray 175; *Commonwealth v. Ryan*, 136 Mass. 436; *Commonwealth v. Kelly*, 7 Gray 332, *note*; *Commonwealth v. Clark*, 145 Mass. 251; 13 N. E. 888.

⁵⁹ *Commonwealth v. Hill*, 4 Allen 589; *Commonwealth v. Davenport*, 2 Allen 299; *Commonwealth v. Wright*, 12 Allen 190; *Commonwealth v. Lee*, 148 Mass. 8; 18 N. E. 586; *Commonwealth v. Howe*, 13 Gray 26.

⁶⁰ *State v. Erickson*, 14 N. D. 139; 103 N. W. 389.

⁶¹ *Commonwealth v. Quinlan*, 153 Mass. 483; 27 N. E. 8.

allege sufficiently an unlawful sale of liquor, nor the offense of keeping a disorderly house.⁶² A saloon keeper gave a statutory bond conditioned that there should be only one entrance to his saloon and that from the street. He violated the bond by opening a door leading to a driveway in the rear. It was held that a warrant charging the licensee "with maintaining a common liquor nuisance" in this respect sufficiently recited the substance of the offense.⁶³ If a statute defines a nuisance as a place "used" for the illegal sale of liquors, the charge cannot be that it was "resorted to" for such illegal sales.⁶⁴ Nor, under such a statute, can it be alleged that it was "occupied" by the defendant for the sale of liquors.⁶⁵ And where a statute defines the offense of keeping a building for the sale of liquors, it is not enough to charge the accused "kept a grocery and did retail" liquor.⁶⁶ A charge of specific sales is not necessary if it be alleged that the defendant kept, maintained and used the specified building for the sale, and keeping for sale, of intoxicating liquors.⁶⁷ Whether or not it is necessary to charge that defendant owned or controlled the building depends upon the statute; usually words of ownership or control are necessary in a charge of letting out the premises.⁶⁸ But here slight charges are usually sufficient as in a case of letting; thus, that the accused "a certain room knowingly let to and permitted to be used by one C for the

⁶² *Campbell v. State*, 62 N. J. 402; 41 Atl. 717.

As saloon keepers are usually under bond to keep orderly houses, they may eject persons creating disturbance therein. *Lampton v. State* (Tex. Cr. App.), 65 S. W. 526. And there is no reason why they cannot, after request made, "bond or no bond."

It need not be averred the disorder was such as to disturb the peace of the neighborhood. *Miller v. Commonwealth* (Ky.), 113 S. W. 518.

⁶³ *Commonwealth v. Ferden*, 141 Mass. 28; 6 N. E. 239.

⁶⁴ *State v. Dodge*, 78 Me. 439; 6 Atl. 875.

⁶⁵ *Duke v. Marston* (N. H.), 15 Atl. 222.

⁶⁶ *Hensley v. State*, 6 Ark. 252; *Commonwealth v. Hill*, 4 Allen 589; *State v. Crabtree*, 27 Mo. 232; *State v. Adams*, 81 Iowa, 593; 47 N. W. 770; *Commonwealth v. Kelly*, 12 Gray 175.

⁶⁷ *State v. Dorr*, 82 Me. 157; 19 Atl. 157.

⁶⁸ *State v. Schilling*, 14 Iowa 455; *State v. Nickerson*, 30 Kan. 545; 2 Pac. 654.

illegal sale and keeping for sale of intoxicating liquors.”⁶⁹ Of course, if the accused kept the nuisance, allegations of ownership or control is not necessary.⁷⁰ Where a statute defined the offense of keeping a disorderly shop “to the annoyance or injury of any part of the citizens of this State,” it was held sufficient to follow the language of the statute in charging the offense, as “did then and there unlawfully keep a place, to-wit, a saloon where intoxicating liquors were sold, bartered and given away, and suffered to be drunk in a disorderly manner, and did then and there keep said saloon in a disorderly manner, by then and there unlawfully permitting and suffering divers persons on week days and Sundays, by day and night, to congregate in and about said saloon, and then and there make a great noise by yelling, quarreling, boisterous talk, fighting, swearing and drunken rows, to the annoyance and injury of part of the citizens of said State.”⁷¹ Where illegal sales are relied upon to constitute the place a nuisance, then facts must be alleged to show illegal sales. Thus, to allege that sales were made, but the purchasers were not retailers of beer, was held not sufficient because they might have been made to jobbers or wholesale dealers and not to consumers.⁷² Two persons may be jointly indicted for maintenance of a nuisance: one for maintaining it, the other for aiding.⁷³ It need not be alleged in Kansas⁷⁴ that the

⁶⁹ *State v. Pierce* (Me.), 15 Atl. 68.

⁷⁰ *State v. Ryan*, 81 Me. 107; 16 Atl. 406; *Donovan v. State*, 170 Ind. 123; 83 N. E. 744.

⁷¹ *Skinner v. State*, 120 Ind. 127; 22 N. E. 115; *Sopher v. State*, 169 Ind. 177; 81 N. E. 913.

⁷² *Terre Haute Brewing Co. v. State*, 169 Ind. 242; 82 N. E. 81.

⁷³ *State v. Ruby*, 68 Me. 543.

The indictment should conclude “Contrary to the statute” or “against the form of the statute,” and not “to the common nuisance of all citizens.” *Commonwealth*

v. Howe, 13 Gray 26; *State v. Rhodes*, 2 Ind. 321.

A charge of sales to habitual drunkards and also to minors, contrary to law, is only one charge, a charge of keeping a nuisance. *Nicholson v. People*, 29 Ill. App. 57. See also *State v. Dean*, 44 Iowa 648.

A charge that accused kept liquors in the past where liquors “are sold” is not sufficient, for the act of keeping and sale—a sale being necessary—must concur in point of time. *State v. Chiles*, 64 Kan. 453; 67 Pac. 884.

⁷⁴ Gen. St. 1901, Sec. 2493.

place maintained as a nuisance is not a private dwelling house nor used in connection with a place of business.⁷⁵ Unlawful acts constituting the place a nuisance may be charged conjunctively in one count, and the State cannot be required to elect upon which one it will rely.⁷⁶

Sec. 898. Description of house or place constituting the nuisance as illegally kept.

Under a statute prohibiting the keeping of a tippling house it is generally sufficient to charge that the accused did "keep a tippling house," contrary to the form of the statute, no other description being required, except that it was kept in the jurisdiction of the court or in the county.⁷⁷ But if the indictment is against the premises, as it were—if they are to be abated—then a specific description of them must be inserted in the indictment, so as to be readily known or ascertained.⁷⁸ A charge that the place where the liquors were illegally sold was "in a building located on lot 12, block 28,"

⁷⁵ State v. Thurman, 65 Kan. 90; 68 Pac. 1081.

⁷⁶ State v. Labore (Kan.), 103 Pac. 106.

An ordinance provided that "all rooms, taverns, eating houses, bazaars, restaurants, drug stores, groceries, coffee houses, or other places of public resort, where intoxicating liquors are sold, shall be deemed a public nuisance, and whoever shall keep such place by himself or his agent or servant shall for each offense be fined." It was held that an indictment drawn upon it which merely charged the accused sold such liquor at a place specified was not sufficient. Grom v. People, 135 Ill. App. 453.

⁷⁷ State v. Casey, 54 Me. 435;

State v. Collins, 48 Me. 217; Howard v. State, 6 Ind. 444; State v. Rollins, 77 Me. 380; State v. Kreig, 13 Iowa 426; State v. Schilling, 14 Iowa 455; Commonwealth v. Logan, 12 Gray, 136; Commonwealth v. Welsh, 1 Allen 1; State v. Becker, 20 Iowa 438; Segars v. State, 35 Tex. Cr. App. 45; 31 S. W. 370; Commonwealth v. Hill, 14 Gray 24; Commonwealth v. Skelley, 10 Gray, 464; Commonwealth v. Quinlan, 153 Mass. 483; 27 N. E. 8.

⁷⁸ Zumhoff v. State, 4 G. Greene (Iowa) 526; State v. Waltz, 74 Iowa 610; 38 N. W. 494.

In this last case the indictment was held sufficient to support a fine, but not an abatement of the nuisance.

in a certain town, county and State, was held sufficient.⁷⁹ Where the place was described as "within G township, in the county of N, at and near a small village or collection of houses, commonly known as 'Wanlock,' a more particular description of which place is to the State's attorney unknown," and also described it as a "house, room and place of public resort at and near a place known and commonly called 'Wanlock,'" this was held sufficient, the evidence showing that the defendant kept a place a few rods from a place of that name, where he sold liquors.⁸⁰ In cases where the nuisance was not to be abolished but a fine to be imposed for keeping the nuisance, slighter descriptions have been held sufficient, where a description was required. As, "in a certain room in the Windsor Hotel;"⁸¹ a building "at the corner of Depot Square in said town,"⁸² "to-wit, a building, to-wit, a tenement in a building," was held not inconsistent in its description of the place.⁸³ "In a certain frame building under his [defendant's] control," was held sufficient.⁸⁴ The name of the owner of the building need not be given.⁸⁵ Nor is it necessary to aver, for keeping a nuisance, that the building was under the defendant's control.⁸⁶ A "tenement" in a certain named street has been held sufficient;⁸⁷ so "a certain building, to-wit, a certain tenement known as 'Clark's Block,' so called, situated on the corner of Main and Mechanic streets, in the city of Worcester, said tenement being in the fourth story of said block, in that part of the block fronting on Main Street."⁸⁸ Where it was alleged that the accused

⁷⁹ *State v. Knoby*, 6 Kan. App. 334; 51 Pac. 53.

⁸⁰ *Daxanbeklar v. People*, 93 Ill. App. 553.

⁸¹ *State v. Cox*, 82 Me. 417; 19 Atl. 857.

⁸² *State v. Hall*, 79 Me. 501; 11 Atl. 181, which corner was not stated.

⁸³ *Commonwealth v. Lee*, 148 Mass. 8; 18 N. E. 586.

⁸⁴ *State v. Schilling*, 14 Iowa 455.

⁸⁵ *Our House v. State*, 49 G. Greene (Iowa), 172.

⁸⁶ *State v. Schilling*, 14 Iowa 455.

⁸⁷ *Commonwealth v. Skelley*, 10 Gray 464.

⁸⁸ *Commonwealth v. Hill*, 14 Gray 24.

Under an early Ohio statute it had to be averred the place was one of public resort. *Aultfather v. State*, 4 Ohio St. 467.

“did then and there erect and keep a certain tippling house or place wherein spirituous or intoxicating liquors were sold by the defendant, without license, to be drunk in and about the said tippling house, which said tippling house, during all the time aforesaid, was then and there kept by the defendant in a disorderly manner,” it was held that the indictment was not uncertain in charging the place where the liquors were sold because the words “tippling house or place wherein” liquors were sold by the defendant were aided by the statement that the liquors were sold to be drunk “in and about said tippling house.”⁸⁹

Sec. 899. Time of maintaining nuisance.

The keeping of a nuisance may be laid with a *continuendo*, as on a day named “and on divers other days and times between that day and the day of finding this indictment.”⁹⁰

Sec. 900. Sale to be drunk on premises.

Where the offense consists of a sale of liquor to be drunk or consumed on the premises, then it must be averred that the sale was for that purpose, though it is not necessary to give a description of the premises beyond alleging that the sale was made within the county, which carries with it a charge that the premises were situated in the county of sale.⁹¹ A charge that the liquor was sold “to be drunk in or upon the premises where sold” is sufficient.⁹² If it be illegal to sell in a less

⁸⁹ State v. Zimmerman, 2 Ind. 565; Shilling v. State, 5 Ind. 443.

⁹⁰ Commonwealth v. Hoyer, 9 Gray 292 (not open to a charge of duplicity); State v. Welsh (Me.), 7 Atl. 475; Commonwealth v. Welsh, 1 Allen 1; State v. Prater, 57 S. C. 271; 37 S. E. 933; Campbell v. State, 62 N. J. L. 402; 41 Atl. 717; Commonwealth v. Sheehan, 143 Mass. 468; 9 N. E. 839; Commonwealth v. Keefe, 9

Gray 290; State v. Buck, 78 Me. 193; 3 Atl. 513.

As to repeating the allegation of time in the second clause of a count, see State v. Brady, 16 R. I. 51; 12 Atl. 238.

⁹¹ People v. Sweetser, 1 Dak. 308; 46 N. W. 452; Dansey v. State, 23 Fla. 316; 2 So. 692; People v. McDonnell, 108 N. Y. Supp. 749.

⁹² Higgin v. People, 69 Ill. 11; Burke v. State, 52 Ind. 522; State v. Williamson, 19 Mo. 384.

quantity than a particular amount, then it must be averred that the amount sold was less than such quantity.⁹³ As a rule, the statutes require the allegation that the place where the liquors were sold was owned or controlled by the defendant.⁹⁴ If the offense simply consists of a sale without a license, then a charge of a sale of liquor to be drunk upon the premises will not vitiate it, the allegations concerning the place in which it was sold to be drunk being regarded as surplusage.⁹⁵

Sec. 901. Location of saloon in residence part of city.

A charge that the defendant "did unlawfully establish, locate, conduct and maintain a saloon within a resident portion of said city, contrary to the ordinances in such cases made and provided," was held not sufficient where the ordinance defined the resident part of the city as "any part of said city where there are more dwelling houses than there are business houses within a radius of three hundred feet of the place where any saloon is now or may hereafter be located."⁹⁶

Sec. 902. Sale in general.

Apt words must be used in charging a sale, and if it be doubtful whether a sale or a gift or even a barter be charged, the indictment will be fatally defective. Nor can it be charged that the accused "sold, exchanged, or otherwise disposed of" liquor.⁹⁷ But it may be charged that the accused "did sell and barter and give away" liquors, yet if no price be alleged the words "sell and barter" will be regarded as surplusage, and the indictment stand as a charge of a gift.⁹⁸ If it be

⁹³ *Burke v. State*, 52 Ind. 522.

⁹⁴ *State v. Woolsey*, 92 Ind. 131.

⁹⁵ *Commonwealth v. Halback*, 101 Ky. 166; 40 S. W. 245; 19 Ky. L. Rep. 278.

⁹⁶ *Tejszeaski v. Dallas* (Tex. Cr. App.), 45 S. W. 569. See also *Oak Cliff v. State* (Tex. Cr. App.), 107 S. W. 1121; *Otte v. State*, 29 Ohio Cr. Ct. Rep. 203.

⁹⁷ *Raisler v. State*, 55 Ala. 64; *Blasdell v. Hewit*, 3 Caines 157.

⁹⁸ *Eagan v. State*, 53 Ind. 162; but in Nebraska where the words "sell and give away" were used, the words "give away" were construed to mean "deliver." *State v. Ball*, 27 Neb. 601; 43 N. W. 398; *Wendt v. State*, 32 Neb. 182; 49 N. W. 351; *State v. Bielby*, 21 Wis. 204; *Jordan v. State*, 37

averred the accused sold the liquor for a price it is not necessary to aver that the sale was "for purpose of gain," even though the statute makes it an offense to sell or barter liquors for such purposes.⁹⁹ A charge that the accused "did retail" liquor charges a sale under a statute forbidding sales by retail.¹ It is sufficient to charge that the accused "did sell to one G, then and there being, spirituous and intoxicating liquors," where it is not necessary to aver the price nor quantity sold.² But a charge that the accused at a particular time and in the county "did unlawfully sell whisky and brandy and other spirituous liquors" is too indefinite.³ A detail of the acts and circumstances constituting the sale need not be set forth,⁴ nor by whose hand the liquor was delivered.⁵ A sale by an agent is a sale by his principal, and on a charge of a sale by the accused it may be shown that his duly authorized agent

Tex. Cr. App. 222; 39 S. W. 110; 38 N. W. 780; Lawson v. State, 151 Ala. 95; 44 So. 50. Allegations of a gift in connection with those of a sale may be regarded as surplusage. Steel v. State, 26 Ind. 92. See State v. Fant, 2 La. Ann. 837; State v. Finan, 10 Iowa 19; State v. Woodward, 25 Vt. 616.

⁹⁹ Schlicht v. State, 56 Ind. 173; State v. Finan, 10 Iowa 19; Anderson v. People, 63 Ill. 53; Arrington v. Commonwealth, 87 Va. 96; 12 S. E. 224; 10 L. R. A. 242; State v. Shackle, 29 Kan. 341.

¹ Wrocklege v. State, 1 Clarke (Iowa) 167; Commonwealth v. Kimball, 7 Met. 304.

² State v. Muntz, 3 Kan. 383; State v. Ratner, 44 Kan. 429; 24 Pac. 953; State v. Tanner, 50 Kan. 365; 31 Pac. 1096; State v. Looker, 54 Kan. 227; 38 Pac. 288; State v. Smith, 35 Tex. 132; State v. Heldt, 41 Tex. 220; State

v. Leppert, 7 Ind. 355; State v. Schreiber, 98 Ind. 333; State v. Downer, 21 Wis. 274; Taylor v. State, 126 Ga. 557; 55 S. E. 474.

³ Commonwealth v. White, 18 B. Mon. 492; Commonwealth v. Middleton, 8 Ky. L. Rep. 264; State v. Lane, 33 Me. 536; People v. Minnock, 52 Mich. 628; 18 N. W. 390; Burch v. Republic of Texas, 1 Tex. 608; Alexander v. State, 29 Tex. 495; Cochran v. State, 26 Tex. 678.

⁴ Commonwealth v. Rowe, 14 Gray 47; Commonwealth v. Thayer, 8 Met. 525; State v. Kelly, 29 Mo. 476.

Thus if the statute declares that if any one shall "sell or be in any wise concerned in selling liquor," he shall be liable to a fine, it is enough to charge that the accused "sold" the liquors. Needham v. State, 19 Tex. 332.

⁵ State v. Steward, 31 Me. 515; State v. Brown, 31 Me. 520.

made the sale.⁶ It is not necessary, as a rule, to state the house where sold, it being sufficient to aver it was sold in the county.⁷ A sale of several kinds of liquor at one time may be alleged in one count, as "did then and there sell vinous, spirituous and malt liquors;"⁸ at least it is good after verdict where no objection is made for indefiniteness.⁹ But in some jurisdictions this is not permitted because it renders the indictment uncertain.¹⁰ On a charge of an illegal sale against a druggist, who by law is required to keep a register of all sales made by him, it is sufficient to charge the sale without any reference to a failure to keep the register, or even that he did keep it.¹¹ Whether or not the name of the purchaser must be given will depend somewhat upon the terms of the statute,¹² as elsewhere discussed; and the same is true

⁶ *Johnson v. State*, 83 Ga. 553; 10 S. E. 207; *Commonwealth v. Kimball*, 7 Met. 308; *State v. Curtiss*, 69 Conn. 86; 90 S. W. 1014; *Weil v. State*, 48 Tex. Cr. App. 603; 90 S. W. 644; *Regina v. Alexander*, 17 Ont. App. 458; *McGovern v. State*, 49 Tex. Cr. App. 35; 90 S. W. 502; *Kemp v. State*, 120 Ga. 157; 47 S. E. 548; *Morgan v. Commonwealth (Ky.)*, 97 S. W. 411; 30 Ky. L. Rep. 139; *Commonwealth v. McGuire*, 11 Gray 460; *Roberts v. State*, 52 Tex. Cr. App. 355; 107 S. W. 59; *Commonwealth v. Farren*, 9 Allen, 489; *Commonwealth v. Very*, 12 Gray 124; *Commonwealth v. McGuire*, 11 Gray 460; *State v. Wentworth*, 35 N. H. 442; *O'Bryan v. State*, 48 Ark. 42; 2 S. W. 339.

If the charge that the defendant was "interested in" an unlawful sale, it is not necessary to give the name of his agent through whom the sale was made.

O'Bryan v. State, 48 Ark. 42; 2 S. W. 339. If the charge be that the accused acted as agent for an individual, the name of such individual must be given. *State v. Higgins*, 53 Vt. 191.

⁷ *State v. Heldt*, 41 Tex. 220; *In re Savage*, 84 Va. 619; 5 S. E. 565; *People v. Sweetser*, 1 Dak. 308; 46 N. W. 452; *State v. Jaques*, 68 Mo. 260.

⁸ *State v. Ratner*, 44 Kan. 429; 29 Pac. 953; *State v. Tanner*, 50 Kan. 365; 31 Pac. 1096; *State v. Looker*, 54 Kan. 227; 38 Pac. 288.

⁹ *State v. Ratner*, 44 Kan. 429; 29 Pac. 953.

¹⁰ *Commonwealth v. White*, 18 B. Mon. 492; *Commonwealth v. Middleton*, 8 Ky. L. Rep. 264.

¹¹ *Lutton v. Palmer*, 69 Mich. 610; 37 N. W. 701; *People v. Scott*, 90 Mich. 376; 51 N. W. 520.

¹² *People v. Minnock*, 52 Mich. 628; 18 N. W. 390.

of the quantity sold.¹³ If the statute forbid the sale of a less quantity than several gallons, it is not necessary to aver that the sale was at retail nor not in an original package.¹⁴ And where the charge was that the accused "did sell by retail, and cause and knowingly permit to be sold to G L certain intoxicating liquors, contrary to law, contrary to the statute in such case made and provided," it was held that it charged no legal offense.¹⁵ If the pay for the liquor is part cash and part in exchange for an article, the charge may be of a sale only.¹⁶ It is not necessary to aver that the liquor sold was delivered, for the word sale imports a delivery.¹⁷ Charging a sale in the language of the statute is usually enough.¹⁸ Thus, where a statute provided that no person should sell liquors in a less quantity than one gallon without taking out a license as a dramshop keeper, it was held sufficient to allege that the accused sold one quart of whisky without a license so to do, it not being necessary to aver the price at which it was sold, as it is in some States.¹⁹ But an indictment alleging that the accused, at a particular time and place, "did unlawfully sell intoxicating liquors in a less quantity than a gallon without then and there having a dramshop keeper's license, or any other authority," was held

¹³ *Lutton v. Palmer*, 69 Mich. 610; 37 N. W. 701; *People v. Scott*, 90 Mich. 376; 51 N. W. 520; *State v. Clikenbeard* (Mo.), 115 S. W. 1059.

¹⁴ *State v. Herd*, 1 Mo. App. Rep'r 343; *In re Savage*, 84 Va. 619; 5 S. W. 565.

¹⁵ *State v. Schmidt*, 57 N. J. L. 625; 31 Atl. 280; *Bridgeford v. State*, 7 B. Mon. 47.

¹⁶ *Commonwealth v. Thayer*, 8 Met. 525.

¹⁷ *Commonwealth v. Leonard*, 8 Met. 530; *Bennett v. State*, 40 Tex. Cr. App. 445; 50 S. W. 947.

¹⁸ *Commonwealth v. Roberts*, 1 Cush. 505; *People v. Telford*, 56

Mich. 541; 23 N. W. 213; *Trost v. State*, 64 Miss. 188; 1 So. 49; *State v. Gregory*, 27 Mo. 231; *State v. Atkins*, 40 Mo. App. 344; *Lambie v. State*, 151 Ala. 86; 44 So. 51; *Rogers v. State*, 58 N. J. L. 220; 33 Atl. 283; *Hodgman v. People*, 4 Denio 235; *People v. Townsey*, 5 Denio 70; *Lincoln Center v. Linker*, 6 Kan. App. 369; 51 Pac. 807; *State v. Brennan*, 6 Kan. App. 765; 50 Pac. 986.

¹⁹ *State v. Gregory*, 27 Mo. 231; *State v. Williamson*, 19 Mo. 384; *State v. Fanning*, 38 Mo. 359; *State v. Mooty*, 3 Hill (S. C.) 187; *State v. Young*, 5 Cold. 51; *Commonwealth v. Hatcher*, 6 Gratt. 667.

not to set forth sufficiently the particular acts constituting the sale.²⁰ So was one alleging that the accused "did unlawfully and knowingly sell and give away malt, spirituous, and vinous liquors and intoxicating liquors" on a certain date, and on all the several days between that date and a certain subsequent date, without a license so to do, on the ground that it failed to charge directly and certainly particular offenses and the time they were committed.²¹ In an early case in Vermont it was held unnecessary to aver that the sale was made with force and arms.²² A Virginia statute made it an offense to sell liquor "by sample, representation, or otherwise, either at wholesale, retail, or to be drunk at the place where sold, or in any other way, without a license" to sell. In charging an offense under this statute the court said it was necessary to aver definitely the place of the sale, whether by wholesale or retail, or whether to be drunk on the premises, so that the accused might know for what he was prosecuted and so be able to prepare his defense.²³ But it was also said that it need not be averred that the sale was "by sample, representation, or otherwise," because not an essential ingredient of the offense.²⁴ A charge that the accused sold to "P and N and C, each, one drink of whisky" is bad, not alleging a joint sale or one transaction.²⁵ Where the offense

²⁰ *State v. Cox*, 29 Mo. 475; *State v. Fanning*, 38 Mo. 409; *State v. Solio*, 4 Penn. (Del.) 138; 54 Atl. 684.

²¹ *State v. Pischel*, 16 Neb. 490; 20 N. W. 848; *People v. Bates*, 61 N. Y. App. Div. 559; 15 N. Y. Cr. Rep. 469; 71 N. Y. Supp. 123.

²² *State v. Munger*, 15 Vt. 290.

In this State the omission of the verb "did," in connection with the words "sell and dispose of" was held not fatal. *State v. Whitney*, 15 Vt. 298; *Cæsar v. State*, 50 Fla. 1; 39 So. 470.

As to the payment of liquor taxes and the amount due and

rate, see *Allen v. State* (Tex.), 13 S. W. 998, and *Monford v. State*, 35 Tex. Cr. Rep. 237; 33 S. W. 351; *Barker v. State*, 117 Ga. 428; 43 S. E. 744.

²³ *Arrington v. Commonwealth*, 87 Va. 96; 12 S. E. 224; 10 L. R. A. 242; *Boyle v. Commonwealth*, 14 Gratt. 674; *State v. Chapman*, 25 W. Va. 408.

²⁴ *Arrington v. Commonwealth*, 87 Va. 96; 12 S. E. 224; 10 L. R. A. 242.

²⁵ *Alexander v. State*, 51 Tex. Cr. App. 506; 102 S. W. 1122; *State v. Solkowski*, (Del.), 69 Atl. 839; *People v. Schmidt*, 19 N. Y. Misc.

consisted of taking an order for the sale of liquor, an averment that the accused "did unlawfully take an order for one pint of whisky" was held to sufficiently charge the offense.²⁶ Each distinct sale on any one day is a distinct and separate offense, and the vendor may be prosecuted separately for each one of them,²⁷ even though the sales were made in quick succession.²⁸ Whether or not a person selling liquor in local option territory can be prosecuted for a sale without a license, or must be prosecuted for selling in a territory where sales are forbidden, are questions turning upon the peculiar language employed in local option statutes, and no general rule can be laid down.²⁹ Upon a charge of a sale without a license, it is not necessary to aver that one could have been obtained.³⁰ Upon a charge of soliciting orders for liquor in

Rep. 458; 44 N. Y. Supp. 607 (sold to Y C and divers other persons); *Hudson v. State*, 73 Miss. 784; 19 So. 965; *Hornberger v. State*, 47 Neb. 40; 66 N. W. 23; *People v. Polhemus*, 8 N. Y. App. Div. 133; 11 N. Y. Cr. Rep. 372; 40 N. Y. Supp. 491. See *Shea v. Muncie*, 148 Ind. 14; 46 N. E. 138.

²⁶ *State v. Camper*, 91 Md. 672; 47 Atl. 1027; *Moseley v. State* (Ala.), 47 So. 193.

²⁷ *Robinson v. State*, 53 Tex. Cr. App. 567; 110 S. W. 905; *State v. Darling*, 77 Vt. 67; 58 Atl. 974.

²⁸ *State v. Bursaw*, 74 Kan. 473; 87 Pac. 183.

The Legislature may provide that if a licensee sells on Sunday he may be prosecuted for a sale without a license. *Schiller v. State*, 49 Fla. 25; 38 So. 706.

²⁹ *Moore v. State*, 126 Ga. 414; 55 S. E. 327; *Pughsley v. State*, 4 Ga. App. 494; 61 S. E. 886; *Glover v. State*, 4 Ga. App. 455;

61 S. E. 862; *State v. Perkins*, 141 N. C. 797; 53 S. E. 735; *Sandys v. Williams*, 46 Ore. 327; 80 Pac. 642; *Kruse v. Williams*, 46 Ore. 632; 80 Pac. 648; *Adams Exp. Co. v. Commonwealth* (Ky.), 103 S. W. 352; 31 Ky. L. Rep. 810; *Oberer v. State*, 28 Ohio Cr. Ct. Rep. 620.

It is not necessary to charge that the sale was unlawful if the facts stated show it to be such. *State v. Johnson*, 62 W. Va. 154; 57 S. E. 371; 11 L. R. A. (N. S.) 872.

³⁰ *State v. Mudie* (S. D.), 115 N. W. 107.

Where the offense is actually selling liquor in a local option district, a charge that the accused "did engage in and pursue the occupation of selling spirituous, vinous and malt liquors" is not sufficient. *Robinson v. State* (Tex. Cr. App.), 75 S. W. 526.

If a statute declares that a delivery in a local option district shall be deemed a sale, then the trans-

local option territory as agent of a company supplying liquors, it need not be alleged whether the company was an individual, a partnership, a joint stock company, or a corporation.³¹ So under a charge of soliciting such orders it need not be stated whether the accused solicited the orders as principal or agent.³²

Sec. 903. Devices or evasions to conceal sale.

In a few States it is enacted that no evasion to conceal an actual sale shall defeat the charge of a sale having been actually made. Such statutes as these would seem to be useless, for if the transaction was an actual sale, then no device or concealment is sufficient to defeat the charge of a sale. Thus, where such a statute provided that "the giving away of intoxicating liquors or other shift or device to evade the provisions of this act shall be deemed and held to be an unlawful selling," it was held not necessary to set out the devices claimed to have been resorted to, but it was only necessary to aver a sale, and under that averment the devices resorted to could be proven.³³ So if the sale be for part cash and the remainder an exchange of property, the averment of a sale is sufficient, and a mere proof of the cash paid will support the charge.³⁴ So a prohibited sale need not be alleged to have been made with the intent to evade the law, for it is a violation and not an evasion of the law.³⁵ But where a statute forbids the giving away of liquor "in consideration of the purchase of other property" after charging a

action may be charged as a sale. *State v. Baserman*, 54 Conn. 88; 6 Atl. 185.

³¹ *Weil v. State*, 48 Tex. Cr. App. 603; 90 S. W. 644.

³² *State v. Braun*, 96 Minn. 521; 105 N. W. 975.

Unless some statute makes a sale of liquor an offense, there is no crime committed in selling it. *State v. Dougher*, 49 Mo. 409; *Commonwealth v. Kelly*, 10 Ky. L. Rep. (abstract) 721.

That certainty which is sufficient to bar any future prosecution for the same offense is sufficient. *Commonwealth v. Knoerr*, 3 Ky. L. Rep. (abstract) 694.

³³ *People v. Sweetser*, 1 Dak. 308; 46 N. W. 452; *Devine v. State*, 1 Clarke (Iowa) 443.

³⁴ *Commonwealth v. Thayer*, 8 Met. 525.

³⁵ *McMillan v. State*, 18 Tex. App. 375.

gift, it should be added that it was in consideration of the purchase of property, alleging what the property was, if known.³⁶ And where a gift is forbidden if made "with the purpose of evading the law," the indictment should allege that the pretended transaction was a gift made with such purpose, though it was really a sale.³⁷

Sec. 904. Sale or gift to minor.

In charging a gift or sale to a minor it is not necessary to give his age; it is sufficient to aver that at the time he was under the age of twenty-one years;³⁸ but the fact of his minority must be averred.³⁹ No reference need be made to a license, for a licensee can commit the offense as readily as a non-licensee.⁴⁰ It need not set out the name of the agent or servant making the sale if it was so made.⁴¹ An allegation of a sale to "John Minor, a person under the age of twenty-one years," sufficiently shows that the vendee was under age at the time the sale was made, and the use of the words "then and there" in connection therewith is not necessary.⁴² Where it was made an offense to sell to a "white person under the age of twenty-one years," it was necessary to allege that the minor was a "white person."⁴³ A charge of a sale to "S and M, who being minors," sufficiently shows that both were

³⁶ *State v. Finan*, 10 Iowa 19.

³⁷ *Stallworth v. State*, 16 Tex. App. 345.

³⁸ *Brinkman v. State*, 57 Ind. 76; *Loeb v. State*, 75 Ga. 258; *Hatfield v. State*, 9 Ind. App. 296; 36 N. E. 664; *State v. Allen*, 12 Ind. App. 528; 40 N. E. 705; *Commonwealth v. Sullivan*, 153 Mass. 229; 30 N. E. 1023.

³⁹ *Linder v. State*, 93 Ind. 254. A charge of a sale to "A M then and there a minor" has been held sufficient. *Waller v. State*, 38 Ark. 656. See also *Commonwealth v. O'Brien*, 134 Mass. 198,

and *Supernant v. People*, 100 Ill. App. 121; *Commonwealth v. Fowler*, 145 Mass. 398; 14 N. E. 457.

⁴⁰ *Mayer v. State*, 50 Ind. 18; *Commonwealth v. O'Brien*, 134 Mass. 198; *Johnson v. State*, 74 Ind. 197; *State v. Hamilton*, 75 Ind. 238.

⁴¹ *O'Bryan v. State*, 48 Ark. 42; 2 S. W. 339; *State v. Mays*, 59 W. Va. 331; 53 S. E. 416.

⁴² *Shaffer v. State*, 106 Ind. 319; 6 N. E. 818; *Brinkman v. State*, 57 Ind. 76.

⁴³ *Commonwealth v. Ewing*, 7 Bush 105.

minors.⁴⁴ The word "give" used in a statute forbidding the giving of liquor to a minor is equivalent to the word "furnish" or "supply," the intent of the statute being to keep liquors out of the control of minors.⁴⁵ If a statute makes a sale to a minor the offense, then a sale must be averred; or if it makes the furnishing of the liquors to him "to be drunk" by him, then it must be alleged that the liquor was furnished him to be drunk by him.⁴⁶ As a rule, it is not necessary to aver the amount of liquor sold a minor, since a sale of any quantity to such a person is an offense;⁴⁷ and as it is an offense to give liquor to a minor, it is usually not necessary to aver the price paid, even though a sale be alleged, and even though it is necessary in alleging a sale generally without a license to state the price paid.⁴⁸ The kind of liquor which the statute forbids to be sold or given to a minor must be stated.⁴⁹ A charge of a sale of "spirituous, vinous, malt and intoxicating liquors" has been held not to render the indictment bad for duplicity.⁵⁰ A charge that the accused "did sell, give and barter to M intoxicating liquor at and for the price of ten cents" was held to allege a sale, the words "give and barter" being rejected as surplusage by reason of the fact that it was plainly evident that it was the intent of the pleader to charge a sale.⁵¹ But if a "barter" be alleged, then facts must be stated which show some article was exchanged for the liquor,⁵² but the value of the article

⁴⁴ State v. Boncher, 59 Wis. 477; 18 N. W. 335.

⁴⁵ Commonwealth v. Davis, 12 Bush, 240; Newson v. State, 1 Ga. App. 790; 58 S. E. 71.

⁴⁶ Grunkemeyer v. State, 25 Ohio St. 548.

⁴⁷ Payne v. State, 74 Ind. 203; State v. Allen, 12 Ind. App. 528; 40 N. E. 705.

⁴⁸ State v. Allen, 12 Ind. App. 528; 40 N. E. 705.

⁴⁹ Callahan v. State, 2 Ind. App. 417; 28 N. E. 717; State v. Han-

nan, 53 Ind. 335; State v. Allen, 12 Ind. App. 528; 40 N. E. 705; Carmon v. State, 18 Ind. 450; Wiles v. State, 33 Ind. 206; Dant v. State, 106 Ind. 79; 5 N. E. 870; Fenton v. State, 100 Ind. 598; State v. Jones, 3 Ind. App. 121; 29 N. E. 274.

⁵⁰ Kraemer v. State, 106 Ind. 192; 6 N. E. 341.

⁵¹ Hatfield v. State, 9 Ind. App. 296; 36 N. E. 664.

⁵² Hatfield v. State, 9 Ind. App. 296; 36 N. E. 664.

exchanged need not be averred.⁵³ Whether or not it must be averred that the vendor knew the purchaser was a minor has been discussed elsewhere. The necessity for such an allegation usually turns upon the statute, as where knowledge is made a necessary ingredient of the offense; but if it does not do so an allegation of knowledge is unnecessary.⁵⁴ It need not be averred that the sale was not for medicinal purposes,⁵⁵ nor that notice had been given to the defendant not to sell to the minor.⁵⁶

Sec. 905. Sale or gift to minor without permit.

The usual statute of the present day absolutely forbids a sale or gift to a minor, but in the past a sale or gift to a minor by many statutes was only made an offense where it was made without the permission, request or consent of the

⁵³ Forkner v. State, 95 Ind. 406.

⁵⁴ Ward v. State, 48 Ind. 289; Jones v. State (Tex. Cr. App.), 81 S. W. 49.

⁵⁵ Brinkman v. State, 57 Ind. 76; Shaffer v. State, 106 Ind. 319; 6 N. E. 818.

⁵⁶ State v. Hyde, 27 Minn. 153; 6 N. W. 555.

To purchase liquor on behalf of a minor is an offense both on behalf of the purchaser and the vendor. Vincent v. State (Tex. Cr. App.), 55 S. W. 819.

The sex of the minor need not be given. Supernant v. People, 100 Ill. App. 121.

An indictment for selling intoxicating liquors to a minor, in the following form, is good, viz.: "State of West Virginia, M County. To-wit: The grand jurors of the State of West Virginia in and for the body of the county of M, upon their oaths present, that A M B, on the — day of No-

vember, in the year 1889, within one year next preceding the date of the finding of this indictment, in the said county, he, the said A M B, having then and there a State license to sell spirituous liquors, wine, porter, ale, beer and other intoxicating drinks, did at his place of business, and on premises under his control, in the town of M, then and there unlawfully, and in violation of the conditions of his license bond, sell and give away to F F, a minor, under twenty-one years of age, spirituous liquors, wine, porter, ale, beer and other intoxicating drinks, he, the said A M B, then and there knowing and having reason to believe the said F F was then and there a minor under twenty-one years of age, against the peace and dignity of the State." State v. Boggess, 36 W. Va. 713; 15 S. E. 423.

minor's parents or guardians. Under these statutes it therefore became necessary to aver that the sale or gift to the minor was made without the permission of such person.⁵⁷ The indictment had to allege that the consent, permission or request had not been given by all the persons who could give it; as, if the permission of the parent *or* guardian was necessary, it had to be alleged that neither the parent nor guardian had given his permission.⁵⁸ So where the consent of the "parents" is requisite, a charge that the consent of the "father" had not been given was held fatal,⁵⁹ and the same ruling was made where the "written consent *or* request" of the parent was necessary and the averment was that the sale was "without the written consent *and* request," because that was an attempt to charge that both a written consent and request was necessary to justify the sale when only one of them was necessary.⁶⁰ Yet it has been held that where a sale "without the written consent or order of the parent or guardian" was an offense, a charge that the sale was made "without the written consent of or order of the parent" was sufficient, notwithstanding the fact no reference was made to a guardian.⁶¹ So where a sale "without the consent of the parent, guardian or person having the legal charge of" the minor, a charge of a sale "without the consent of the parent or guardian" was held sufficient without using the words "or person having the legal charge of" the minor.⁶² If the parents be dead and no guardian appointed, then these facts should be averred to show no request or consent had been given.⁶³ It is not necessary to aver the age and sex of

⁵⁷ Parkinson v. State, 14 Md. 184; 74 Am. Dec. 522.

⁵⁸ State v. Emerick, 35 Ind. 324. But in an instance of this kind it was said it would be presumed the parent was alive and therefore unnecessary to allege that the guardian had not given his permission. State v. Shoemaker, 4 Ind. 100. See also Newman v. State, 63 Ind. 533.

⁵⁹ Lautznester v. State, 19 Tex. App. 320.

⁶⁰ Commonwealth v. Hadcraft, 6 Bush 91.

⁶¹ Mogler v. State, 47 Ark. 109; 14 S. W. 473. This case is in line with the Indiana case just cited in the note.

⁶² Weed v. State, 55 Ala. 13.

⁶³ Reich v. State, 63 Ga. 616.

the minor, merely alleging he was under twenty-one years of age being sufficient.⁶⁴

Sec. 906. Sale to drunkard or intoxicated person.

What allegations must be used in charging a sale to a drunkard or intoxicated person must depend upon the phraseology of each statute. If the statute makes it an offense to sell to anyone "in the habit of getting drunk," then the indictment must contain an allegation that he had that habit at the time of the sale.⁶⁵ But this is not necessary where the offense is a sale to an intoxicated person, it being sufficient to aver that the purchaser was "then and there in a state of intoxication" or "intoxicated."⁶⁶ An averment that the person was "in the habit of becoming intoxicated" is a sufficient averment that he was in the habit of "being intoxicated" at the time the liquor was sold him.⁶⁷ Elsewhere has been discussed whether knowledge on the part of the vendor of the habits of the purchaser was a necessary element of the offense. If it is, then the fact of his having such knowledge at the time of the sale must be averred;⁶⁸ if not, then it is not necessary.⁶⁹

Sec. 907. Sale to drunkard after notice given.

A statute in Indiana makes a sale, gift or barter of intoxicating liquors "to any person who is in the habit of be-

⁶⁴ *Supernant v. People*, 100 Ill. App. 121.

It may be noted that a minor attains to twenty-one years of age on the day preceding the twenty-first anniversary of his birth. *Wells v. Wells*, 6 Ind. 447.

⁶⁵ *Wiedemann*, 92 Ill. 314; *State v. Dolan*, 122 Ind. 141; 23 N. E. 761.

⁶⁶ *Berry v. State*, 67 Ind. 222.

⁶⁷ *Dolan v. State*, 122 Ind. 141; 23 N. E. 761; *Jenkins v. State*, 82 Miss. 500; 34 So. 217. (It need

not be alleged the drunkard was a minor, and if it be, it need not be proven.)

⁶⁸ *Commonwealth v. Bell*, 14 Bush 433. See *Parker v. State*, 4 Ohio St. 563.

⁶⁹ *Mapes v. People*, 69 Ill. 523; *Werneke v. State*, 50 Ind. 22.

Of course, if an ordinance prohibits sales to drunkards, it is not necessary to set it out literally, it being sufficient to aver its substance. *Woods v. Prineville*, 19 Ore. 108; 23 Pac. 880.

coming intoxicated, after notice shall have been given to him, in writing, by any citizen of the township or ward wherein such person resides, that such person is in the habit of becoming intoxicated" an offense. The offense, of course, can only be incurred after the receipt of a written notice, given⁷⁰ by the proper citizen, concerning a person in the township or ward who is "in the habit of becoming intoxicated."⁷¹ Proof of the giving of the notice is essential to a conviction,⁷² and while a sale by an agent will render the principal guilty, yet if it be made in direct violation of his commands, he will not be liable to the penal provisions of the statute.⁷³ And if the charge be a sale, there can be no conviction on proof of a gift.⁷⁴ The proof must show that a proper person gave the notice.⁷⁵ Under this statute the indictment must allege that the person concerning whom the notice was given was in the habit of becoming intoxicated,⁷⁶ at the time the sale or gift was made,⁷⁷ that the statutory notice had been given the accused by a qualified person,⁷⁸ and that it was in writing.⁷⁹ If the notice has been given by the purchaser's wife, then it must be alleged that she was a citizen of the township or ward wherein her husband resided.⁸⁰ The mere allegation that the accused had notice of the habits of the person in question is not sufficient,⁸¹ nor is an allegation that the defendant's employer, where the charge is against his

⁷⁰ A signing does not seem to be necessary if given in person.

⁷¹ 1 Burns R. S. 1908, § 2485; Miller v. State, 107 Ind. 152; 7 N. E. 898; State v. Smith, 122 Ind. 178; 23 N. E. 714; Wilson v. State, 19 Ind. App. 389; 46 N. E. 1050.

⁷² State v. Smith, 122 Ind. 178; 23 N. E. 714.

⁷³ O'Leary v. State, 44 Ind. 91; Lathrope v. State, 51 Ind. 192; Miller v. State, 107 Ind. 152; 7 N. E. 898; Wilson v. State, 19 Ind. App. 389; 43 N. E. 1050.

⁷⁴ Harvey v. State, 80 Ind. 142.

⁷⁵ Dolan v. State, 122 Ind. 141; 23 N. E. 714.

⁷⁶ Geraghty v. State, 110 Ind. 03; 11 N. E. 1.

⁷⁷ Zeizer v. State, 47 Ind. 129.

⁷⁸ State v. Smith, 122 Ind. 178; 23 N. E. 714; Geraghty v. State, 110 Ind. 103; 11 N. E. 1.

⁷⁹ Geraghty v. State, 110 Ind. 103; 11 N. E. 1; State v. Smith, 122 Ind. 178; 23 N. E. 714.

⁸⁰ Engle v. State, 97 Ind. 122.

⁸¹ Geraghty v. State, 110 Ind. 103; 11 N. E. 1.

barkeeper, had such notice.⁸² It must be charged that the person giving the notice was a resident of the ward or township at the time he gave the notice, and it is not enough to allege he was at the time the indictment is found.⁸³ The quantity sold or given need not be alleged.⁸⁴ Finally, it may be said that a charge of this character is sufficient if it be substantially in the language of the statute.⁸⁵

Sec. 908. Sale or gift on Sunday.

In charging a sale on a Sunday or Sabbath care must be observed with reference to the time of the sale, for here time becomes of the gist of the offense.⁸⁶ Such allegations must be used as show a sale on Sunday.⁸⁷ But where the charge was that the defendant "on the 1st day of May, 1889, unlawfully did keep open his dramshop on Sunday," this was held sufficient, although such first day of May came on Wednesday.⁸⁸ But a charge of a sale made "on or about the 2d day of November, 1873, the said day being Sunday," was held not to charge the offense with sufficient accuracy.⁸⁹ And it

⁸² State v. Smith, 122 Ind. 178; 23 N. E. 714.

⁸³ Geraghty v. State, 110 Ind. 103; 11 N. E. 1.

⁸⁴ Brow v. State, 103 Ind. 133; 2 N. E. 296.

A charge of "sell, barter and give away" is not bad for duplicity if the evidence shows the accused did only one of these three things. Hatfield v. State, 9 Ind. App. 296; 36 N. E. 664.

Different counts in same affidavit. Deveney v. State, 47 Ind. 208.

⁸⁵ State v. Smith, 122 Ind. 178; 23 N. E. 714.

⁸⁶ Effinger v. State, 47 Ind. 235; 256, 262; People v. McDonnell (N. Y.), 108 N. Y. Supp. 749.

⁸⁷ Morris v. State, 47 Ind. 503.

It is sufficient to follow the statute. State v. Cragg (Mo.

App.), 111 S. W. 856; Walbert v. State, 17 Ind. App. 350; 46 N. E. 827; State v. Maryland Club, 105 Md. 585; 66 Atl. 667.

⁸⁸ Marguardt v. State, 52 Ark. 269; 12 S. W. 562; Roy v. State, 91 Ind. 417; State v. Eskridge, 1 S. W. 413; Frasier v. State, 5 Mo. 536; Commonwealth v. Kingsbury, 5 Mass. 496; State v. Drake, 69 N. C. 589; Megowan v. Commonwealth, 2 Met. (Ky.), 3; Hoover v. State, 56 Md. 584; People v. Ball, 42 Barb. 324; Clark v. State, 34 Ind. 311; Ruge v. State, 62 Ind. 388.

⁸⁹ Effinger v. State, 47 Ind. 235, 256, 262; Ruge v. State, 62 Ind. 388; State v. Slentz, 27 Ind. App. 557; 61 N. E. 793.

Contra, Brown v. State, 16 Neb. 658; 21 N. W. 454.

has been held that it is not sufficient to merely specify a certain day of the month, because under such a charge any sale can be proven, which was made within the statute of limitations, and the accused would not know whether he was charged merely with a sale or with a sale on Sunday.⁹⁰ It is sufficient, after stating the date of the sale, to allege that the day named was "the first day of the week, commonly called Sunday,"⁹¹ or the "Lord's Day," when that term is used in the statute.⁹² Where the indictment charged that "on the — day of June, 1886, that day being then and there the first day of the week, commonly called Sunday," it was held to sufficiently show the sale took place on Sunday.⁹³ Of course, it is not necessary to allege that the vendor held a liquor license,⁹⁴ unless the statute is limited in its application to licensees,⁹⁵ or unless there is to be a decree forfeiting the license; nor is it necessary to aver the liquor was to be drunk on the premises, unless the statute makes that an essential ingredient of the offense;⁹⁶ nor the amount sold;⁹⁷ nor that the liquor was sold as a beverage unless that is an essential part of the offense, made so by statute.⁹⁸ Where sales are permitted on Sundays upon prescription, it is usually necessary to negative that the sale was made upon prescription.⁹⁹ Where a statute specifi-

⁹⁰ Shepler v. State, 114 Ind. 194; 16 N. E. 521; Gilbert v. State, 81 Ind. 565; Robinson v. State, 38 Ark. 548 (date given not a Sunday).

⁹¹ State v. Brown, 83 Mo. 480; State v. Roehm, 61 Mo. 82; State v. Koch, 61 Mo. 117; State v. Crabtree, 27 Mo. 232; State v. Effinger, 44 Mo. 81; Henry v. State, 113 Ind. 304; 15 N. E. 593.

⁹² Commonwealth v. McKiernan, 128 Mass. 414; State v. Peterson, 38 Minn. 143; 36 N. W. 443 ("the Sabbath").

⁹³ State v. Effinger, 44 Mo. App. 81.

⁹⁴ Stein v. State, 50 Ind. 21, 22.

⁹⁵ Jensen v. State, 60 Wis. 577;

19 N. W. 374; State v. Cain, 8 W. Va. 720.

⁹⁶ Megowan v. Commonwealth, 2 Met. (Ky.) 3; Layton v. State, 49 Ind. 229; Morris v. State, 47 Ind. 503.

⁹⁷ Megowan v. Commonwealth, 2 Met. (Ky.) 3.

⁹⁸ Morel v. State, 89 Ind. 275; Shepter v. State, 114 Ind. 194; 16 N. E. 521; Dowdell v. State, 58 Ind. 333.

⁹⁹ Shepler v. State, 114 Ind. 194; 16 N. W. 521.

A charge of keeping a saloon open on a specified day, "the same being the Sabbath, in the night time of said day, so being the Sabbath day" is sufficient. Kroer v. People, 78 Ill. 294.

cally makes it an offense for a servant or barkeeper to sell liquor of his master or principal on Sunday, the indictment must allege that the liquor sold was his master's and that he sold it as agent or employe of the owner.¹ A pending indictment for a sale without a license is no bar to a prosecution for the same sale on Sunday.² And an indictment charging a sale without a license is not vitiated by the fact that it was designated as a sale on the Sabbath.³

Sec. 909. Sale or gift on election day.

It is necessary in charging a sale of liquors on an election day to aver that an election was then held in the place where the offense is committed. If it is a State or county election, then it should be alleged that the election was held in the county; if a city or town election, then in such city or town; but if the election be held in a ward of such city or town, whether or not it should be alleged the sale was held in such ward, or merely in the city or town, will depend upon whether the statute forbids, in case of a ward election, that all sales in the city or town are forbidden or merely those in such ward.⁴ It must be distinctly averred that the sale was on an election day, but an averment that the accused "did, on election day, sell and give" away intoxicating liquors, sufficiently shows an election was held.⁵

¹ Behrens v. State, 42 Tex. Cr. App. 629; 62 S. W. 568.

² Montross v. Commonwealth, 8 Pa. Super. Ct. 237.

³ Harrington v. State, 77 Ark. 480; 91 S. W. 747. It must be shown the liquors in question are such as the statute forbids. State v. Lises, 58 Mo. 359.

Where the accusatory part of an indictment, having fixed the offense as a selling of liquor without a license, an averment that the offense was committed by selling on Sunday, which is a distinct of-

fense, was mere *surplusage*, and if the defendant does not show his license a conviction is proper if the proof shows the sale to have been on any day within the year prior to the finding of the indictment. Baer v. Commonwealth, 13 Ky. Law Rep. (abstract) 396.

⁴ Zweifel v. State, 16 Tex. App. 154; Patton v. State, 31 Tex. Cr. Rep. 20; 19 S. W. 252; State v. Weaver, 83 Ind. 542.

⁵ State v. Irvine, 3 Heisk. 155; Niedeiser v. State, 6 Baxt. 499.

But where the offense was for selling or giving away of liquors "during a public election," a charge of a sale or gift "on and during an election day" was held insufficient, for the sale may have taken place on the election day after the election was over.⁶ A statute prohibited the keeping open of a barroom where liquors were sold "during any portion of a day on which an election is being held for any purpose or office whatsoever, in any voting precinct, village, town, or city where such election is held, or within three miles thereof." An indictment alleged that the accused kept open his barroom on a certain day, "the said day being an election day on which an election was then and there being held" for the purpose of determining "whether or not B City should be incorporated," but it was held insufficient because of the absence of an allegation that the liquor was sold in B or within three miles of that place, and also because, only by inference, was it shown that B City was in the county. The indictment failed to aver that the barroom was kept open in the accused's voting precinct, but it was held that an allegation to that effect was not necessary.⁷ An allegation that the election was held "under and by lawful authority, for the purpose of voting for presidential electors, congressmen, State, district, county and precinct officers, the same being a general election," is sufficient to show the purpose for which the election was held.⁸ In the case of a special election it is not necessary to allege by whom or by what authority it was ordered, but it is sufficient to aver that it was "held by lawful authority" for the election of a certain officer (where it is necessary to state the purpose of the election) and that it was being held "by lawful authority" when the gift or sale was made.⁹ If the offense is for anyone to sell liquor in

⁶ State v. Stamey, 71 N. C. 202; Prather v. State, 12 Tex. App. 401.

⁷ Patton v. State, 31 Tex. Cr. Rep. 20; 19 S. W. 252.

⁸ Borches v. State, 33 Tex. Cr. Rep. 96; 25 S. W. 423; Hoskey

v. State, 9 Tex. App. 202. In this State it is necessary to aver the purpose for which the election was held.

⁹ Janks v. State, 29 Tex. App. 233; 15 S. W. 815.

"his" precinct, then it must be alleged that the sale was in *his* precinct.¹⁰ An indictment charging that the election for the entire county was held in a particular precinct is fatally defective.¹¹

Sec. 910. Sale or gift within prohibited area.

In earlier days of liquor legislation statutes not infrequently forbade the sale of intoxicating liquor within a certain specified distance of a school, college, or even towns. Where sales of intoxicating liquors were forbidden within four miles of "an incorporated institution of learning," it was held not necessary to designate the institution.¹² But such is not the usual rule. Where the statute prohibits a sale within a certain distance of a specially named academy, it is not necessary to allege it is an incorporated institution.¹³ In Indiana a statute forbade a sale within two miles of any religious assembly at a "booth, tent, wagon, huckster shop, or other place erected, kept, continued or maintained within" that distance, and it was held that it must be alleged that the sale was "at" one of the places thus enumerated.¹⁴ If a special act of the Legis-

¹⁰ *Smith v. State*, 18 Tex. App. 454. See *State v. Weaver*, 83 Ind. 542.

¹¹ *Thweatt v. State* (Tex. Cr. App.), 95 S. W. 517.

In Texas the indictment must give the number of the voting precinct where the election was held, under a statute prohibiting sales of liquors within three miles of a voting precinct where an election is held. *Gage v. State* (Tex. Cr. App.), 76 S. W. 459.

An indictment charged that the defendant "being then and there a keeper of a saloon in said village, and the same being a place where spirituous and malt liquors are sold at retail, and the said Fourth of July, A. D. being the legal holiday, did not keep the

said saloon closed, and did then and there on the said fourth day of July, A. D. 1882, a legal holiday, keep the said saloon open for the purpose of selling spirituous and malt liquors at retail therein, the said defendant not being then and there a druggist nor a person whose business consists in whole or in part of the sale of drugs and medicines," etc. This was held sufficient. *People v. Baumann*, 18 N. W. 369; 52 Mich. 584.

¹² *State v. Odam*, 2 Lea, 220.

¹³ But if alleged it must be proven. *Blackwell v. State*, 36 Ark. 178.

¹⁴ *Bouser v. State*, *Smith* (Ind.), 408. See *Commonwealth v. Slaughter*, 12 Ky. L. Rep. 893.

lature forbids sales within a certain named distance of a certain college or academy, and the name of the institution be changed, then the indictment should charge the sale within the distance specified of the new institution, followed by an allegation identifying the institution by both names.¹⁵ But where the sale of liquor was prohibited within three miles of "a Methodist Church in M County, known by the name of White Church," a charge of a sale within that distance of "White Church in M County" was held sufficient to identify the church named in the indictment with the one designated in the statute.¹⁶ If the prohibited district lies in two counties, then the indictment should be found in that county in which the sale or gift was made.¹⁷

Sec. 911. Second offense.

In many of the States a severer punishment is inflicted upon a second conviction for a violation of the liquor laws than upon a first conviction. These statutes do not apply to an instance where a second offense is shown, but only to an instance of a second conviction.¹⁸ Occasionally a different punishment is prescribed for a third offense, which usually must be committed after a conviction for a second offense.¹⁹ Under some statutes both, or even all three offenses must be

¹⁵ Ragan v. State, 67 Miss. 332; 7 So. 280.

¹⁶ Block v. State, 66 Ala. 493.

¹⁷ Wilson v. State, 35 Ark. 414.

As a rule if a special act applies to a designated area, the indictment must be drawn under that act, and not under the general law. State v. Orton, 41 Ark. 305; State v. Cathey, 41 Ark. 308; Brown v. State, 104 Ga. 525; 30 S. E. 837; Blunchi v. Commonwealth (Ky.), 64 S. W. 971; 23 Ky. L. Rep. 1185.

¹⁸ Christie v. Britnell, 21 Vict. L. R. 71; 17 Austr. L. T. 59; 1 Austr. L. R. 59; Rex v. O'Brien, 38 N. B. 381.

A statute is essential to an instance of this kind. *Ex parte* Edwards, 31 N. B. 118; *Ex parte* Wilbur, 31 N. B. 678.

¹⁹ Rex v. Marsh, 36 N. B. 186; Rex v. Bigelow, 36 Nov. Sco. 554; Hyser v. Commonwealth, 116 Ky. 410; 76 S. W. 174; 25 Ky. L. Rep. 608; Queen v. Murrens, 7 Can. Cr. Cas. 459; *Ex parte* Edgar, 31 N. B. 128. Some statutes provide that it is sufficient to show it was committed after indictment found for the first offense, in an instance of a second conviction. *Ex parte* Le Blanc; 1 Can. Cr. Cas. 12; 33 N. B. 90.

under the same statute,²⁰ though even here the terms of the statute may call for a different rule.²¹ And the first conviction may be under one license and the second one under another.²² In all such instances such averments must be inserted in the indictment, if a greater punishment is desired, as will reasonably point out to the accused where he can find the record of the first conviction.²³ But if the indictment alleges an impossible date as to the former conviction, it will still be sufficient to sustain a verdict or withstand a motion to quash it as to that part alleging an illegal sale, if the allegations as to such sale be otherwise sufficient.²⁴ Thus, an indictment alleging that the accused "has been once before convicted as a common seller, under the laws for the suppression of drinking houses and tippling shops in the county of P," was held insufficient concerning a former conviction, though following the statutory form, not being sufficiently specific touching such offense.²⁵ However, it is not necessary to set out with particularity the former record; it is sufficient to give such date as by its use the former conviction can be found.²⁶ Thus, to give the term of the court at which the first conviction was had, and allege what the conviction was for—as, for "selling a quantity of intoxicating liquor"—is sufficient.²⁷ The Legislature cannot dispense with an allegation of a former conviction.²⁸

²⁰ *In re* Anthers, 58 L. J. M. C. 62; 22 Q. B. Div. 345; 60 L. T. 454; 37 W. R. 320; 16 Cox C. C. 588; 53 J. P. 116; Connolly v. Whitty, 1 Austr. L. R. 105.

²¹ *Commonwealth v. Marchand*, 155 Miss. 8; 29 N. E. 578.

²² *Queen v. McLeod*, 6 Can. Cr. Cas. 94; *Ex parte* Sheritt, L. R. 5 Q. B. 174; *Regina v. Vine*, 44 L. J. M. C. 60; L. R. 10 Q. B. 195; 31 L. T. 842; 23 W. R. 649; 13 Cox C. C. 43.

²³ *Ex parte* Donahue, 1 W. N. (N. S. W.), 101; *State v. Small*, 64 N. H. 491; 14 Atl. 727; *State v. Gorham*, 65 Md. 270; *Ranch v.*

Commonwealth, 28 P. Smith (Pa.) 490; *Maguire v. State*, 47 Ind. 485; *State v. Robinson*, 39 Me. 150.

²⁴ *State v. Dorr*, 82 Me. 341; 19 Atl. 861.

Contra, *Seick v. State*, 94 Md. 71; 50 Atl. 436.

²⁵ *State v. Bartley*, 92 Me. 422; 43 Atl. 19.

²⁶ *State v. Robinson*, 39 Me. 150.

²⁷ *State v. Lashus*, 79 Me. 504; 11 Atl. 180; *State v. Wyman*, 80 Me. 117; 13 Atl. 47.

²⁸ *Commonwealth v. Harrington*, 139 Mass. 35. As to amendment,

Sec. 912. Physician's prescription.

In a prosecution of a physician for giving an illegal prescription he cannot be indicted for an illegal sale, for by giving the prescription he does not make a sale. The charge must be for giving an illegal prescription, or a prescription to a person who could not otherwise obtain it, and such allegations must be used as will show that it was illegally issued.²⁹ The prescription should be described in such a manner that the court can, by inspection, pronounce whether it was such an instrument as supports the offense charged. A copy of it need not be set out.³⁰

Sec. 913. Music in saloon.

A statute provided that "no devices for amusement or music of any kind or character * * * shall be permitted in" any room where intoxicating liquors are sold at retail under a license. The object of the statute in forbidding music was to forbid the use of means by which people might be lured into the saloon, so that merely keeping a music box in the saloon, if not played, was not an offense. In an indictment it had to be alleged that the accused was engaged in the sale of intoxicating liquors, and that music was played or employed in his saloon, merely alleging that he kept a music box not being sufficient.³¹

Sec. 914. Employing women in saloon.

Under a statute forbidding the employment of lewd women in any theater, dance house, and house where liquors are kept for sale, by its owner, or which forbids the owner permitting

see *State v. Shine*, 149 N. C. 400; 62 S. E. 1080.

The State may abandon the charge as to the second offense. *State v. Doyle* (W. Va.), 62 S. E. 453.

²⁹ *Williams v. State* (Tex. Cr. App.), 81 S. W. 1209.

³⁰ *McAllister v. State* (Ala.), 47 So. 161.

³¹ *Collins v. State*, 38 Ind. App. 625; 78 N. E. 851. For cases construing this statute, see *State v. Myers*, 146 Ind. 36; 44 N. E. 801; *Cahill v. State*, 36 Ind. App. 507; 76 N. E. 142; *State v. Kiley*, 36 Ind. App. 513; 76 N. E. 184.

such women to display themselves in such building in a lewd manner, it is not enough to charge that he kept a disorderly house, but the facts constituting the offense must be set out by direct averment.³²

Sec. 915. Sale of liquors from unstamped cask.

Upon a charge of a sale of liquor from a cask or barrel not having at the time proper stamps thereon, it must appear that the liquor was such as required the cask or barrel to be stamped. So that, where a statute did not apply to liquors manufactured for export, or before its enactment, an indictment alleging that the defendant, a dramshop keeper, knowingly and unlawfully had in his possession in his place of business a barrel of whisky which did not have affixed to it license tax stamps, and that he sold from it one gallon of whisky drawn from such barrel, to which no such stamps were attached, was held insufficient because it did not show the liquor had not been manufactured for import or before the enactment of the statute.³³

Sec. 916. Failure to exhibit license or tax receipt.

Statutes frequently require the liquor dealer to keep his license or tax receipt which authorizes him to sell liquors posted up in view in the place for which it is issued, and makes it an offense if he do not. To be sufficient, an indictment must show that the defendant is such a person as one to whom the statute applies. But where an indictment described him as "a person then and there engaged in the business of selling and offering and keeping for sale spirituous and intoxicating liquors," this was held sufficient, it not being sufficient to set forth the specific acts for the purpose of showing him to be a dealer.³⁴ In such an indictment allegations as to specific sales are treated as surplusage.³⁵

³² Johnson v. State (Tex. Cr. App.), 21 S. W. 371, 372. 541; 23 N. W. 213; People v. Aldrich, 104 Mich. 455; 62 N. W. 570.

³³ State v. Bengsch, 170 Mo. 81; 70 S. W. 710.

³⁵ People v. Aldrich, 104 Mich. 455; 62 N. W. 570. See also

³⁴ People v. Telford, 56 Mich. 455; 62 N. W. 570. See also

Sec. 917. Gambling in saloon.

Statutes not infrequently forbid the playing of a game of cards in saloons, or in a place where intoxicating liquors are sold at retail or used for that purpose. It has been held that it was not necessary to aver that the house was at the time used for the purpose of selling liquors therein if the charge is that the accused played at a game of cards "in a certain house for retailing spirituous liquors,"³⁶ and it has also been held that it must be averred that the playing took place at the time the liquors were being retailed.³⁷ This is, of course, due to the different wording of the several statutes. Upon a charge for permitting card playing in his house, the indictment must charge that the accused was licensed to retail liquors,³⁸ though in Kentucky this was held not necessary.³⁹ Where it was an offense for an innholder to permit card playing in his house, it was held necessary to aver in direct terms that he was an innholder, and it was not sufficient to aver that he was duly licensed as such and permitted persons to play in his inn.⁴⁰ An averment that the accused "being an innholder duly licensed" permitted persons to "play the game of cards in his dwelling house, where he was then and there licensed as an innholder," was held to sufficiently charge the offense.⁴¹ Under the Texas statute it must be averred that the place where the cards were played was a "public place," and it was not enough to aver that the game was played "in the room back of the Gilt Edge Saloon."⁴² Nor

Stewart v. Calhoun Circuit Judge, 156 Mich. 642; 121 N. W. 279.

Indictments for failure to pay liquor tax. State v. Bradley, 132 N. C. 1060; 44 S. E. 122; Stewart v. Calhoun Circuit Judge, *supra*; People v. Aldrich, *supra*.

³⁶ Royal v. State, 9 Tex. 449; State v. Sherman (Mo.), 119 S. W. 476.

³⁷ State v. Coleman, 3 Ala. 14.

³⁸ State v. Kennedy, 1 Ala. 31.

³⁹ Buford v. Commonwealth, 14 B. Mon. 24.

⁴⁰ Commonwealth v. Bokom, 3 Pick. 251.

⁴¹ Commonwealth v. Arnold, 4 Pick. 251; Robinson v. State, 24 Tex. App. 4; 5 S. W. 509.

⁴² Jackson v. State, 16 Tex. App. 373; State v. Mansker, 36 Tex. 364; Bowman v. State, 16 Tex. App. 513; Ballew v. State 26 Tex. App. 483; 9 S. W. 765.

is an averment that they were played in a livery stable.⁴³ Where the statute declared that all houses commonly known as public and all gaming houses were included within a statute forbidding playing at a game with cards at any house for retailing liquor, or any other public place or house, and also provided that any room attached to a public house, commonly used for gambling, was included, but not a private room in an inn or tavern, unless commonly used for gaming, nor a private business office, nor a private residence unless it was a place for retailing liquors, an indictment charging that a game of cards was played in a private room of a private residence was held insufficient where it did not allege liquors were retailed there or that it was a gaming house.⁴⁴ But a charge that the accused permitted "a game of cards to be played upon his premises, the said premises then and there being appurtenances to a public place, to-wit, a house for retailing spirituous liquors," was held sufficient.⁴⁵ So was one charging a playing in a club room in a certain hotel.⁴⁶

Sec. 918. Miscellaneous.

Where a statute provided that in all cases the defendant may be found guilty of an attempt to commit the offense, it was held to apply also to one charged with selling liquor to an Indian where the latter statute was enacted after the former, and that he might be convicted of attempting to commit that offense.⁴⁷

⁴³ Fassett v. State, 16 Tex. App. 375.

⁴⁴ Miller v. State, 35 Tex. Cr. Rep. 650; 34 S. W. 959.

⁴⁵ Ballev v. State, 26 Tex. App. 483; 9 S. W. 765.

⁴⁶ Goldstein v. State (Tex. Cr. App.), 35 S. W. 289.

It is no defense that the re-

tailer had not pursued the directions of the statute in obtaining a license to retail. State v. Terry, 4 Dev. & B. (N. C.) 185.

⁴⁷ *Ex parte* Finnegan, 27 Nev. 57; 71 Pac. 642.

As to a sale to an Indian, see State v. Nibbet (Nev.), 102 Pac. 229.

CHAPTER XXIX.

EVIDENCE.

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Sec. 919. Competency of witnesses.

The competency of witnesses in liquor prosecutions does not differ from their competency in any other criminal prosecutions. In all States the defendant is now competent to testify in his own behalf, and nothing need be said in this respect. If the accused takes the witness stand in his own behalf he is treated the same as any other witness and may be cross-examined to the same extent as any other interested witness, but no farther. Thus, where an accused testified he kept no intoxicating liquors except those he himself drank, it was held that he could be cross-examined concerning his methods of conducting his business both before and after the time of the alleged unlawful sale.¹ To prove a sale it is not necessary to call the purchaser,² and a purchaser cannot claim he is exempt from testifying on the ground that it would tend to incriminate him, because he is not liable, either civilly or criminally, for having made the purchase.³ Nor is one who merely acts as the agent or friend of the buyer.⁴ But a

¹ *People v. Hicks*, 79 Mich. 457; 44 N. W. 931. See also *King v. State*, 77 Ga. 734.

² *Commonwealth v. Tinkham*, 14 Gray 12.

³ *State v. Rand*, 51 N. H. 361; *State v. Baden*, 37 Minn. 212; 34 N. W. 24; *Commonwealth v. Willard*, 22 Pick. 476; *Wakeman v. Chambers*, 69 Iowa 169; 28 N. W. 498; *State v. Teahan*, 50 Conn. 92; *Harvey v. State*, 8 Lea, 113; *State v. Miller*, 26 W. Va.

106; *Harrington v. State*, 36 Ala. 236.

⁴ *Campbell v. State*, 79 Ala. 271; *Morgan v. State*, 81 Ala. 72; 1 So. 472; *Barger v. State*, 50 Ark. 20; 6 S. W. 15; *Foster v. State*, 45 Ark. 361.

Of course, if such a person is an unwilling witness, manifestly so shown in his examination, leading questions are proper. *Commonwealth v. Chaney*, 148 Mass. 6; 18 N. E. 572.

witness may refuse to testify if his answer would tend to subject him to a prosecution for a penalty;⁵ nor can the defendant, as a witness, be compelled to convict himself.⁶

Sec. 920. Spies and informers.

The testimony of persons who bought liquors of the accused with a view to prosecute him for an illegal sale is admissible, and its weight is one for the jury. Such persons do not become a party to the crime. "The law makes the sale charged an unlawful sale and whatever motive the purchaser may have had in making the purchase it can be no justification to the seller violating the law. No legal wrong was committed by the prosecuting witnesses when they purchased the liquor with the intention of making it the basis of a criminal prosecution."⁷ Even though the sale was to an officer of the law, with his consent, the vendor may be prosecuted.⁸ What credence shall be put in the testimony of such

⁵ *In re Askwith*, 3 Can. Cr. Cas. 78. He cannot be compelled to testify as to a former conviction. *Queen v. Nurse*, 2 Can. Cr. Cas. 57.

⁶ *Regina v. Halpins*, 12 Ont. 330; *Regina v. Fee*, 13 Ont. 590; *In re Cullinan*, 82 N. Y. App. Div. 445; 81 N. Y. Supp. 567; 40 N. Y. Misc. Rep. 423; 82 N. Y. Supp. 337.

It has been held that the judge may be called as a witness. *Regina v. Sproule*, 14 Ont. 375.

For the purpose of refreshing his memory as to the date of a sale, a witness may be required to examine a statement he made before the grand jury as to the date of the purchase of liquor. *Wagner v. State*, 53 Tex. Cr. App. 306; 109 S. W. 169.

The extent of the cross-examination is largely under the control of the trial court. *Fouraker v.*

State, 4 Ga. App. 692; 62 S. E. 116.

⁷ *Baehner v. State*, 25 Ind. App. 597; 58 N. E. 741; *Rater v. State*, 49 Ind. 507; *In re Cullinan*, 93 N. Y. App. Div. 301, 303; 87 N. Y. Supp. 660, affirming 41 N. Y. Misc. Div. 3; 83 N. Y. Supp. 581; *Borek v. State* (Ala.), 30 So. 580; *Union v. State* (Ga.), 66 S. E. 24; *State v. Gibbs* (Minn.), 123 N. W. 810.

⁸ *Borek v. State* (Ala.), 39 So. 580; *Rector v. State* (Tex. Cr. App.), 90 S. W. 41; *O'Grady v. People*, 42 Colo. 312; 95 Pac. 346.

There are authorities that where an officer of the law persuades a person to violate the law so he may secure his conviction of the violation, his evidence is not admissible. See *Baehner v. State*, 25 Ind. App. 597; 58 N. E. 741.

witnesses is one for the jury. The court may say to the jury that they should consider all the circumstances appearing from all the evidence tending to diminish or fortify the credit of such witnesses, and decide for themselves alone what confidence they will place in them.⁹ But the court may not say to the jury that the testimony of a private detective should be considered by them with distrust and great caution.¹⁰ In one case the court charged the jury as follows, and the charge was held not to be erroneous: "In considering R's testimony, the jury are to have regard to what appears in the evidence, as to the part he had taken in connection with the case. When a witness has by words or acts manifested an intent or feeling adverse to the defendant in any case, or for any cause might be affected by prejudice or bias, the jury should consider and weigh these facts, and make reasonable allowance therefor in considering his testimony."¹¹ Such instruction is sufficient even where the witness is employed by the day to secure evidence for the conviction of persons who violate the liquor law.¹²

⁹ *Commonwealth v. Whitecomb*, 12 Gray 126; *O'Grady v. People*, 42 Colo. 312; 95 Pac. 346.

¹⁰ *O'Grady v. People*, 42 Colo. 312; 95 Pac. 346.

¹¹ *Commonwealth v. Trainor*, 123 Mass. 414. See *Commonwealth v. Mason*, 135 Mass. 555.

¹² *State v. Hoxsie*, 15 R. I. 1; 22 Atl. 1059. See also *Commonwealth v. Foran*, 110 Mass. 179.

It is not ground for a new trial, that another person "deceitfully and fraudulently brought about the alleged violation of law by purchasing the liquor" for the sale of which defendant was convicted. *Rater v. State*, 49 Ind. 507.

After it has been brought out that a witness voluntarily informed on accused and was being

paid to testify, the witness may tell when and how he came to tell about his buying the liquor. *Biddy v. State* (Tex. Cr. App.) 108 S. W. 689. See also *Dooley v. State*, 52 Tex. Cr. App. 491; 108 S. W. 676.

A jury may be told by the State's counsel that the State expected to rely upon the testimony of a private detective and ask them as to their attitude and prejudice, if any, against the testimony of such a witness, as a basis for intelligently exercising peremptory challenges. *Morrow v. State* (Tex.), 120 S. W. 491.

It is not admissible to show that the prosecuting attorney employed the detective. *People v. Curtis*, 95 Mich. 212; 54 N. W. 767.

The accused is not entitled to

Sec. 921. Admissions and declarations of accused.

No rule different from that which prevails in all criminal cases applies to a prosecution for a violation of the liquor laws. One of the cardinal rules is that self-serving admissions or declarations are not admissible, as one made at the time of the sale that the liquid sold was a medicine,¹³ or a native wine.¹⁴ Nor is one made by him after the sale.¹⁵ Nor can a witness testify to a fact when all he knows about it is what the accused has told him.¹⁶ But the prosecution may put in evidence the declaration of the accused that he considered the liquor law unconstitutional, and intended to sell in disregard of it, even though the sale for which he is prosecuted was made after he had been convicted of a previous sale.¹⁷ Statements of the accused that he owned the premises where the sale took place are admissible,¹⁸ especially upon

have the jury told, where the detective swears he purchased the liquor so as to have a basis for the prosecution, that the witness was not entitled to be believed, or that they should not convict upon such evidence. *Commonwealth v. Moore*, 145 Mass. 244; 13 N. E. 893. Nor is the accused entitled to have the jury told that the fact the detective did not fortify his evidence by producing the persons to whom the sales were made, to testify, if he could have done so, was "a proper matter for consideration in weighing his testimony," for the reason that he has nothing to do with summoning and procuring witnesses, that being the duty of the prosecuting or district attorney. *Commonwealth v. Farrell*, 137 Mass. 579.

As to instructions concerning detectives as witnesses, see *Commonwealth v. Trainor*, 123 Mass. 414.

Effect of witnesses called before the county attorney to give him information. *State v. Whisner*, 35 Kan. 271; 10 Pac. 852.

A conversation of two detectives laying a scheme to purchase liquor in order to prosecute the accused is not *res gestae* of the alleged subsequent sale by him to them, and cannot be put in evidence by the prosecution. *Pace v. State (Ala.)*, 50 So. 353.

¹³ *Sells v. State*, 76 Ala. 92.

¹⁴ *State v. Miller*, 53 Iowa, 84; 4 N. W. 838.

¹⁵ *State v. Greenleaf*, 31 Mo. 517.

¹⁶ *State v. Farley*, 87 Iowa, 22; 53 N. W. 1089.

¹⁷ *Commonwealth v. Kimball*, 24 Pick. 366; *People v. Dippold*, 30 N. Y. App. Div. 62; 51 N. Y. Supp. 859; *Commonwealth v. Dixon*, 1 Wilcox (Pa.), 211.

¹⁸ *Commonwealth v. Collins*, 16 Gray, 29.

the charge of keeping a place for unlawful sale of liquors;¹⁹ and a continuous control of the place for several weeks prior to the date of the sale, or connection therewith by going in and out of it, may also be shown.²⁰ Offer of the accused to plead guilty to keeping liquors in a tenement for an unlawful sale is admissible for the State upon a charge covering the same period of keeping a tenement for the illegal sale of liquor.²¹ The business card of the accused having thereon his name and the words "dealer in imported wines and liquors," when accompanied by evidence of his declarations that it is his or was printed for him, is admissible against him on the charge of keeping a liquor nuisance, although it bear date several months prior to the date it is alleged he kept the nuisance.²² So upon a charge for such an offense the accused's question, "Can't it be fixed up?" in response to the statement made to him by the witness, "There is a man who has been drinking a good deal, and he says he has bought liquor at your shop, and the matter has been reported to the chief of police," is admissible when it is claimed it took place during the period covered by the charge, the question whether it took place during that period being one for the jury.²³ Where the witness applied to accused for employment as a clerk in a store who told him to see his brother, saying he was interested therein, and at the same time said he had several cases of whisky of a particular brand, in square bottles, which he intended to put on sale, it was held proper to show this and that thereafter the defendant's father bought whisky of the witness in the place of the description given above.²⁴ But where the accused several months before promised not to sell any more liquors on certain conditions, it was held not admissible, for it did not tend to show he kept liquors at the time charged.²⁵

¹⁹ *Commonwealth v. Hildreth*, 11 Gray, 327.

²⁰ *Commonwealth v. Kelley*, 116 Mass. 341.

²¹ *Commonwealth v. Callahan*, 108 Mass. 421.

²² *Commonwealth v. Twombly*, 119 Mass. 104.

²³ *Commonwealth v. Slosson*, 152 Mass. 489; 25 N. E. 835.

²⁴ *State v. McGill*, 65 Vt. 604; 27 Atl. 429.

²⁵ *Commonwealth v. Purdy*, 147 Mass. 29; 16 N. E. 745. See also *People v. Werner*, 174 N. Y. 132; 66 N. E. 667; reversing 52 N. Y.

Sec. 922. Confession of accused—Accused intoxicated.

A sale may be shown by the admissions or confessions of the accused. Thus, where an accused attempted to justify the sale which he is charged to have made, it was held that his justification was sufficient to show a sale.²⁶ So the declarations of the accused that he had kept and would keep liquor for sale was held admissible, though not immediately accompanying the act of selling.²⁷ In one case it appeared that the defendant "was excited and scattering in his conversation, and that no one who heard him could repeat all he said;" but this was held not to render his declarations or guilt inadmissible.²⁸ But drunkenness may and shall be considered in weighing the declarations of an intoxicated person.²⁹ The weight of such confessions are for the jury.³⁰ Even though the accused is suffering from delirium tremens, his confessions may be admitted;³¹ but if he is so intoxicated he cannot understand his confessions, then they are not admissible.³² Even though the intoxication is brought about by the person to

App. Div. 635; 66 N. Y. Supp. 1139.

An admission of accused charged with selling liquors that at the time and place alleged he sold whisky for other than the excepted purposes, is sufficient to authorize a finding that he is guilty. *State v. Shackle*, 29 Kan. 341. But see *Bradford v. State*, 5 Ga. App. 494; 63 S. E. 530.

Evidence that the accused, on the road to the trial, met the prosecuting witness, pulled him out of the buggy and fought with him, was excluded. *Haney v. State* (Tex.), 122 S. W. 34.

²⁶ *Neuman v. State*, 76 Wis. 112; 45 N. W. 30.

²⁷ *New Gloucester*, 28 Me. 60; *State v. Durein*, 70 Kan. 1, 13; 78 Pac. 152; 80 Pac. 987.

²⁸ *Eshridge v. State*, 25 Ala. 30; *Lester v. State*, 32 Ark. 727; *Williams v. State*, 12 Lea, 211; *Lienpe v. State*, 28 Tex. App. 179; 12 S. W. 588.

²⁹ *State v. Bryon*, 74 N. C. 351; *Leach v. State*, 99 Tenn. 584; 42 S. W. 195; *State v. Hogan*, 117 La. 863; 42 So. 352; *State v. Berry*, 50 La. 1309; 24 So. 329.

³⁰ *White v. State*, 32 Tex. Cr. Rep. 625; 25 S. W. 784; *State v. Gear*, 28 Minn. 426; 10 N. W. 472; 41 Am. Rep. 296; *State v. Felter*, 51 Iowa, 495; 1 N. W. 755.

³¹ *State v. Felter*, 51 Iowa, 495; 1 N. W. 755; *State v. Gear*, 28 Minn. 426; 10 N. W. 472; 41 Am. Rep. 296.

³² *Commonwealth v. Howe*, 9 Gray, 110; *Lienpe v. State*, 28 Tex. App. 179; 12 S. W. 588.

whom they were made, they are admissible;³³ but where the charge was murder and they were made to an officer, who brought about the confession, they were held not admissible.³⁴ Yet where the confession was made under influence of liquor furnished the defendant by consent of the officer having him in charge, and to whom the confession was made, though not influenced by anything said by the officer, it was held admissible.³⁵ Declarations of the accused's wife, made in his presence when he was not under arrest, that "We will sell liquor in spite of all the officers," was held admissible as implying an admission on his part that he and his wife were keeping liquor for illegal sale, the circumstances being such that he would naturally have repudiated her assertion if it were not true.³⁶ But admissions of the employe of the accused, not made in his presence, are not admissible.³⁷ Testimony of accused given at another trial may be used when relevant.³⁸ Statements of third persons, made near the accused in his own house, but not shown to have been brought to his attention, are not admissible, though charging that he was guilty of the crime for which he is being tried.³⁹

Sec. 923. Prima facie evidence—Power of Legislature to declare.

The ample authority conferred upon a Legislature to make, ordain and establish all manner of wholesome and reasonable orders, laws and statutes, which it shall judge to be for the good and welfare of the State, necessarily invests that department of Government with the right of determining conclusively upon the propriety and reasonableness of all provisions which are not in some way repugnant to the Constitution. And it

³³ *State v. Hopkirk*, 84 Mo. 278.

³⁴ *McCabe v. Commonwealth* (Pa.), 8 Atl. 45.

³⁵ *People v. Ramirez*, 56 Colo. 533; 38 Am. Rep. 73.

³⁶ *Commonwealth v. Funai*, 146 Mass. 570; 16 N. E. 458.

³⁷ *Kolman v. State*, 2 Ga. App. 648; 58 S. E. 1070.

³⁸ *Biddy v. State* (Tex. Cr. App.), 108 S. W. 689.

³⁹ *Frazier v. State*, 52 Tex. Cr. App. 131; 105 S. W. 508; *Eñard v. State*, 44 Tex. Cr. App. 447; 71 S. W. 957; *Walker v. State* (Tex. Cr. App.), 72 S. W. 401.

possesses to the same extent the power to change, at its pleasure, all existing laws, whether they are in force as part of the common law or by virtue of any previous enactment.⁴⁰ Accordingly it has often been decided that a Legislature has the power to prescribe rules of evidence and methods of proof. It may declare what shall be presumptive or *prima facie* evidence of any fact.⁴¹ The power to enact such a provision is founded upon the jurisdiction of the Legislature over rules of evidence both in civil and criminal cases.⁴² In the enactment of such a law the utmost care should be observed so as to preserve the sacredness of the domicile and to secure to the defendant a fair and impartial trial.⁴³ A law which would in effect exclude the evidence of a party and thereby deny him the right to be heard, would deprive him of due process of law. A law which provides that certain facts shall be conclusive proof of guilt would be unconstitutional, as also would one which makes an act *prima facie* evidence of crime which has no relation to the criminal act. If, however, a Legislature in prescribing the rules of evidence in any class of cases leaves a party a fair opportunity to establish his case or defense and give any evidence to the court or jury of the facts legitimately bearing on the issues in the cause to be considered and weighed by the tribunal trying the same, such acts of a Legislature are not

⁴⁰ Commonwealth v. Williams, 72 Mass. (6 Gray) 1.

⁴¹ Robertson v. People, 20 Colo. 279; Gage v. Carraher, 125 Ill. 447; 17 N. E. 777; Chicago, etc., R. Co. v. Jones, 149 Ill. 361; 37 N. E. 247; American Trust, etc., Bank v. Gueder, etc., Co., 150 Ill. 336; 37 N. E. 227; Morgan v. State, 117 Ind.; 19 N. E. 154; Voght v. State, 124 Ind. 358; 24 N. E. 680; Richard v. Carrie, 145 Ind. 49; 43 N. E. 949; Allen v. Armstrong, 16 Ia. 508; State v. Hurley, 54 Me. 562; Commonwealth v. Wallace, 73 Mass. (7 Gray) 22; Commonwealth v. Rowe, 80 Mass. (14 Gray) 47; Holmes

v. Hunt, 122 Mass. 505; 23 Am. Rep. 381; Wright v. Dunham, 13 Mich. 414; Ess v. Bouton, 64 Mo. 105; State v. Kingsley, 108 Mo. 135; 18 S. W. 994; State v. Buck, 120 Mo. 479; 25 S. W. 573; State v. Sattley, 131 Mo. 464; 33 S. W. 41; Hand v. Ballou, 12 N. Y. 541; Howard v. Moot, 64 N. Y. 262; Board, etc., v. Merebant, 103 N. Y. 143; 8 N. E. 484; People v. Cannon, 139 N. Y. 32; 34 N. E. 759; Deleplain v. Cook, 7 Wis. 43.

⁴² State v. Beech, 147 Ind. 74; 46 N. E. 145; Board, etc., v. Merchant, 13 N. Y. 143.

⁴³ Sullivan v. City of Oneida, 61 Ill. 243.

unconstitutional.⁴⁴ To this end it is within the power of a Legislature to declare the possession of intoxicating liquors for the purpose of sale, a *quasi* nuisance, and to provide a well-guarded system of suppression of its use, and that possession shall be *prima facie* evidence of unlawful intent. Such a statute only prescribes, to a certain extent and under particular circumstances, the legal effect which shall be given to the particular species of evidence, if it stands entirely alone and is left wholly unexplained. This neither conclusively determines the guilt or innocence of the party who is accused, nor withdraws from the jury the right and duty of passing upon and determining the issue to be tried. The burden of proof remains continually upon the State to establish the accusation which it makes.⁴⁵

Sec. 924. Burden of proof in general.

The burden rests upon the State, in case of a charge of a sale of prohibited liquor without a license, or at a prohibited time or place, to prove that the liquor sold was such as the statute by its terms embraced. If the statute forbids a sale of intoxicating liquors merely, then the prosecution must show that the liquor was an intoxicating liquor in fact; and this is done by proof that it was the kind of liquor which the court will take judicial notice was intoxicating, or by proof that it in fact was an intoxicating liquor. Such was held to be the case in an instance of a sale of cider.⁴⁶ But it is not necessary to prove that the liquors sold were owned by the defendant, that being presumed.⁴⁷ If the charge be of a sale to a person whose name is unknown to the grand jury, the burden is in some jurisdictions upon the Government to show

⁴⁴ State v. Beech, 147 Ind. 74; 46 N. E. 145.

⁴⁵ Commonwealth v. Williams, 72 Mass. (6 Gray) 1.

⁴⁶ Feldman v. Morrison, 1 Bradw. (Ill.) 460; Kurz v. State, 79 Ind. 488; Commonwealth v. Livermore, 2 Allen, 292; Brantley v. State, 91 Ala. 47; 8 So. 816;

Houser v. State, 18 Ind. 106; Josephdaffer v. State, 32 Ind. 402; Klare v. State, 43 Ind. 483; Devenny v. State, 47 Ind. 208; Lathrope v. State, 50 Ind. 555; Plunkett v. State, 69 Ind. 68.

⁴⁷ Commonwealth v. Murphy, 10 Gray, 1; Pana v. State, 51 Ark. 481; 11 S. W. 692.

that fact, which may be done by the oath of one of the grand jurors or the vendee himself; and the fact that his name was unknown must be shown before there can be a conviction.⁴⁸ So on a charge of being a common seller of intoxicating liquors, the Government must prove that the sales relied upon were such as could not be made without a license; but if made under a license, the burden is on the defendant to show that fact.⁴⁹ Upon a charge that the accused kept a tenement for the illegal sale of liquors during a certain period of time, the burden is upon the State to prove that fact, but it need not prove that he kept it during the entire period, nor need it prove the premises were disorderly or in other respects a nuisance.⁵⁰ And while, upon a charge of keeping intoxicating liquors in a dwelling house with the intent to illegally sell them, the burden is on the prosecution to prove their keeping at the place described, and that they were kept with the intent to unlawfully sell them; yet it is not necessary to prove that they or any part of them were sold in the dwelling house, or that it was the intention to there sell them; but it may be shown that the intention was to unlawfully sell them in a saloon in the neighborhood.⁵¹ Nor need the Government actually prove the delivery of the liquor sold; that fact may be made to appear by circumstantial evidence.⁵² But the burden concerning the non-intoxicating quality of a liquor sold may shift. Thus where the purchaser called for beer in a saloon and a liquid was furnished him that looked like beer, it was held that the burden was on the accused to show it was not an intoxicating liquor.⁵³ And where a statute

⁴⁸ Commonwealth v. Thornton, 14 Gray, 41.

⁴⁹ Commonwealth v. Livermore, 2 Allen, 292.

⁵⁰ Commonwealth v. Owens, 114 Mass. 252; Commonwealth v. Dowdican, 114 Mass. 257.

⁵¹ Commonwealth v. Intoxicating Liquors, 116 Mass. 24, 27.

⁵² Commonwealth v. Campbell, 116 Mass. 32.

⁵³ State v. Claughly, 73 Iowa, 626; 35 N. W. 652; Dant v. State, 106 Ind. 79; 5 N. E. 870; Dant v. State, 83 Ind. 60.

(This last case is a record-turning case in Indiana. As all the judges now connected with the case are dead, except one, it is not a violation of confidence to state that it was the determination of a part of the bench to reverse the

provided that "lager beer and any beverage containing more than three per cent. of alcohol shall be deemed intoxicating liquor," it was held not necessary on proof of a sale of "lager beer" to show it contained more than three per cent. of alcohol, the percentage of alcohol applying only to other beverages.⁵⁴ So where the statute prohibited the keeping of a public resort for the sale of liquors, evidence showing that many more persons went to the defendant's house than went to other houses in the neighborhood, many going at unusual hours of the night, and coming from other towns, it was held that the defendant had the burden to overcome the presumption arising from proof of these facts that the house was a place of public resort.⁵⁵ If the sale has been made in a local option district, then the burden is on the prosecution to show that the law had been lawfully adopted,⁵⁶ proving each necessary step. Statutes, however, shift the burden occasionally, and require the defendant to prove that local option was not in force at the place of sale, where it is alleged that it was, and the sale was made in violation thereof.⁵⁷ Or occasionally a statute requires the defendant to prove that the election proceedings were insufficient to secure a legal election, as that a proper notice of the election had not been given.⁵⁸ If the accused desires to escape punishment for an illegal sale on the ground that he was in the employment of another who could lawfully make the sale,

case, on the ground that it was not shown there was an actual sale, or that the liquor sold was whisky, as claimed by the State; but those so insisting were met with the statement that if such was the decision of the majority, a dissenting opinion would be filed claiming that the fact of sale and the kind of liquor sold might be proven by circumstantial evidence, and in support of it cite and explain at length how many a murderer had been convicted and executed upon purely circumstantial evidence. The majority were not

willing to face the "fire," so the judgment of conviction was affirmed. See *State v. Volmer*, 6 Kan. 371.

⁵⁴ *Commonwealth v. Snow*, 133 Mass. 575.

⁵⁵ *State v. Pratt*, 34 Vt. 323. See *State v. Wade*, 63 Vt. 80; 22 Atl. 12.

⁵⁶ *Donaldson v. State*, 15 Tex. App. 25; *Carnes v. State*, 23 Tex. App. 449; 5 S. W. 133.

⁵⁷ *Young v. Commonwealth*, 14 Bush, 161.

⁵⁸ *Irish v. State*, 34 Tex. Cr. Rep. 130; 29 S. W. 778.

the fact of his agency for the vendor must be shown by him, and the same is true where one is charged with illegally purchasing for another, if such other could legally make the sale.⁵⁹ And, of course, if the accused's case falls within some exception of a statute, he has the burden to show he comes within such exception.⁶⁰ Likewise where the sale is shown to have been made by his servant in the regular course of business, to a minor, the burden is on him to show a lack of knowledge and consent to the sale.⁶¹ So where a defendant hotel keeper desires to defend on the ground that he sold only to his guests, the burden is upon him to show the purchaser was a *bona fide* guest of his hotel at the time the sale was made.⁶² So where the defense was made upon a physician's prescription, the accused has the burden to show that fact;⁶³ and the same is true where the sale is claimed to have been made for medicinal purposes.⁶⁴ In the latter instance the burden is on the accused to show the liquor was sold for medicinal purposes, not that such use was made of it.⁶⁵ If the accused was an importer of liquors and had the right to sell as such, he has the burden to prove that fact.⁶⁶ If native wines could be lawfully sold, the accused usually has the burden to show that the intoxicating liquor he sold was of that kind of wine.⁶⁷ Where a

⁵⁹ Shaw v. State, 3 Ga. App. 607; 60 S. E. 326; Commonwealth v. Zelt, 138 Pa. St. 615; 21 Atl. 7.

⁶⁰ Otte v. State, 29 Ohio Cir. Ct. 203; People v. Clark, 61 N. Y. App. Div. 500; 70 N. Y. Supp. 594; State v. Collins, 28 R. I. 439; 67 Atl. 796; State v. Cloughly, 73 Iowa, 626; 35 N. W. 652; Gunnarssohn v. Sterling, 92 Ill. 569; State v. Baughman, 20 Iowa, 497; Shear v. Green, 73 Iowa, 688; 36 N. W. 642; State v. Becker, 20 Iowa, 438; State v. Guisenhouse, 20 Iowa, 227.

⁶¹ Kolman v. State, 2 Ga. App. 648; 58 S. E. 1070; *In re Johnston's License*, 37 Pa. Super. 438

⁶² Lehman v. District of Columbia, 19 App. D. C. 217. Evidence of the good faith of the "guests" in ordering meals is admissible. People v. Dippold, 30 N. Y. App. Div. 62; 51 N. Y. Supp. 859.

⁶³ Rowe v. Commonwealth (Ky.), 70 S. W. 407; 24 Ky. L. Rep. 974.

⁶⁴ Miles v. State, 5 W. Va. 524; Howard v. State, 5 Ind. 516; State v. Emery, 98 N. C. 768; 3 S. E. 810.

⁶⁵ Leppert v. State, 7 Ind. 300.

⁶⁶ State v. Robinson, 49 Me. 285; Commonwealth v. Zelt, 138 Pa. St. 615; 21 Atl. 7.

⁶⁷ State v. Miller, 53 Iowa, 84; 4 N. W. 838.

statute required the vendor of intoxicating liquor to give a bond and take an oath not to sell adulterated liquors, the burden was held to be upon him, when it was shown he had made a sale of liquor to show he had complied with the statute.⁶⁸

Sec. 925. Presumption.

Necessarily what is said concerning the subject of presumptions must be very brief and be confined to a few instances where the subject of intoxicating liquors has been involved. As no one is presumed to sell another's property without authority, because it would be an illegal act that would lay the vendor liable for a conversion, it is presumed on proof of a sale of intoxicating liquor that the liquor was the property of the vendor, without any other or further proof on that question.⁶⁹ So on proof of the passing of intoxicating liquors across a saloon bar, by the proprietor, to a person on the other side where customers of saloons usually stand when making a purchase of the drinks, it may be presumed that there was a sale, although no money be proven to have passed, and a sale may be presumed rather than a gift where either a sale or a gift is equally an unlawful act by reason of the time the transaction took place, and also by reason of the fact that men part with their property for a consideration rather than by way of a gift.⁷⁰ Where the charge is that the accused sold liquor to be drunk upon the premises, proof of a sale of liquor by him, and that it was actually drunk upon the premises raises a presumption that he sold it for that purpose, especially in the absence of any proof of protests or objections made to its being drunk on the premises.⁷¹ And this presumption was held to prevail even where the liquor was carried in the glass from the barroom, but drunk upon the lot belonging to the premises, the glass being returned to the barkeeper.⁷²

⁶⁸ *State v. Finn*, 38 Mo. App. 504; *Cheadle v. State*, 4 Ohio St. 477.

⁶⁹ *Rana v. State*, 51 Ark. 481; 11 S. W. 692; *Commonwealth v. Murphy*, 10 Gray, 1.

⁷⁰ *Dant v. State*, 106 Ind. 79; 5 N. E. 870.

⁷¹ *Casey v. State*, 6 Mo. 646; *Cochran v. State*, 26 Tex. 678.

⁷² *Rater v. State*, 49 Ind. 507.

So if an innkeeper sells liquor to his guests who drink it in their rooms, it is presumed he knew of the fact that they drank it and that he permitted them to do so, unless it be affirmatively shown he did not know that they drank it there.⁷³ And where the accused was charged with unlawfully keeping a bar, proof of a sign in the barroom with his name printed thereon, followed by the word "boarding," was held to raise the presumption that he was the keeper of the barroom.⁷⁴ Where the proof was that the sale took place on the 18th day of a month the court refused to indulge the presumption, in favor of innocence, that the date was of a day after the indictment had been returned.⁷⁵ If the offense consists in keeping liquors with intent to sell them in violation of law or to maintain a liquor nuisance, then proof of sale in violation of law is sufficient to raise a presumption of the unlawful intent with which they were kept.⁷⁶ But if the liquor may in part be kept on the premises for a lawful purpose, proof that they were kept on the premises will not raise the presumption that they were kept for an illegal purpose.⁷⁷ And if a servant of the defendant illegally sells liquor, proof of that fact does not necessarily raise the presumption that his master intended him to make an illegal sale, but the presumption is rather that the act of making an illegal sale was unauthorized.⁷⁸ Not infrequently statutes provide that upon proof of certain facts, certain presumptions of guilt will thereby be raised. Thus a statute made the mere finding of liquor in possession of a person under suspicious circumstances presumptive evidence that he was keeping the liquor with intent to illegally sell it. As against this was set, of course, the presumption of innocence raised by the common law, yet the court held that the presumption of innocence did not overcome the presumption of guilt raised

⁷³ *Scott v. State*, 25 Tex. Supp. 168.

⁷⁴ *State v. Wilson*, 5 R. I. 291.

⁷⁵ *Commonwealth v. Dillane*, 1 Gray, 483.

⁷⁶ *State v. Sartin*, 55 Iowa, 340;

7 N. W. 604; *State v. Fertig*, 70 Iowa, 272; 30 N. W. 633.

⁷⁷ *State v. Shank*, 74 Iowa, 649; 38 N. W. 523.

⁷⁸ *Commonwealth v. Briant*, 142 Mass. 463; 8 N. E. 338; 56 Am. Rep. 707.

by the statute.⁷⁹ In those jurisdictions where it is necessary to prove that the beer sold was intoxicating, this may often be done by the circumstances under which it is sold. As all know, there are intoxicating and non-intoxicating beers. In some States it will be presumed that when the word "beer" is used, there is meant either a malt or intoxicating liquor, and this usually meets the terms of the statute under which the indictment is drawn; but if it was a non-intoxicating liquor that was sold, then that fact is a defense. The conditions under or surroundings where it was sold may raise a presumption that the liquor sold was intoxicating. Thus, where the proof showed a call for beer in a saloon at its bar on Sunday and the bartender furnished the customer a glass of beer, it was held that the evidence raised a presumption that the beer furnished was an intoxicating liquor, as charged in the indictment, the primary signification of the word meaning an intoxicating liquor. "If any other kind of beer is desired," said the court, "it is expected that qualifying words will be used, such as spruce beer, root beer, small beer, and the like, thus attaching a remote and secondary meaning to the word 'beer,' as descriptive of particular beverages. When, therefore, the witness testifies to the sale or giving away of beer under circumstances which make the sale or giving away of any intoxicating liquor unlawful, the *prima facie* inference is that the beer was of that malted and fermented quality declared by the statute to be an intoxicating liquor, and the court trying the cause ought to take judicial notice of the inference which thus arises from the use of the word 'beer' in its primary and general sense."⁸⁰ But upon a charge of a violation

⁷⁹ State v. Cunningham, 25 Conn. 195.

⁸⁰ Myers v. State, 93 Ind. 251, citing Briffitt v. State, 59 Wis. 39; Commonwealth v. Anthes, 12 Gray, 29; People v. Wheelock, 3 Parker, 9; Nevin v. Ladue, 3 Denio, 43; Board v. Taylor, 21 N. Y. 173; State v. Goyette, 11 R. I. 592; Rau v. People, 63 N. Y.

277; and overruling Lathrope v. State, 50 Ind. 555; Schlosser v. State, 55 Ind. 82; Shaw v. State, 56 Ind. 188; Plunkett v. State, 69 Ind. 68; Kurz v. State, 79 Ind. 488, and explaining Klare v. State, 43 Ind. 483. Followed in Stout v. State, 96 Ind. 407. See also State v. Cloughly, 73 Iowa, 626; 35 N. W. 652.

of the local option law, where it is necessary in order to constitute the act or offense, that some officer charged with the duty shall perform a certain act with reference to putting the law in the district in force, it will not be presumed he did perform the act, and the fact of his having performed it must be proven. Thus, if it is necessary for an officer to publish a notice of the result of the election, upon the question of the adoption of local option in a district, it will not be presumed the officer charged with that duty, even though he be a judge of a court ordering the election, gave the proper notice.⁸¹ Where the charge was a sale to a person whose name was unknown, on proof by the testimony of such person that his name was unknown to the grand jury, it was held that it would be presumed that there was no testimony or evidence to the contrary.⁸² It is presumed that the licensee is the owner of the premises, but it may be shown he is only an agent.⁸³

Sec. 926. Connecting accused with unlawful acts shown.

Before there can be a conviction of the defendant it must be shown that he was responsible for the illegal transaction proven to have been committed. It is not enough to show an illegal act was committed; it must be shown that it was his act, or that he was connected with it. Many illustrations have been given in this chapter in the various sections, and a few may be here noted. What is sufficient evidence of the accused's connection with the transaction to convict him, must depend upon each particular transaction. It may be shown that he associated with those who visited his premises, and who procured liquor and carried it away, although there be no direct evidence that they procured it from him nor the exact place where they obtained it, there being some evidence from which the inference may be drawn that it was on his premises.⁸⁴ So upon the charge of keeping intoxicating liquors for sale, it is competent to show that persons visiting his premises came away

⁸¹ Toole v. State, 83 Ala. 158; 7 So. 42.

⁸² Commonwealth v. Thornton, 14 Gray, 41.

⁸³ Huffman v. Walterhouse, 19 Ont. App. 186.

⁸⁴ Commonwealth v. Kelley, 152 Mass. 486; 25 N. E. 835.

intoxicated.⁸⁵ So upon a charge of keeping a saloon open on Sunday it is enough to show that it was so kept open, and that the accused was proprietor of it; for proof of proprietorship raises the presumption of immediate control and presumably knowledge of what is taking place upon it. In such an instance it is not necessary to show the actual presence of the accused.⁸⁶ So evidence that there was a board put up in the barroom claimed to be the accused's having his name upon it and announcing "boarding" by him, raises the presumption that he is keeper of the place.⁸⁷ So it may be shown that the accused was ostensibly in possession of the house and referred to it as his,⁸⁸ or that he said he was repairing the house, and that it would cost him so much,⁸⁹ or that he was the owner of the premises, in instances where the charge is keeping a liquor nuisance or keeping a house for illegal sale of liquor.⁹⁰ So where the charge was an illegal sale and the witness testified he went into the accused's store, there drank liquor and there left money for it on the counter, the accused not being in the room at the time, but in the house, it was held to be a question for the jury whether the sale was the accused's act, even though the witness said he had never bought liquor of him.⁹¹

Sec. 927. Incriminating or exculpatory circumstances.

Efforts to conceal a sale are always admissible, as evidence tending to show that the accused was conscious of its illegality, and arrangements made and devices used to effect its secrecy are likewise admissible.⁹² So evidence of persons going

⁸⁵ *Commonwealth v. Finnerty*, 148 Mass. 162; 19 N. E. 215.

⁸⁶ *Sanders v. State*, 74 Ga. 82. For illustrations, see *Lucker v. Commonwealth*, 4 Bush, 440; *Commonwealth v. Murphy*, 147 Mass. 525; 18 N. E. 403; and *Johnson v. Atlanta*, 79 Ga. 507; 4 S. E. 673.

⁸⁷ *State v. Wilson*, 5 R. I. 291.

⁸⁸ *State v. Wambold*, 74 Iowa, 605; 38 N. W. 429.

⁸⁹ *Commonwealth v. Hildreth*, 11 Gray, 327.

⁹⁰ *Commonwealth v. Dearborn*, 109 Mass. 368.

⁹¹ *Neighbors v. Commonwealth* (Ky.), 9 S. W. 718. See also *State v. Barron*, 37 Vt. 57.

⁹² *Johnson v. Atlanta*, 79 Ga. 507; 4 S. E. 673; *Commonwealth v. Keenan*, 148 Mass. 470; 20 N. E. 101.

in and out of the accused's place of business and carrying jugs and demijohns may be given,⁹³ as well as drunken persons coming away from his premises.⁹⁴ Statements of the accused to the effect that he intended to sell may be put in,⁹⁵ and the bringing of barrels of liquor upon the premises may be shown.⁹⁶ In one case a police officer testified that he had seen seven men in the accused's house, and his wife with beer bottles under her apron, and it was held not error to permit him to so testify.⁹⁷ The fact that many persons visited accused's house may be shown, although there be nothing to show that they were only ordinary visitors.⁹⁸ In the case of a prosecution for the maintenance of a "club," the club's books and papers were held admissible, the accused having access to them and presumably being familiar with their contents.⁹⁹ So to show the purpose for which a tenement is kept by the accused, the conduct of those employed therein may be shown.¹ The accused cannot show, on a charge of making a sale, that he had refused to sell to another person on another occasion,² or that he had prohibited his clerk selling in his shop when the latter is charged with making illegal sales.³ The conduct of the accused in former years to show he then had used great care as to the person to whom he would sell is not admissible.⁴ Nor can he prove, in order to show that his wife was the owner

⁹³ Commonwealth v. Maloney, 16 Gray, 20.

⁹⁴ Commonwealth v. Higgins, 16 Gray, 19; Commonwealth v. Kennedy, 97 Mass. 224.

⁹⁵ Commonwealth v. Davenport, 2 Allen, 299.

⁹⁶ Commonwealth v. Davenport, *supra*.

⁹⁷ Commonwealth v. Gillon, 148 Mass. 15; 18 N. E. 584.

⁹⁸ Commonwealth v. Finnerty, 148 Mass. 162; 19 N. E. 215. This was a case of illegal keeping of liquor for sale, a continuing offense; and evidence of visits three weeks before the date of the offense as charged was held ad-

missible. See also Commonwealth v. Lynch, 151 Mass. 358; 23 N. E. 1137; Commonwealth v. Brothers, 158 Mass. 200; 33 N. E. 386.

⁹⁹ Commonwealth v. Jacobs, 152 Mass. 276; 25 N. E. 463.

¹ Commonwealth v. Lattinville (Mass.), 25 N. E. 972.

² Corley v. State, 87 Ga. 332; 13 S. E. 556; Commonwealth v. Barlow, 97 Mass. 597; Commonwealth v. Bickum, 153 Mass. 386; 26 N. E. 1003.

³ Commonwealth v. Tinkham, 14 Gray, 12.

⁴ Commonwealth v. Keenan, 148 Mass. 470; 20 N. E. 101.

and keeper of the liquor, that he threw it out of doors, whereupon he had a contest with his wife, resulting in his arrest upon her complaint.⁵ But a druggist may show that at the time of a seizure of liquors on his premises he had pending an application for a license or permit to sell liquors, as explanatory of the presence of the liquor on his premises.⁶

Sec. 928. Effort to avoid detection.

Efforts on the part of the accused to avoid detection or to conceal the evidence of his crime may always be shown as admissions of guilt. Thus it may be shown that when the accused was arrested he attempted to conceal liquor or threw it away, and that he attempted to bribe the officer arresting him.⁷ The acts of others in connection with his in concealing liquors may be shown, where he starts the operation, though he does not see the conclusion, even though it be not shown he knew what some of those in the chain of operation did.⁸ It may be shown the accused broke and emptied bottles containing liquor which the prosecution claims was intoxicating.⁹ Even the act of his barkeeper in doing so may be shown,¹⁰ or the act of a third person doing so in his presence

⁵ Commonwealth v. Cleary, 152 Mass. 491; 25 N. E. 834.

⁶ Commonwealth v. Wellington, 146 Mass. 566; 16 N. E. 446.

An accused testified on cross-examination he did not know until a few days before trial that he was charged with selling liquor. It was held proper to put in his bail bond and ask him when he employed counsel in the case, to contradict him. Taylor v. State (Tex. Cr. App.), 112 S. W. 942.

The State cannot prove legitimate sales by the accused on a charge of violating the local option law. Blesingame v. State, 47 Tex. Cr. App. 582; 85 S. W. 275. See State v. Pierce, 111 Mo. App. 216; 85 S. W. 663.

Failure of accused to call witnesses to the transaction is a legitimate subject of comment on the part of the State's attorney. Commonwealth v. McCabe, 163 Mass. 98; 39 N. E. 777.

⁷ Commonwealth v. Wallace, 123 Mass. 400; Commonwealth v. Ac-ton, 165 Mass. 11; 42 N. E. 329.

⁸ Commonwealth v. Kohlmeier, 124 Mass. 322.

⁹ Commonwealth v. Daily, 133 Mass. 577; Commonwealth v. Sullivan, 156 Mass. 487; 31 N. E. 647; Commonwealth v. Henley, 158 Mass. 159; 33 N. E. 342; Commonwealth v. McHugh, 147 Mass. 401; 18 N. E. 74.

¹⁰ Commonwealth v. Locke, 145 Mass. 401; 14 N. E. 621.

without protest from him,¹¹ or the act of his son in doing so when there is some evidence or inference of concert of action between them.¹²

Sec. 929. Sales.

Proof of a sale of intoxicating liquors in no wise differs from proof of a sale of any other liquor or of an article of commerce. The transaction is simply the voluntary transfer of the title to and possession of the liquor from the vendor to the vendee for a consideration then paid or promised to be paid in the future, and an instruction that "a sale is the passing of the title and possession of any property for money, which the buyer pays or promises to pay" is a sufficient definition of a sale.¹³ Occasionally statutes declare what shall be sufficient evidence of a sale. Thus in New Zealand a statute declared proof that "the fact * * * of there being on such" [meaning the occupiers] "premises more liquor than is reasonably required for the use of the persons residing therein" should be deemed *prima facie* evidence of the unlawful sale of liquors by such persons. Yet in order to avail himself of the provisions of this statute, it was held that the informant must show that the liquor claimed to be more than reasonably requisite was on the premises at the time of the sale, and also he must give some evidence of the number and circumstances of the persons who were then residing on the premises.¹⁴ Sales may be implied from proof of the actions of the parties. Thus, if a person goes into a liquor house, calls for whisky, and it is placed before him and he drinks it, a sale

¹¹ Commonwealth v. McHugh, 147 Mass. 401; 18 N. E. 74.

¹² Commonwealth v. Nally, 151 Mass. 63; 23 N. E. 660.

¹³ Krnavek v. State, 38 Tex. Cr. App. 44; 41 S. W. 612; Harding v. State, 65 Neb. 238; 91 N. W. 194; Byrd v. State, 54 Tex. Cr. App. 170; 114 S. W. 135. Failure to define a sale in the instructions to the jury is not error, if there

be no question that the sale was made. McKinley v. State, 52 Tex. Cr. App. 182; 106 S. W. 342. See also Walker v. State, 52 Tex. Cr. App. 293; 106 S. W. 376. Nor is it error to refuse to define a dramshop. Cross v. People, 66 Ill. App. 170.

¹⁴ Hill v. Manning, 12 N. Z. L. R. 153.

is implied from these facts and not a gift, the value of the liquor being the amount the law implies is to be paid for it.¹⁵ It is not necessary that any words pass between the vendor and vendee during the transaction which is claimed to show a sale. As is well known, it is a common practice of men who are regular habitués of saloons, to drink on nearly every occasion they enter their favorite places the same kind of liquor, and the barkeepers become so familiar with their likes and dislikes that on their appearance the kind of liquor they habitually use is at once set before them, whereupon they help themselves, lay down the price and depart. Not a word is said, and yet the law implies a sale; and even if no money be forthcoming, but the drinker takes his departure without saying anything about pay, yet the law still treats the transaction as a sale rather than a gift.¹⁶ Should the saloon keeper invite a person to have a drink, and nothing further was said, of course, a sale would not be implied; but, on the contrary, a gift would be.¹⁷ A sale may be proven by proof of circumstances, but the circumstances must not only be consistent with the theory of the accused's guilt, but must be so strong as to exclude all other reasonable hypotheses.¹⁸ Proof of a sale will not fail because the witness is not able to state out of ten men who were drinking which one furnished the money passed to the accused.¹⁹ Where accused gave a person liquor and some time afterward such person gave him money merely

¹⁵ Auburn Excise Comm'rs v. Merchant, 34 Hun, 19; State v. Davis, 62 W. Va. 500; 60 N. E. 584; Hill v. State, 37 Ark. 395; State v. Cutting, 3 Ore. 260; Kimball v. People, 20 Ill. 348; Emerson v. Noble, 32 Me. 380; Riley v. State, 43 Miss. 397.

¹⁶ Jackson v. State (Tex. Cr. App.), 123 S. W. 142; McClure v. State, 43 Ark. 75; Liles v. State, 43 Ark. 95; Dant v. State, 83 Ind. 60; Commonwealth v. Clark, 14 Gray, 367.

¹⁷ State v. Quinn, 25 Mo. App. 102; State v. Spaulding, 61 Vt. 505; 17 Atl. 844; O'Shenneset v. State, 49 Tex. Cr. App. 600; 96 S. W. 790.

¹⁸ State v. Sweizewski, 73 Kan. 733; 85 Pac. 800; Trail v. State (Tex. Cr. App.), 107 S. W. 545; Tompkins v. State, 2 Ga. App. 639; 58 S. E. 1111; Brown v. State, 4 Ga. App. 73; 60 S. E. 805; Johnson v. State, 52 Tex. Cr. App. 554; 107 S. W. 816.

¹⁹ Durein v. State of Kansas, 208 U. S. 613; 28 S. C. 567; 52 L. Ed.

as a gift and not as the price of the liquor, it was held that this was a gift and not a sale, unless it was merely colorable.²⁰ A witness testified he went to accused's house, and was directed by him to go inside, which he did, and found a bottle of whisky. He took the bottle and left some money on the table. This was held to authorize a finding that there was a sale of the whisky.²¹ So where a witness testified he saw C enter the accused's saloon, and ten minutes afterward come out with a bottle of whisky in his pocket, and two hours later he was seen in the same saloon, and it was also shown that the accused had exhibited extreme anxiety to get the witness away from the trial, it was held that the evidence justified the verdict of the jury that the accused had sold the liquor to C.²² A jury cannot infer a sale of liquor where the evidence only shows that the defendant had agreed to sell and deliver a quart of the liquor at an agreed price, and while he was in the act of drawing it from the barrel he was prevented from carrying his intention into effect by being arrested for an illegal sale.²³ Where the evidence was that the prosecuting witness asked the accused, in a local option district, in his place of business for whisky and was told by him he could not have it, but took his order for the amount desired, and thereupon a third person came into the place, and the prosecuting witness then asked such third person to loan him a quart of whisky he had previously ordered, whereupon he requested the accused to give the prosecuting witness a quart and replace it with some of that which had been ordered by the latter when it came, it was held error

²⁰ *Finley v. State* (Tex. Cr. App.), 47 S. W. 1015; *Mills v. State*, 47 Tex. Cr. App. 220; 82 S. W. 1045.

²¹ *Winter v. State*, 133 Ala. 176; 31 So. 717; *Isom v. State*, 49 Tex. Cr. App. 610; 95 S. W. 518.

In a Georgia case it was said that where a person is charged with selling liquor, is found in an apparently guilty situation, an un-

reasonable explanation is worse than no explanation at all. *Davis v. State*, 4 Ga. App. 274; 61 S. E. 132.

As to the question of a loan or a sale, see *Coleman v. State*, 54 Tex. Cr. App. 396; 112 S. W. 1072.

²² *Commonwealth v. Stevens*, 153 Mass. 4; 26 N. E. 96.

²³ *Fleming v. State*, 106 Ga. 359; 32 S. E. 338.

not to instruct the jury the accused was not guilty unless he participated with such third person in making the sale.²⁴ Where it was shown that an habitual drunkard gave the accused money to buy whisky for him, and the accused went across the State boundary line and purchased it in another State, and there delivered it to a boy who carried it to the drunkard in the first State, the offense of placing liquor in such drunkard's possession was held complete and the accused liable to a fine for the commission of the offense.²⁵

²⁴ Huff v. State, 51 Tex. Cr. App. 550; 103 S. W. 629.

²⁵ Jenkins v. State, 82 Miss. 500; 34 So. 217.

It is not error for the court to charge the jury that accused was guilty if he "either directly or indirectly" made the sale. Griffin v. Commonwealth (Ky.), 66 S. W. 817; 23 Ky. L. Rep. 1992.

Accused collected from witness money with which to get liquor not his out of the express office; and personating the owner, he paid for it, and the witness, by agreement, took it out. This was held to show a sale, although accused did not own the liquor. Polk v. State (Tex. Cr. App.), 97 S. W. 467.

Evidence on a sale, though conflicting, must all be submitted to the jury. Levy v. State, 133 Ala. 190; 31 So. 805.

Upon a charge of having committed a misdemeanor, in that in a named county the accused did "unlawfully sell spirituous and intoxicating liquors, contrary to the laws of the State," there can be no conviction of a violation of a statute prohibiting a sale within a certain distance of a church in the county, nor of a sale without

a license. O'Brien v. State, 109 Ga. 51; 35 S. E. 112.

Where a sale without a license is a distinct offense from a sale of liquor to be drunk upon the premises, proof of the latter offense will not support the former. State v. Apperger, 80 Mo. 173.

If the accused may sell liquor for certain purposes, on a charge of selling for other purposes, the latter charge is not sustained by showing he exercised his privilege improperly or made sales under it in an irregular manner. State v. White, 31 Kan. 342; 2 Pac. 598.

Where it is permissible to allege in the same count a sale, a gift and a furnishing of liquor without incurring the defect of duplicity, then proof of any of these offenses is sufficient to sustain a conviction. State v. Hassett (Vt.), 23 Atl. 584.

Where the charge is a sale without a license, proof of a sale on Sunday will support it, though a sale on that day is a distinct offense. People v. Krank, 110 N. Y. 488; 18 N. E. 242; Commonwealth v. Harrison, 11 Gray, 310.

Where a witness testified he gave accused money and a bottle, and asked him to get some whisky,

Sec. 930. Evidence to show sales—Incriminating evidence.

Upon a charge of a sale of liquor it is always admissible to show that the accused had the power to make a sale, and in order to do this it is permissible to exhibit to the jury the paraphernalia of such illegal business. Thus, bottles, decanters, corkscrews, empty jugs and barrels found in the possession of the accused may be shown the jury,²⁶ or evi-

and the accused went and brought back a bottle filled with whisky, this was held to authorize the jury to find there was a sale. *Richardson v. Commonwealth*, 11 Ky. L. Rep. (abstract) 367.

A statute making a delivery *prima facie* evidence of a sale, does not preclude the Government from proving the fact of a sale by circumstantial evidence, where there is no evidence of a delivery. *Commonwealth v. Campbell*, 116 Mass. 32.

Where the witness testified that on the preliminary examination he had gone with the sheriff and had pointed out the person who had sold him the liquor, but he could not now positively identify the accused as the same man, the sheriff was permitted to testify that the man pointed out by the witness was the accused. *Reno v. State* (Tex.), 120 S. W. 429. See *Commonwealth v. Munsey*, 112 Mass. 287.

A witness testified he had given money to A and told him to go to defendant's place of business and buy liquor. It was held that he could not testify what A told him about buying the liquor of the defendant. *Newman v. State*, 55 Tex. Cr. App. 376; 116 S. W. 1156.

Evidence that the proprietor of a drug store, where it was claimed

the sales had been made, a day or so before had employed accused to haul away some empty beer and whisky bottles, is not admissible, not tending to prove sales by him. *Hawkins v. State* (Tex.), 122 Pac. 22.

A witness may state that the accused was managing the place where the liquor was sold. *Green v. State* (Tex.), 120 S. W. 425.

If the accused accept the money and deliver the liquor "for the money," then such money was the consideration for the liquor, and that is a sale. *Richardson v. Commonwealth*, 11 Ky. L. Rep. (abstract) 367.

Proof of a sale at the particular house stated in the indictment, when not necessary to state it, need not be made. *Horton v. Carrington*, 1 How. Pr. (N. S.) 124.

The jury may presume the sale proved to be the same as that proved before the magistrate below, although there be evidence of other sales not relied upon by the State, which had been introduced at the trial before the magistrate. *Commonwealth v. Carroll*, 15 Gray, 412.

²⁶ *State v. Keenan*, 7 Kan. App. 813; 55 Pac. 102; *Phillips v. State* (Ala.), 47 So. 245; *Myers v. State*, 52 Tex. Cr. App. 558; 108 S. W. 392; *State v. Kennard*, 74 N. H.

dence may be given that they were found in his possession.²⁷ But where a bottle of whisky had been forcibly taken from the accused, it was held that it was not admissible unless he had been legally arrested and the bottle found at his place of business or residence.²⁸ On the contrary, the accused may show that at the time and place he is charged with making a sale he did not have any liquors there.²⁹ A witness testified he entered a stairway of the accused's saloon, removed some bricks and saw him sell liquors to certain persons. It was sought to exclude this evidence on the ground that it compelled the accused to testify against himself in a criminal prosecution, but this claim was held untenable.³⁰ It cannot be shown that the accused had the reputation of keeping a saloon or a "blind tiger."³¹ So where it is shown that the sale was made on a boat, evidence of the character of the boat was held inadmissible.³² The accused's control over the immediate place where the liquors were sold may be shown as tending to connect him with the sale.³³ In corroboration of the witness that he bought a bottle of whisky of the accused, it was held admissible to show that shortly after the time of

76; 65 Atl. 376 (kept the day after the sale); *State v. Lewis*, 86 Minn. 174; 90 N. W. 318; *King v. State*, 50 Tex. Cr. App. 321; 97 S. W. 488 (under floor); *Reynolds v. State*, 52 Fla. 409; 42 So. 373; *O'Shennessey v. State*, 49 Tex. Cr. App. 600; 96 S. W. 790; *Otte v. State*, 29 Cir. Ct. Rep. 203; *Biddy v. State* (Tex. Cr. App.), 108 S. W. 689 (witness saw a bar on accused's premises); *Clark v. State* (Ga.), 63 S. E. 606; *Union v. State* (Ga.), 66 S. E. 25; *Martin v. State* (Tex.), 122 S. W. 24.

²⁷ *Hardesty v. United States*, 164 Fed. 420; *Taylor v. State*, 5 Ga. App. 237; 62 S. E. 1048. Even on the next day. *Cole v. State*, 120 Ga. 485; 48 S. E. 156.

²⁸ *Smith v. State*, 3 Ga. App.

326; 59 S. E. 934. If found by a search warrant, they are admissible. *Hardesty v. United States*, 164 Fed. 420; *Taylor v. State*, 5 Ga. App. 237; 62 S. E. 1048.

²⁹ *Vann v. State*, 140 Ala. 122; 37 So. 158.

³⁰ *Cohn v. State*, 120 Tenn. 61; 109 S. W. 1149.

³¹ *Smothers v. Jackson* (Miss.), 45 So. 982. See *Thompson v. State* (Tex. Cr. App.), 97 S. W. 316.

³² *Cook v. State*, 81 Miss. 146; 32 So. 312; *Gorman v. State*, 52 Tex. Cr. App. 327; 106 S. W. 384; *Thompson v. State* (Tex. Cr. App.), 97 S. W. 316.

³³ *Wright v. State*, 129 Ala. 123; 29 So. 864; *State v. Green*, 61 S. C. 12; 39 S. E. 185; *Commonwealth v. Collins*, 16 Gray, 29.

the purchase a bottle of whisky was found in the pocket of the witness, the circumstances tending to show it was the same bottle.³¹ Of course, the evidence must show that the liquor sold was intoxicating, or such as the law forbids being sold.³⁵ A witness may not say he had heard that liquor could be bought at the accused's place of business,³⁶ unless he were asked on cross-examination why he went there. Nor may he testify what he said before the grand jury about the sale, when no fact that occurred in the grand jury room is in controversy.³⁷ Nor may he testify that he told an officer where he bought the whisky he exhibited to him.³⁸ The accused may show that he was not at the place on the day or at the time it is claimed the sale took place.³⁹ The accused cannot show that he had refused to sell the prosecuting witness liquor on other times than that alleged in the indictment.⁴⁰ On a claim that the accused sold liquor to a certain person on Sunday, it may be shown that such person was drunk on that day.⁴¹ If there be a dispute as to which one of two persons the liquor was sold, one of them who is a witness cannot be asked if he considered that the liquor was sold to him, for that is a question for the jury.⁴² Nor may it be shown that it is usual for a mill owner to keep liquor for his own use and to give it to his employes under certain circumstances.⁴³ Where it is in mitigation of the penalty, it may be shown that the purchaser said at the time of the purchase he desired the liquor as medicine for immediate use, as, for

³⁴ *Matkins v. State* (Tex. Cr. App.), 58 S. W. 108.

³⁵ *Regina v. Beard*, 13 Ont. 608.

³⁶ *Gorman v. State*, 52 Tex. Cr. App. 327; 106 S. W. 384; *Brighton v. Miles*, 153 Ala. 673; 44 So. 394.

³⁷ *Pride v. State*, 52 Tex. Cr. App. 449; 107 S. W. 819. But he may be asked if he did not testify so and so before the grand jury for the purpose of impeachment. *Finley v. State* (Tex. Cr. App.), 47 S. W. 1015.

³⁸ *Holmes v. State*, 52 Tex. Cr. App. 353; 106 S. W. 1160.

³⁹ *Harper v. State* (Tex. Cr. App.), 98 S. W. 839.

⁴⁰ *Becker v. State* (Tex. Cr. App.), 50 S. W. 949.

⁴¹ *Pike v. State*, 40 Tex. Cr. App. 613; 51 S. W. 395.

⁴² *Ratliff v. State* (Tex. Cr. App.), 49 S. W. 583.

⁴³ *Ward v. State*, 51 Fla. 133; 40 So. 177.

sick members of his family.⁴⁴ It may be shown that the accused possessed an unusual amount of liquor at the time of the sale.⁴⁵ Where the witness says the liquor he purchased of accused was intoxicating, it may be shown that he drank whisky the same day several times elsewhere, which was not the liquor he secured from the accused.⁴⁶ On a charge of a sale on Sunday, it cannot be shown that the accused's bartender had been convicted of the same sale.⁴⁷ Where accused claims he merely ordered the liquor for a certain person, he may show by witnesses that such person instructed him to order the liquor for him.⁴⁸ Where the evidence showed that

⁴⁴ Huff v. State, 51 Tex. Cr. App. 550; 103 S. W. 629.

⁴⁵ State v. Kiger, 63 W. Va. 450; 61 S. E. 362.

⁴⁶ Wingo v. State (Tex. Cr. App.), 108 S. W. 372.

⁴⁷ People v. Mullins, 5 N. Y. App. Div. 172; 39 N. Y. Supp. 361.

⁴⁸ Waddle v. State (Miss.), 24 So. 311.

Accused and a witness went to an express office, secured a box containing whisky in bottles, carried it to the accused's room, and the witness took one of the bottles and paid the accused for it. The accused testified the witness had a key to this room and also kept a locker there, to which he likewise had a key. But the court refused to allow him to prove that the witness kept whisky in the locker also, and this was held not to be error. Jones v. State, 136 Ala. 118; 34 So. 236.

It is not error to refuse to instruct the jury that witnesses should fortify their testimony concerning sales made by producing the witnesses to whom the sales were made. Commonwealth v. Farrell, 137 Mass. 579.

In order to show that the accused had got the prosecuting witnesses out of the court's jurisdiction, the State offered to prove, by the officer given subpoenas to serve upon them, but he simply said that "he heard that they had gone away and did not look for them." This testimony was held inadmissible. State v. Barron, 37 Vt. 57.

A testified that he and B went into a shop and bought liquor, and that when they came out, B told him the name of the seller was that of the accused. The accused asked him what else was said, and why they went there; but this was held to be inadmissible. Commonwealth v. Keyes, 11 Gray, 323. See Commonwealth v. Clark, 14 Gray, 367.

M was with the accused. He spoke to each one of several alleged purchasers, and took them to the place of sale; but did not remain with them nor drink. Evidence was admitted that one of the alleged purchasers was seen to give M money, but the jury were told to disregard this evidence unless they were satisfied M and the ac-

the defendant, indicted for selling, was a railroad agent, that he delivered the liquor brought from without the State and consigned C. O. D. to a person who had not ordered it, it was held that he could show he asked the consignee if he had ordered the liquor for his personal use, and that in delivering the liquor to him he acted in good faith.⁴⁹ The accused cannot show he kept liquors in storage for several persons, subject to withdrawal by them as they desired them.⁵⁰ As a rule, an indefinite conversation between the purchaser and accused at the time of the sale, having some relation to it, cannot be excluded because it is indefinite unless it affirmatively appear that they did not understand each other.⁵¹ The prosecution is not necessarily bound by a statement of a witness it has introduced, especially if it has no other witness on the question of sale, but the jury may consider all the circumstances attending the sale. Thus, where an alleged accomplice of the accused was used by the State as a witness, it was held that it was not necessarily bound by his statement that he was not authorized by the accused to make the sale.⁵² Evidence is admissible to show that the transaction was a loan and not a sale of whisky, and in order to prove this the conversation accompanying the delivery of the whisky, and immediately preceding and following it, relating thereto, is admissible.⁵³ For the purpose of identifying the transaction, the prosecuting witness may testify that immediately

cused were acting in concert. *Commonwealth v. McDonald*, 147 Mass. 527; 18 N. E. 402.

⁴⁹ *State v. Smith*, 61 W. Va. 329; 56 S. E. 528.

In a Pennsylvania case the question as to where the sale of liquor made on orders and shipped C. O. D. took place was submitted to the jury for its decision. *Commonwealth v. Tynnauer*, 33 Pa. Super. Ct. 604.

⁵⁰ *Donald v. State* (Miss.), 41 So. 4.

⁵¹ *Haynes v. State* (Tex. Cr. App.), 83 S. W. 16.

⁵² *Oldham v. State*, 52 Tex. Cr. App. 516; 108 S. W. 667.

⁵³ *Wilson v. State*, 54 Tex. Cr. App. 13; 111 S. W. 1018.

Instances of newly discovered evidence not sufficient to entitle accused to a new trial. *Commonwealth v. Churchill*, 2 Met. 118; *Commonwealth v. Galligan*, 156 Mass. 270; 31 N. E. 1142; *State v. Beardsley*, 43 Kan. 641; 23 Pac. 1070; *Merriweather v. State*, 53 Tex. Cr. App. 410; 108 S. W. 661.

after the sale he went immediately from the place where it was made to another person, especially where such person has testified he saw the transaction claimed to constitute the sale.⁵⁴ The accused may show by a witness who got liquor at the same time and place where the prosecuting witness got his, that he did not pay him for the liquor he got.⁵⁵ It is not admissible to show that the accused was a whisky drummer, that his house furnished him free samples to treat his customers, and the length of time he had been in the business.⁵⁶ The receipt of large quantities of liquors by the accused, more than necessary for his personal use, may be shown by the records of the railroad station in the town to which they were consigned to him.⁵⁷ A witness may testify he bought whisky of the accused, though he neither smelt nor tasted the liquor so purchased.⁵⁸ The books of an express company are admissible to show shipments of liquor to the accused.⁵⁹ So it may be shown that accused telephoned to his place of business an order for whisky, and whisky was shipped to the alleged purchaser.⁶⁰ A minor asked the accused for whisky and was by him referred to another; afterwards the whisky was placed where accused said it would be placed. It was held proper to let the minor testify that shortly after he got the whisky he gave the person to whom he was referred a dollar.⁶¹ The evidence must show that the sale took place in the jurisdiction of the court. But where the prosecuting witness testified to sales on a certain day, and several others after that time, and that he bought the liquor at a certain town within a designated county of the State, it was

⁵⁴ Henderson v. State, 50 Tex. Cr. App. 604; 101 S. W. 208.

⁵⁵ Whitfield v. State, 2 Ga. App. 124; 58 S. E. 385; Murphy v. State (Ala.), 45 So. 208.

⁵⁶ McKinley v. State, 52 Tex. Cr. App. 182; 106 S. W. 342.

⁵⁷ State v. Dahlquist (N. D.), 115 N. W. 81.

⁵⁸ Rice v. State, 52 Tex. Cr. App. 359; 107 S. W. 833.

⁵⁹ State v. Kriechbaum, 81 Iowa, 633; 47 N. W. 872.

⁶⁰ State v. Priester, 43 Minn. 373; 45 N. W. 712.

⁶¹ Deisher v. State (Tex. Cr. App.), 96 S. W. 28.

Where the accused denied he had whisky, it was held not admissible to show he had bought whisky at various times, because such evidence would have no probative force on the question of the particular sale involved. Harris v. State (Tex. Cr. App.), 98 S. W. 842.

held that the sale was sufficiently proven.⁶² It may be shown that the witness was furnished money with which to purchase whisky, and it is not error that there was no showing that he purchased whisky with it.⁶³ On failure of the prosecuting witness to testify he paid for the liquor, the State cannot introduce his declarations made shortly after the transaction that he had paid for it, and this rests upon two grounds: (1) Because his declarations are not evidence; (2) because the State cannot impeach its own witness when he is not contradicted by any of its other witnesses.⁶⁴ Where accused claimed he was the barkeeper of a club, it was held proper to show that large quantities of liquors had been shipped to the club.⁶⁵ A statute provided that an accused might be convicted upon the uncorroborated testimony of a single witness; and this statute was held to apply to the testimony of an accomplice.⁶⁶ An accused may be convicted on proof of a sale of liquor, without showing that he owned it; but proof of his ownership may be made, and to that the jury may look in determining who made the sale.⁶⁷

⁶² *State v. Gibson*, 114 Mo. App. 652; 90 S. W. 400.

⁶³ *Morris v. State* (Tex. Cr. App.), 44 S. W. 510.

⁶⁴ *Largin v. State*, 37 Tex. Cr. App. 574; 40 S. W. 280.

⁶⁵ *Arnold v. State*, 38 Tex. Cr. App. 1; 40 S. W. 734.

⁶⁶ *Ross v. State*, 53 Tex. Cr. App. 295; 109 S. W. 152.

It cannot be shown that there was litigation over seizure of liquors, though possession of the same liquors by accused may be shown. *Myers v. State*, 52 Tex. Cr. App. 558; 108 S. W. 392.

Evidence of a delivery of liquor at the accused's place of business will be excluded, if there is no evidence of a sale of that particular kind of liquor at such place.

Brighton v. Miles, 151 Ala. 479; 44 So. 394.

Proof of a voluntary sale in a dispensary in Alabama is sufficient proof of the accused's unlawful intent. *Collins v. State*, 152 Ala. 90; 44 So. 571.

⁶⁷ *Whitfield v. State*, 2 Ga. App. 124; 58 S. E. 385.

For instances of the extent of cross-examination as to the whole of a conversation, where a part of it has been brought out by the evidence in chief, see *Barnes v. State*, 20 Conn. 254; *Commonwealth v. Keyes*, 11 Gray, 323; *Commonwealth v. Clark*, 14 Gray, 367.

Accused, when charged with a sale without a license, cannot show the licensing officer refused to hear

Sec. 931. Other sales—Other crimes.

It is a general rule that the prosecution must prove the sale as laid in the indictment or information, and as that sale is the issue raised, no other sale can be proven,⁶⁸ unless they all

his application for a license. *Montpelier v. Mills*, 171 Ind. 175; 85 N. E. 6.

Where the sale was made by the accused's clerk, and the prosecution was for conniving at the sale, evidence that the clerk begged a person who saw the sale not to report the act to the grand jury was held competent. *Carroll v. State*, 80 Miss. 349; 31 So. 742.

Accused may rebut the statutory presumption of a sale arising from finding liquor on his premises. *Appling v. State* (Ark.), 114 S. W. 927.

Defendant's statement that he had served deceased a certain mild drink is not admissible as part of the *res gestae*. *Young v. Beveridge*, 81 Neb. 180; 115 N. W. 766.

Statute making request for liquor evidence of a sale. *State v. Gregory*, 110 Iowa, 624; 82 N. W. 335.

Where a witness testifies he purchased of the accused a half pint bottle of whisky, he cannot be asked, on cross-examination, how much he paid for a half gallon claimed he bought. *Ratliff v. State* (Tex. Cr. App.), 49 S. W. 583.

Where it was alleged that M was the purchaser, the evidence showed several persons went to accused, a distiller, and they having trouble to raise the money necessary to buy a cask of liquor, M agreed to take a part of the liquor

and paid accused some money for it, and the others next day paid the remainder, when the cask was carried to a particular place and the liquor divided, M receiving his share. This was held to show a sale to M, and was not a variance. *Parker v. State*, 45 Tex. Cr. App. 334; 77 S. W. 783.

A charge of a sale of liquor is not supported by proof of a soliciting or receiving orders for such a sale. *Potts v. State* (Tex. Cr. App.), 89 S. W. 835.

As to statutes concerning the use of devices in making sales, see *Commonwealth v. Pollak*, 33 Pa. Super. Ct. 600; *Noble v. Commonwealth* (Ky.), 105 S. W. 413; 32 Ky. L. Rep. 73; *State v. Stephens*, 70 Mo. App. 554.

The accused cannot show that the grand jury investigated the charge of an illegal sale on the day alleged and found no evidence of one. *Patrick v. State*, 45 Tex. Cr. App. 587; 78 S. W. 947.

⁶⁸ *State v. Nield*, 4 Kan. App. 626; 45 Pac. 623; *Commonwealth v. Giles*, 1 Gray, 466; *King v. State*, 66 Miss. 502; 6 So. 188; *Stone v. State* (Miss.), 7 So. 500; *Naul v. McComb City*, 70 Miss. 699; 12 So. 903; *Bailey v. State*, 67 Miss. 333; 7 So. 348; *Ware v. State*, 71 Miss. 264; 13 So. 936; *State v. Fierline*, 19 Mo. 380; *Hodgman v. People*, 4 Denio, 235; *Stockwell v. State*, 27 Ohio St. 563; *State v. Miller*, 24 Conn. 522;

constitute one transaction, or unless a whole series must be proven to make out the offense charged, or it is necessary to prove a motive or *scienter*, or to identify the accused.⁶⁹ Of course, if several sales be charged in as many counts (when that is permitted) as many sales may be proven as there are counts.⁷⁰ So where an accused was charged as a common seller and by order of the court the Government filed a specification of the sales it would rely upon, it was held that other sales could not be shown.⁷¹ In case of a prosecution for unlawfully issuing a prescription for liquors, for non-medicinal purposes, the issuance of other prescriptions by the accused, about the same time, cannot be shown if there be nothing to show they were not issued in good faith and for a lawful purpose.⁷² But where the accused testified he sold no liquors to certain persons without prescriptions, evidence of sales without prescriptions was admitted.⁷³ But there are many instances where proof of

Grimes v. State, 44 Tex. Cr. App. 542; 72 S. W. 862; Vallance v. King, 3 Barb. 548; State v. Lawson, 45 Kan. 339; 25 Pac. 864; State v. Marshall, 2 Kan. App. 792; 44 Pac. 49; State v. Hughes, 3 Kan. App. 95; 45 Pac. 94; People v. Andrus, 74 N. Y. App. Div. 542; 77 N. Y. Supp. 780; Swaln v. State, 49 Tex. Cr. App. 241; 91 S. W. 575; Winslow v. State, 50 Tex. Cr. App. 465; 98 S. W. 866; State v. Collins, 8 Kan. App. 398; 57 Pac. 38; Zinn v. State (Tex.), 120 S. W. 893; Chipman v. State, 24 Colo. 520; 52 Pac. 677; Wooten v. State (Tex.), 121 S. W. 703; Devine v. Commonwealth, 107 Va. 860; 60 S. E. 37; Harris v. State (Tex. Cr. App.), 100 S. W. 920; Guarreno v. State, 148 Ala. 637; 42 So. 833; State v. Reynolds, 5 Kan. App. 515; 47 Pac. 573; State v. Austin, 74 Minn. 463; 77 N. W. 301; Abrams v. State (Ala.), 46 So. 464; McClure v. State, 148 Ala. 625; 42

So. 813; Blasingame v. State, 47 Tex. Cr. App. 582; 85 S. W. 275. *Contra*, State v. Crotean, 23 Vt. 14; 54 Am. Dec. 90; State v. Smith, 22 Vt. 74.

⁶⁹ King v. State, 66 Miss. 502; 6 So. 188.

The accused cannot complain if he brings out on cross-examination evidence of other sales, and the court then charges the jury with reference thereto. Alderson v. State (Tex. Cr. App.), 111 S. W. 738.

⁷⁰ State v. Lawson, 45 Kan. 339; 25 Pac. 864.

⁷¹ Commonwealth v. Giles, 1 Gray, 466.

⁷² State v. Roberts, 33 Mo. App. 524.

⁷³ Gilmore v. State, 37 Tex. Cr. App. 178; 39 S. W. 105.

Evidence that accused was in the liquor business is a harmless error upon a charge of a sale without a license or to a minor. Nelson v. Commonwealth, 23 S. W. 350.

other sales is admissible. Thus where the intent with which the particular sale was made is an issue, proof of other sales are admissible.⁷⁴ So where it is necessary to prove that the sale was made of liquor to be drunk upon the premises, evidence of other sales was held admissible to show that the accused knew the liquor sold by him at other times was drunk on the premises, and also to illustrate the character of the first sale.⁷⁵ So on a charge of keeping liquors with intent to sell them illegally, the prosecution may rely for a conviction upon one sale, and yet give evidence of other prior sales, for the purpose of showing the intent with which they were kept,⁷⁶ even though indictments on such other sales be pending.⁷⁷ The same rule applies on a charge of keeping a liquor nuisance, even though the sales take place in other buildings, but on the same premises.⁷⁸ So for the purpose of proving that the accused had notice of that of which he would not be guilty unless he had such notice, other similar transactions may be shown. Thus in a prosecution of an expressman for conveying liquors from a railroad station, it was held competent to prove that he on several occasions shortly prior to the time of the conveyance charged in the indictment, received other packages containing a considerable amount of liquors at the same station,⁷⁹ and in such a case evidence that he had in his wagon another jug having thereon the name of a well-known seller of liquors is admissible.⁸⁰ So evidence of other sales of liquor of the same compound may be shown, and its effect upon the purchaser who drank it, upon the question of intoxicating effect,⁸¹ but not sales made by another person

⁷⁴ *Commonwealth v. Sinclair*, 138 Mass. 493; *Commonwealth v. Colton*, 138 Mass. 500; *Archer v. State*, 45 Md. 33; *Pike v. State*, 40 Tex. Cr. App. 613; 51 S. W. 395; *Hans v. State*, 50 Neb. 150; 69 N. W. 838; *Efird v. State*, 44 Tex. Cr. App. 447; 71 S. W. 957; *Commonwealth v. Coughlin*, 182 Mass. 558; 66 N. E. 207.

⁷⁵ *Pearce v. State*, 40 Ala. 720.

⁷⁶ *State v. Raymond*, 24 Conn. 204; *State v. Gorman*, 58 N. H. 77.

⁷⁷ *State v. Raymond*, 24 Conn. 204.

⁷⁸ *State v. Arnold*, 98 Iowa, 253; 67 N. W. 252.

⁷⁹ *Commonwealth v. Commeskey*, 13 Allen, 585.

⁸⁰ *Commonwealth v. Kenney*, 115 Mass. 149.

⁸¹ *Pike v. State*, 40 Tex. Cr. App. 613; 51 S. W. 395; *State v. Coulter*, 40 Kan. 87; 19 Pac. 368.

years before of liquor of a similar name, to show that the liquor the accused sold was intoxicating, because it is too remote.⁸² So other sales may be shown in order to show a system of making sales adopted by the accused to escape detection.⁸³ This is particularly true in charges of a violation of local option laws, to show the accused's intent to violate them.⁸⁴ In such an instance it may be shown that the accused for several months prior had been soliciting C. O. D. orders for liquors, that of itself being an offense.⁸⁵ So upon a charge of keeping a "blind tiger" and selling liquor by that means, evidence of sales other than the one charged, if made in similar manner, may be shown.⁸⁶ So it may be shown other persons obtained the liquor of accused in a similar manner.⁸⁷ The transactions, however, must be similar in the manner of their occurrence to the one for which the accused is on trial.⁸⁸ A prior sale may

⁸² *Malone v. State* (Tex. Cr. App.), 51 S. W. 381.

⁸³ *Bennett v. State*, 40 Tex. Cr. App. 445; 50 S. W. 945, 947; *Monroe v. State* (Tex. Cr. App.), 120 S. W. 479; *Young v. State* (Tex. Cr. App.), 66 S. W. 567; *McIntosh v. State*, 140 La. 137; 37 So. 223; *Killnan v. State*, 53 Tex. Cr. App. 570; 112 S. W. 92; *State v. Peterson*, 98 Minn. 210; 108 N. W. 6; *Stovall v. State* (Tex. Cr. App.), 97 S. W. 92; *Roach v. State*, 47 Tex. Cr. App.), 500; 84 S. W. 586.

⁸⁴ *Wilson v. State* (Tex. Cr. App.), 55 S. W. 68; *Dane v. State*, 36 Tex. Cr. App. 84; 35 S. W. 661; *Gilmore v. State*, 37 Tex. Cr. App. 178; 39 S. W. 105; *Pitner v. State*, 37 Tex. Cr. App. 268; 39 S. W. 662; *Myers v. State*, 37 Tex. Cr. App. 331; 39 S. W. 938; *Bennett v. State*, 40 Tex. Cr. App. 445; 50 S. W. 947; *Taggart v. State* (Tex. Cr. App.), 97 S. W. 95; *Smith v. State* (Tex. Cr. App.), 100 S. W. 953; *Walker v. State*, 49 Tex. Cr. App. 345; 94 S. W. 230; *Matkins*

v. State (Tex. Cr. App.), 62 S. W. 911.

⁸⁵ *Taggart v. State* (Tex. Cr. App.), 97 S. W. 95.

⁸⁶ *Gorman v. State*, 52 Tex. Cr. App. 327; 106 S. W. 384; *Myers v. State*, 37 Tex. Cr. App. 331; 39 S. W. 938; *Bennett v. State*, 40 Tex. Cr. App. 445; 50 S. W. 945, 947.

⁸⁷ *Holland v. State*, 51 Tex. Cr. App. 142; 101 S. W. 1005; *Roach v. State*, 47 Tex. Cr. App. 500; 84 S. W. 586; *Carns v. State*, 51 Tex. Cr. App. 437; 103 S. W. 403; *Wilson v. State* (Tex. Cr. App.), 55 S. W. 68; *Gilmore v. State*, 37 Tex. Cr. App. 178; 39 S. W. 105; *State v. Peterson*, 98 Minn. 210; 108 N. W. 6; *Commonwealth v. Pollak*, 33 Pa. Super. Ct. 600; *Archer v. State*, 45 Md. 33.

⁸⁸ *Lane v. State*, 49 Tex. Cr. App. 335; 92 S. W. 839; *Holland v. State* (Tex. Cr. App.), 101 S. W. 1001; *Archer v. State*, 45 Md. 33.

For the purpose of identifying

be shown, where it tends to show a system, even though the accused has been acquitted of the charge of having made such sale.⁸⁹ It is error to so charge the jury that they can convict the accused of such other sales, when they have been shown to prove the accused's system of evasion of the law.⁹⁰ So where the question is whether the accused acted *bona fide* in making the sale, sales at other times may be shown, as tending to show that the defendant was a seller and not a mere agent.⁹¹ For the purpose of showing the liquor sold was intoxicating, which did not bear a name indicating an intoxicating liquor, evidence of other sales made by the accused and of consignments of the liquor was admitted.⁹² Likewise upon the question of identification, to show that the defendant made the sale alleged, it may be shown that he made a sale to another person on another occasion.⁹³ And so where accused testified that liquor had never been sold in his saloon on Sunday, it was held permissible to prove that on other Sundays his saloon had been known to be open and doing business.⁹⁴ Where the sale was made by the accused's wife in his presence, evidence of other sales made by her in his presence was admitted to show the particular sale was made with his consent or author-

accused with the sale charged. other sales may be shown, where they tend to do so. *Untreiner v. State* (Ala.), 41 So. 170.

A police officer cannot testify he believes similar sales have been made in the community. *Commonwealth v. Fitzpatrick*, 140 Mass. 455; 5 N. E. 272.

⁸⁹ *Stovall v. State* (Tex. Cr. App.), 97 S. W. 92.

⁹⁰ *Holloway v. State*, 54 Tex. Cr. App. 115; 111 S. W. 937, 939; *Holloway v. State*, 53 Tex. Cr. App. 246; 110 S. W. 745; *Belt v. State* (Tex. Cr. App.), 78 S. W. 933.

If there be no evidence of a device or system to evade the law,

then an instruction to the jury that any other sales could be considered by them as circumstances to show the system under which accused was acting, is erroneous. *Belt v. State* (Tex. Cr. App.), 78 S. W. 933. See *State v. Skillicorn*, 104 Iowa, 97; 73 N. W. 503.

⁹¹ *Sweat v. State*, 153 Ala. 70; 45 So. 588.

⁹² The liquor was called "senog cider." *State v. Gillispie*, 63 W. Va. 152; 59 S. W. 957.

⁹³ *Abrams v. State* (Ala.), 46 So. 464; *Intreimer v. State* (Ala.), 41 So. 170.

⁹⁴ *Territory v. Wong Feart*, 17 Hawaii, 353; *Clark v. State*, 40 Tex. Cr. App. 127; 49 S. W. 85.

ity.⁹⁵ Where sales could not be made by the accused except for certain purposes, evidence of other sales by the same purchaser was admitted when not made for the accepted purpose, to the accused's knowledge.⁹⁶ So where a barkeeper testified the defendant, his employer, had forbidden him to sell on Sunday, it was held admissible to ask him on cross-examination if he had not made sales on other Sundays.⁹⁷ In proceedings to revoke a license other illegal sales may be shown than the one charged in the petition for revocation.⁹⁸ Of course, if the accused is not connected with such other illegal sales, then evidence of them is not admissible, and the prosecution has the burden to connect him with them.⁹⁹ In this connection it may be said that the prosecution is not restricted to proof of sales of which evidence was given before the grand jury and on which evidence the indictment was found.¹ The accused, in his defense, cannot show that others persons had applied to him under similar circumstances, and he had refused to sell to them.² Where several sales are shown, the

⁹⁵ Hensly v. State, 52 Ala. 10; Wade v. State, 22 Tex. App. 629; 3 S. W. 786.

⁹⁶ State v. Elliott, 45 Kan. 525; 26 Pac. 55.

⁹⁷ This was, of course, to discredit his testimony that he had been forbidden to sell on Sunday. Fasstnow v. State, 89 Ind. 235; Scott v. State, 150 Ala. 59; 43 So. 181. See also Lynn v. State (Tex. Cr. App.), 22 S. W. 878; Levine v. State, 35 Tex. Cr. Rep. 647; 34 S. W. 969.

Where accused denied he had previously violated the local option law, it was held error to admit records of several previous convictions of him for violation of such law. Tyrrell v. State (Tex. Cr. App.), 38 S. W. 1011.

⁹⁸ Lillienfeld v. Commonwealth, 92 Va. 818; 23 S. E. 882.

⁹⁹ Howell v. State, 53 Tex. Cr.

App. 536; 110 S. W. 914; Harris v. State, 50 Tex. Cr. App. 411; 97 S. W. 704; Taylor v. State (Tex. Cr. App.), 50 S. W. 343; Clark v. State, 40 Tex. Cr. App. 127; 49 S. W. 85; Efird v. State, 44 Tex. Cr. App. 447; 71 N. W. 957.

¹ Commonwealth v. Phelps, 11 Gray, 73; State v. Reno, 41 Kan. 674; 21 Pac. 803; People v. Henschel, 58 Hun, 607; 12 N. Y. Supp. 46. See State v. Rudy, 9 Kan. App. 60; 57 Pac. 263.

If evidence of other sales be shown without objection, and there is no motion to strike it out, there is no error that accused can complain of, a conviction being insisted upon by the State for making the sale charged. State v. Shelton, 16 Wash. 590; 48 Pac. 258.

² Smart v. State, 49 Tex. Cr. App. 373; 92 S. W. 810; Donald-

jury should be instructed that they can only convict the accused of the sale charged in the indictment.³

Sec. 932. Refusal to sell to others—Incompetent evidence.

In the trial of a prosecution under a statute making it a criminal offense to keep a place where intoxicating liquors are kept for sale, given and furnished as a beverage, and for an illegal sale of intoxicating liquors to be used as a beverage, it is error to admit, over the objection of the State, testimony in rebuttal that the defendant at other times refused to sell or give away such liquor as a beverage to the same or to other persons. Such evidence has no tendency to rebut, control or explain the testimony offered on the part of the State, and is not relevant to the issue of his having made the unlawful sales charged. The opposite contention is illogical, and its acceptance as law would tend to introduce at the trial an infinite number of incidents which the State could not be expected to be prepared to contradict, and it would needlessly prolong the trial and encumber the record.⁴

Sec. 933. Sale by or to agent or servant—Sale by wife.

As has been elsewhere stated, a sale by an agent or servant may be charged as a sale by his employer, for the agent's act

son v. State, 3 Ga. App. 451; 60 S. E. 115; Commonwealth v. Barley, 97 Mass. 597; Barnes v. State, 20 Conn. 254; Corley v. State, 87 Ga. 332; 13 S. E. 556; Commonwealth v. Bickeim, 153 Mass. 386; 26 N. E. 1003.

Where the indictment contained two counts, each charging a sale on the same date of the same kind of liquor to two distinct persons, who both testified they bought at the same time under the same circumstances, it was held not error for the court to instruct the jury to consider on each count the testimony of both the witnesses. Lincoln Center v. Bailey, 64 Kan. 885; 67 Pac. 455.

If two sales be made by two persons at same time, it is not error for the State to ask a witness who made the first purchase. State v. O'Brien, 35 Mont. 482; 90 Pac. 514.

³ Boldt v. State, 72 Wis. 7; 38 N. W. 177. See Commonwealth v. Leo, 12 Gray, 33.

⁴ Barnes v. State, 20 Conn. 254; Corley v. State, 87 Ga. 332; 13 S. E. 556; Areher v. State, 45 Md. 33; Commonwealth v. Barlow, 97 Mass. 597; Commonwealth v. Bickum, 153 Mass. 386; 26 N. E. 1003; State v. Linder, 76 Ohio St. 463; 81 N. E. 753.

is his act, and under such an indictment it may be shown that the sale was by the accused's duly authorized agent.⁵ But in all instances where the State relies upon a sale made by a servant or agent of the accused, it has the burden to show that not only was the vendor the servant or agent of the defendant, but in addition thereto it must show that he was authorized to make the particular sale he did.⁶ The difficulty in all questions of this kind arises when the sale is one the defendant should not have made, as if to a minor, or an intoxicated person, or an habitual drunkard, or at a prohibited time. The presumption always is that the accused is innocent, and that if his servant did in his name an un-

⁵ *Parker v. State*, 4 Ohio St. 563; *Commonwealth v. Park*, 1 Gray, 553; *State v. McConnell*, 90 Iowa, 197; 57 N. W. 707; *Commonwealth v. Edds*, 14 Gray, 406; *Commonwealth v. Hurley*, 14 Gray, 411; *Commonwealth v. Hyland*, 155 Mass. 7; 28 N. E. 1055; *State v. Bonney*, 39 N. H. 206; *State v. Colby*, 55 N. H. 72; *Reed v. State*, 53 Tex. Cr. App. 4; 108 S. W. 368; *State v. Roberts*, 55 N. H. 483; *Schwulst v. State*, 52 Tex. Cr. App. 426; 108 S. W. 698; *Moore v. State*, 64 Neb. 557; 90 N. W. 533; *Liberty v. Moran*, 121 Mo. App. 682; 97 S. W. 948; *Kit-trell v. State*, 89 Miss. 666; 42 So. 609; *State v. Back*, 99 Mo. App. 34; 72 S. W. 466; *Commonwealth v. Briant*, 142 Mass. 463; 8 N. E. 338; 56 Am. Rep. 707; *Commonwealth v. Stevenson*, 142 Mass. 466; 8 N. E. 341.

⁶ *Lauer v. State*, 24 Ind. 131; *Hanson v. State*, 43 Ind. 550; *O'Leary v. State*, 44 Ind. 91; *Thompson v. State*, 45 Ind. 495; *Zeller v. State*, 46 Ind. 304; *Wil-son v. State*, 19 Ind. App. 389; 46 N. E. 1050; *Commonwealth v. Gillon*, 2 Allen, 505; *State v. Be-*

loit, 74 Wis. 267; 42 N. W. 110; *Commonwealth v. Lafayette*, 148 Mass. 130; 19 N. E. 26; *Perkins v. State*, 92 Ala. 66; 9 So. 536; *Commonwealth v. Brooks*, 150 Mass. 59; 22 N. E. 436; *Hall v. McKecknie*, 22 Barb. 244; *State v. Bonney*, 30 N. H. 206; *Commonwealth v. Keenan*, 152 Mass. 12; 25 N. E. 32.

One who purchases liquor as agent for another is not guilty of selling. See *Bryant v. State*, 82 Ala. 51; 2 So. 670; *DuBois v. State*, 87 Ala. 101; 6 So. 381; *Anderson v. State*, 32 Fla. 242; 13 So. 435; *Evans v. State*, 101 Ga. 780; 29 S. E. 40; *Cunningham v. State*, 105 Ga. 676; 31 S. E. 585; *Waddle v. State* (Miss.), 24 So. 311; *John-son v. State*, 63 Miss. 228; *State v. Taylor*, 89 N. C. 577; *Bowman v. State* (Tex. Cr. App.), 35 S. W. 382; *Treue v. State* (Tex. Cr. App.), 44 S. W. 829; *Black v. State*, 112 Ga. 29; 37 S. E. 108. *Contra*, where he purchases as agent for a minor. See *Foster v. State*, 45 Ark. 361; *Bourman v. Com.*, 14 Ky. Law Rep. 174; *Vin-cent v. State* (Tex. Cr. App.), 55 S. W. 819.

lawful act that it was not authorized. "We must not hold men responsible for crimes committed by others," said the Supreme Court of Indiana, "without some proof that they either procured, counseled or advised their perpetration."⁷ But there need not be direct proof of the authority of the agent to make the sale; as, for instance, when it is made in the defendant's presence with his knowledge and consent, at least if unrebuked.⁸ And when a sale is proven to have been made in the accused's saloon by a barkeeper or person apparently in charge, it will be presumed, in the absence of countervailing evidence, that he had authorized the sale.⁹ So this is true where he himself takes the witness stand and testifies to his ownership of the premises, and that he had a license to sell there.¹⁰ It may be shown that the master sold to the same minor as his servant did, or that he sold on Sunday, as tending to show in either instance the servant was authorized to make the particular sale alleged.¹¹ Other prior sales of liquors on the premises made by the agent of the accused may be shown, as tending to prove his general authority to make sales.¹² Where the sale was made by the accused's wife at his dwelling, it was held permissible to show that the accused at prior times had kept liquor on the premises for sale, and that at the date of the alleged sale he was still in the liquor business.¹³ A sale by the accused's wife in his place of business may be shown without further evidence, the pre-

⁷ *Lauer v. State*, 24 Ind. 131; *Gerstenkorn v. State*, 38 Tex. Cr. App. 621; 44 S. W. 501; *Newbury v. State* (Tex. Cr. App.), 44 S. W. 843.

⁸ *Hofner v. State*, 94 Ind. 84.

⁹ *Kirkwood v. Autenreith*, 11 Mo. App. 515; *Kolman v. State*, 2 Ga. App. 648; 58 S. E. 1070; *O'Donnell v. Commonwealth*, 108 Va. 882; 62 S. E. 373; *United States v. Bonham*, 31 Fed. 808; *Ameman v. Kall*, 34 Hun, 126; *Gerstenkorn v. State*, 38 Tex. Cr. App. 621; 44 S. W. 501; *State v. McLaughlin*, 47 Kan. 143; 27 Pac.

840; *Roberts v. State*, 54 Tex. Cr. App. 355; 107 S. W. 59. See *Commonwealth v. Coughlin*, 14 Gray, 389. *Contra*, *Hanson v. State*, 43 Ind. 550; *Thompson v. State*, 45 Ind. 495; *Zeller v. State*, 46 Ind. 304. See *Wilson v. State*, 19 Ind. App. 389; 46 N. E. 1050.

¹⁰ *Commonwealth v. Chadwick*, 142 Mass. 595; 8 N. E. 589.

¹¹ *State v. Wentworth*, 65 Me. 234; 2 Atl. 688.

¹² *State v. Shaw*, 58 N. H. 73.

¹³ *State v. Colby*, 55 N. H. 72; *State v. Roberts*, 55 N. H. 483.

sumption being it was by his authority.¹⁴ And the jury may convict the accused, even if both he and his wife testify that he had forbidden her to make sales at any time, and there be no affirmative proof of her agency.¹⁵ But this presumption does not apply to a sale by a concubine of the accused living with him as his wife.¹⁶ In one case the evidence showed the accused kept a hotel, to which a saloon, owned by him, was attached; that the saloon was separated from the hotel office by a hall, from which doors opened into each; that the prosecuting witness entered the office on Sunday and passed through the hall into the saloon, where one of the accused's boarders and two or three others persons were standing some distance from the bar, but the accused was not there nor shown to be about the premises; that the witness asked the boarder if he had any beer, and the latter replied, "There is a bottle; why don't you take it?" that a bottle of beer and a beer glass was on the counter, and the witness poured out a glass of beer, drank it, left the price of the drink on the counter and passed out the way he had entered. This was held sufficient to justify a conviction of the proprietor of the saloon. "It was not explained," said the court, "how the saloon came to be opened on Sunday, with the appellant's [the accused's] boarder and two or three other persons in it; nor was there any explanation of how it came about that the bottle of beer and glass were so conveniently displayed on the counter; nor by what authority the boarder presumed upon the liberality of his host, when he directed the attention of the witness to the bottle and glass on the counter; nor why the witness thought the propriety of the occasion demanded that he should leave the price of the drink on the counter. All this may have occurred without the appellant's consent. The facts were, how-

¹⁴ Trometer v. District of Columbia, 24 App. D. C. 242; Commonwealth v. Coughlin, 14 Gray, 389; Commonwealth v. Fitzgerald, 14 Gray, 14; Commonwealth v. Hurley, 14 Gray, 411; Commonwealth v. Hyland, 155 Mass. 7; 28 N. E. 1055.

¹⁵ Trometer v. District of Columbia, 24 App. D. C. 242; Commonwealth v. Hyland, 155 Mass. 7; 28 N. E. 1055; Commonwealth v. Fitzgerald, 14 Gray, 14.

¹⁶ United States v. Bonham, 31 Fed. 808.

ever, capable of supporting a different theory. The jury may have inferred that the method resorted to was a means of evading the statute, which makes it a misdemeanor to sell, barter or give away any intoxicating liquor to be drunk as a beverage on Sunday. This inference must have been drawn by the jury, otherwise an acquittal must have followed. The sale, barter or gift of intoxicating liquors on Sunday, to be drunk as a beverage, stands upon a somewhat different basis from similar transactions on a secular day. There are no circumstances under which sales, for such a purpose, can be lawfully made on that day. In contemplation of law, that, like other secular business, is to be suspended on Sunday, persons are ordinarily held to take some notice whether or not the law is being violated in the conduct of a business which is under their control, and which is being conducted on premises which they themselves occupy. When, therefore, the State made it appear in evidence that a sale, or what amounted to a sale, of intoxicating liquors had been made on Sunday, in the appellant's [the accused's] saloon, which was in a building which the appellant himself occupied, and by a person who was apparently in control of the saloon at the time, such facts were presented as authorized the jury to infer that the saloon was open, and the sale was made with the appellant's consent. It was not necessary that the appellant [the defendant] should have authorized or directed the particular sale in question. The fact that ready access was obtainable to the saloon, and that three or four persons were already there when the prosecuting witness entered, and all the circumstances taken together, may have induced the belief in the minds of the jury that the saloon was accessible to all such as knew the way, and that liquors were obtainable by doing as the witness did. * * * Where facts, from which guilt may fairly be deduced, are left wholly unexplained, and the jury draw the inference that the defendant is guilty, this court is not authorized to reverse."¹⁷ But where officers found beer

¹⁷ *Pierce v. State*, 109 Ind. 535: 10 N. E. 302.

"This case," said the court, "is not distinguishable from *Showal-*

ter v. State, 84 Ind. 562. and *Dant v. State*, 83 Ind. 60. It is in its facts like the case of *Stultz v. State*, 96 Ind. 456." For a closely

in the accused's saloon and shortly after his son came in and said to his father, "That beer was some which was left over from the last raid," this was held not sufficient to show the son was the agent of the father so as to render testimony that he was seen, on another occasion, to give a man a drink from a bottle in the rear of the accused's building and receive money for it.¹⁸ Where there was a charge of keeping liquors with intent to sell them illegally, it was held the accused could not show that he intended to make the sales in the presence of his employer; for that fact was no defense for him.¹⁹ Nor can the accused show that the liquors he sold were not his liquors, but another's,²⁰ except as bearing upon the question whether he did actually make a sale of liquor; for there is a presumption that a man will not sell the liquor of another without authority to do so.²¹ Where the crime is of that character that the State must show the accused held a license, then proof of sales by a bartender of the accused will not support the charge of an unlawful sale.²² Of course, if the so-called agent acts solely in behalf of the purchaser in securing the liquor, and the accused has no interest in the liquor sold, there can be no conviction.²³ The accused may show that he had forbidden his clerk or barkeeper to sell liquors illegally, as on Sunday, or to a minor or to an intoxicated person,²⁴ unless the statute ex-

analogous case, see *Commonwealth v. Fitzgerald*, 14 Gray, 14, and *Commonwealth v. Edds*, 14 Gray, 406.

In the *Indiana* case, from which a quotation has been made, the conversation between the prosecuting witness and the person in the saloon, about the beer, was held competent.

¹⁸ *Commonwealth v. Keenan*, 152 Mass. 9; 25 N. E. 32. In this case it was also held that the error occasioned by receiving such evidence was not cured by telling the jury not to consider it unless they find the son made the sale with the consent or approbation of the

father, accompanied by their statement on returning the verdict that they did not consider the son's conduct. See a somewhat similar case in *Commonwealth v. Sullivan*, 156 Mass. 229; 30 N. E. 1023.

¹⁹ *Commonwealth v. Ryan*, 160 Mass. 172; 35 N. E. 673.

²⁰ *Evans v. State*, 52 Ark. 227; 15 S. W. 360.

²¹ *Rana v. State*, 51 Ark. 481; 11 S. W. 692.

²² *Archer v. State*, 10 Tex. App. 482.

²³ *Morgan v. State*, 81 Ala. 72; 1 So. 472.

²⁴ *Lauer v. State*, 24 Ind. 131; *Commonwealth v. Cotton*, 138

pressly makes him criminally liable for the act of his servant in making an unlawful sale. But such evidence is not admissible where it conclusively appears or is admitted that the sale alleged was made with the accused's knowledge and approval.²⁵ Of course, the agent making or assisting in making an illegal sale is liable.²⁶ A charge of a sale to an agent, with notice that he was purchasing for his principal, will not support an allegation of a sale to the agent as an individual.²⁷ The accused cannot show in his defense that his barkeeper had been convicted of the same offense, upon a charge of keeping his saloon open on Sunday.²⁸ Where a statute made it an offense to unlawfully procure and deliver liquor, and made such procurer the agent of the seller, a person charged with having committed the offense cannot defeat the prosecution by testifying he was not the agent of the seller of the liquor.²⁹ Nor is the State bound by the testimony of its witness, an alleged accomplice, that he was not authorized to sell in the place charged, but it may show he was authorized by showing the circumstances of the sale.³⁰

Mass. 500; *O'Leary v. State*, 44 Ind. 91; *Wilson v. State*, 19 Ind. App. 389; 46 N. E. 1050; *Barnes v. State*, 19 Conn. 398; *Kolman v. State*, 2 Ga. App. 648; 58 S. E. 1070.

²⁵ *State v. Mueller*, 38 Minn. 497; 38 N. W. 691.

When a servant is charged with making an illegal sale, he cannot show, in his defense that he did not make it, that his master had forbidden him selling liquor in his shop. *Commonwealth v. Tinkham*, 14 Gray, 12. But he may show his master authorized him to give liquors on certain occasions, to show the act was his master's and not his. *Commonwealth v. Cotton*, 138 Mass. 500.

²⁶ *Burnett v. State*, 42 Tex. Cr. App. 600; 62 S. W. 1063.

²⁷ *Barlow v. State*, 127 Ga. 58; 56 S. E. 131.

²⁸ *People v. Mullins*, 5 N. Y. App. Div. 172; 39 N. Y. Supp. 361.

²⁹ *State v. Burchfield*, 149 N. C. 537; 63 S. E. 89. See *Gibson v. State* (Tex. Cr. App.), 97 S. W. 468.

³⁰ *Oldham v. State*, 52 Tex. Cr. App. 516; 108 S. W. 667.

In Montana a statute makes the accused liable for sales made by him "directly or indirectly." In an action charging that the sale was made "directly," proof of sale by his barkeeper was held to sustain the charge, the word "indirectly" referring to a sale by a device resorted to in order to evade the law. *State v. O'Brien*, 35 Mont. 482; 90 Pac. 514.

Proof that the saloon was kept

Sec. 934. Sale or gift—Variance.

Where it is one offense under a statute to sell intoxicating liquors and another to give them away, under a charge of a sale there can be no conviction or proof of a gift, though the penalty for such offense is the same; and, of course, under a charge of a gift there can be no conviction on proof of a sale.³¹ But proof of a sale of liquor, to be used in treating a minor, will sustain a charge of giving liquor to him.³² Nor does proof of an exchange of liquor sustain a charge of sale.³³ It is always a question for the jury where the transaction is of an equivocal character whether it is a sale, gift or barter.³⁴ Where an individual walked into a saloon on Sunday and went behind the bar, helped himself, and went out, this was held to show a gift,³⁵ and where a witness testified he went into the accused's restaurant, and the defendant directed the waiter to deliver to him a glass of liquor for which he paid nothing, and the accused refused to accept pay for it, this was held not to show a sale.³⁶ But liquors furnished with meals and included in the price of the meal are sold and not given away.³⁷ Where the accused took some liquor from his wagons and handed it to some persons, saying he had no

open by the accused's barkeeper or employe casts the burden on the accused to show both lack of knowledge and consent on his part. *Kolman v. State*, 2 Ga. App. 648; 58 S. E. 1070.

Instructions in charge of an illegal purchase by an agent where the evidence showed a sale to the agent and another to the principal. *Gee v. State* (Tex. Cr. App.), 39 S. W. 1078.

³¹ *Kurz v. State*, 79 Ind. 488; *Harvey v. State*, 80 Ind. 142; *Wiecke v. People*, 14 Ill. App. 447; *Wood v. Territory*, 1 Ore. 223; *New Decatur v. Laude*, 93 Ala. 84; 7 So. 382; *Humpeler v. People*, 92 Ill. 400; *Barnes v. State* (Tex. Cr. App.), 88 S. W. 805 *Williams v.*

State, 91 Ala. 14; 8 So. 668; *Bottoms v. State* (Tex. Cr. App.), 73 S. W. 16 (not even if the gift was made to evade the local option law).

³² *Topper v. State*, 118 Ind. 110; 20 N. E. 699.

³³ *Gillan v. State*, 47 Ark. 555; 2 S. W. 185.

³⁴ *Winter v. State*, 133 Ala. 176; 31 So. 717; *State v. Simons*, 17 N. H. 83; *Barnes v. State* (Tex. Cr. App.), 88 S. W. 805.

³⁵ *Baker v. State*, 2 Ind. App. 517; 28 N. E. 735.

³⁶ *Commonwealth v. Packard*, 5 Gray, 101.

³⁷ *Commonwealth v. Worcester*, 126 Mass. 256; *Savage v. State* (Tex. Cr. App.), 88 S. W. 351.

liquor for sale, but had some for his friends, and the amount thus given them was near two pints, and the person receiving the liquor threw \$1.20 into the wagon, the market price of two pints, this was held to show a sale.³⁸ If the transaction is susceptible of an interpretation as either a gift or a sale, then if the sale would have been illegal and a gift legal, it will be construed as a gift rather than a sale, upon the ground "that where an act is susceptible of two interpretations, one involving a wrongful or unlawful purpose and the other favoring innocence and a compliance with law, that which attributes innocence rather than a purpose to violate the law is preferred." But if both a sale and a gift were equally punishable, having the same penalties, then there is not that necessity for the adoption of the rule above stated; for it is really immaterial whether the transaction be regarded as a sale or a gift, for the accused is equally guilty.³⁹ In an Indiana case the evidence showed that the accused kept a saloon, and one Sunday the witness went into it when the accused was behind the bar. The witness asked the accused to let him have a glass of beer, which he did. The witness said he did not ask him to give him the beer, but when he drank it he did not pay for it nor tell the accused to charge it. The witness had previously purchased in the saloon liquor of the accused's employer and paid for it, and never ran an account. This was held to show a sale and not a gift.⁴⁰ In case, however, it is an offense to sell, but not to give away liquor, the transaction, if dubious, will be construed as a gift and not a sale.⁴¹

³⁸ *State v. Cooper*, 26 W. Va. 338.

³⁹ *Dant v. State*, 106 Ind. 79; 5 N. E. 870.

⁴⁰ *Dant v. State*, 106 Ind. 79; 5 N. E. 870. See *Dant v. State*, 83 Ind. 60.

⁴¹ *Keller v. State*, 23 Tex. App. 259; 4 S. W. 886.

Occasionally decisions are found that hold a charge of sale is sustained by proof of a gift. *Dahmer v. State*, 56 Miss. 787.

An instruction which does not distinguish between a sale and a gift is erroneous. *Bert v. People*, 113 Ill. 645.

In Iowa a statute provides that no one, directly or indirectly, or upon any pretense, should sell, barter, exchange, dispense or "give in consideration of the purchase of any property or of any services or in evasion of the statute" any intoxicating liquor whatever. This was held not to prevent a travel-

Sec. 935. Proof who was purchaser—Variance.

Where it is necessary to aver that a particular person was the purchaser of the liquor, then the allegation must be proven as laid, and it cannot be shown that the sale was made to any other person.⁴² But a charge of a sale to "Charles Rock" is supported by proof of a sale to "Charles J. Rock."⁴³ And a charge of a sale to "Cornelius E. Maloney" was held supported by proof of a sale to "Dr. Maloney."⁴⁴ Where the purchaser is a woman and marries before the indictment is found, proof of a sale to her by her maiden name in which name the sale is charged to have been made, cannot be made; for the sale should have been charged to have been made to her by her newly acquired name.⁴⁵ A charge of a sale to "John Hairholser" is not supported by proof of a sale to "John Hairholts."⁴⁶ And where the charge was a gift to "Edward Gresh," a minor, proof of guilt to one "Gresh," a minor, was held not sufficient.⁴⁷ If the prosecution fail to prove the name of the purchaser, but the accused does prove it in his defense, the omission on the part of the pros-

ing salesman for a liquor dealer in another State giving a drink from samples of liquor in order that prospective purchasers might determine the quality of the liquors sold. *State v. Bernstein*, 129 Iowa, 520; 105 S. W. 1015.

⁴² *State v. Heard*, 107 La. 60; 31 So. 384; *Southern Express Co. v. State*, 1 Ga. App. 700; 58 S. E. 67; *Carnes v. State*, 53 Tex. Cr. App. 490; 110 S. W. 750; *State v. Hays*, 36 Mo. 80; *State v. Yockey*, 49 Mo. App. 443; *Drechsel v. State*, 35 Tex. Cr. Rep. 580; 34 S. W. 934; *Commonwealth v. Blood*, 4 Gray, 31; *Commonwealth v. Taggart*, 8 Gratt. 697; *Poe v. State* (Tex. Cr. App.), 44 S. W. 493; *State v. Hays*, 36 Mo. 80; *King v. Vipon*, 1 Menz. 551. But see *State v. White*, 63 Kan. 882;

65 Pac. 234; *Princeville v. Hitchcock*, 101 Ill. App. 588 (a civil action); *Redd v. State* (Tex. Cr. App.), 77 S. W. 214; *Arnold v. State*, 47 Tex. Cr. App. 556; 85 S. W. 18; *State v. Finan*, 10 Iowa, 18; *Cornett v. Commonwealth* (Ky.), 64 S. W. 415; 23 Ky. L. Jr. 773; *Wolf v. State* (Tex. Cr. App.), 85 S. W. 8. Practice where name of purchaser need not be alleged. *Green v. State*, 114 Ga. 918; 115 Ga. 254; 41 S. E. 642.

⁴³ *Commonwealth v. O'Hearn*, 132 Mass. 553; *State v. Feeney*, 13 R. I. 623.

⁴⁴ *Commonwealth v. Dillane*, 1 Gray, 483.

⁴⁵ *Commonwealth v. Brown*, 2 Gray, 358.

⁴⁶ *Mitchell v. State*, 63 Ind. 276.

⁴⁷ *Meyer v. State*, 50 Ind. 8.

ecution is supplied.⁴⁸ Upon a charge of a sale to a particular person, it may be shown that the sale was to his duly authorized agent.⁴⁹ And if the defendant knew the person purchasing liquor was purchasing it for his principal it cannot be alleged the sale was to the agent.⁵⁰

Sec. 936. Sales to two or more persons.

It has been held that a charge of a sale to two persons was not supported by proof of a sale to one;^{50*} and it has also been held that there could be no conviction, because there was a fatal variance.⁵¹ Yet in Georgia, where a sale was charged to have been made to H and other persons unknown, it was held that there could be a conviction on proof of a joint sale to both, or a several sale to either, in which H took part; but there could not be on proof of a several sale to a person, known or unknown, made when H was not present and in which he took no part.⁵² If there be a charge of a

⁴⁸ *Stolte v. State*, 115 Ind. 128; 17 N. E. 258.

On a charge of a sale to "C. Willis," and the proof showed a sale to "C. Willis," there was held to be a fatal variance. *Carnes v. State*, 53 Tex. Cr. App. 490; 110 S. W. 750.

If there be a reasonable doubt to whom a sale was made, there must be an acquittal; and it is error to refuse to so instruct the jury. *Dulin v. State*, 52 Tex. Cr. App. 442; 108 S. W. 696. See *Redd v. State* (Tex. Cr. App.), 77 S. W. 214.

A charge of a sale to S is not supported by proof of a sale "to one of the State's witnesses." *State v. Tucker*, 127 N. C. 539; 37 S. E. 203.

⁴⁹ *Commonwealth v. Woods*, 165 Mass. 145; 42 N. E. 565; *Hall v. State*, 87 Ga. 233; 13 S. E. 634; *Commonwealth v. Gormley*, 133 Mass. 580.

⁵⁰ *Commonwealth v. Remby*, 2 Gray, 508.

^{50*} *Dukes v. State*, 79 Ga. 795; 4 S. E. 876; *Hall v. State*, 87 Ga. 233; 13 S. E. 634; *Tyler v. State*, 69 Miss. 395; 11 So. 25. See *People v. Dippold*, 30 N. Y. App. Div. 62; 5 N. Y. Supp. 859; *Yeoman v. State*, 81 Neb. 244; 115 N. W. 784; *State v. Williams*, 20 S. D. 492; 107 N. W. 830.

⁵¹ *O'Shannessey v. State* (Tex. Cr. App.), 96 S. W. 790; *Sessions v. State* (Tex. Cr. App.), 98 S. W. 243.

⁵² *Moore v. State*, 79 Ga. 498; 5 S. E. 51; *McKeever v. Commonwealth*, 98 Va. 862; 36 S. E. 995; 2 Va. Sup. Ct. 473; *People v. Dippold*, 30 N. Y. App. Div. 62; 51 N. Y. Supp. 859; *People v. Haren*, 35 N. Y. Misc. Rep. 590; 72 N. Y. Supp. 205; *People v. Seeley*, 183 N. Y. 544; 76 N. E. 1102; affirming 105 N. Y. App. Div. 149; 93 N. Y. Supp. 982.

sale to one person and the proof show a sale to him and another, this has been held sufficient to warrant a conviction;⁵³ but in Indiana it has been held not sufficient.⁵⁴

Sec. 937. Joint liability.

In criminal prosecutions it is an every-day practice in indictments and informations, to charge two or more persons with the commission of an offense, and unless the offense be of such a nature that the cooperation of two or more is essential to its completion, the pleading is regarded as a separate charge against each person. Accordingly it has been held that under an information against A and B for unlawfully selling intoxicating liquors evidence was admissible of a sale made by A alone. In so deciding the court said, "Offenses of every grade are several. Each individual concerned in the perpetration of a crime or misdemeanor, is no less an offender against the law and amenable to its penalties because other individuals participate with him in its perpetration. Each individual concerned is a principal offender. It is clear that, except in regard to conspiracies, if two or more are charged in the same information or indictment with the commission of one and the same offense, one may be convicted without the rest."⁵⁵ And in other States like decisions have been made.⁵⁶ In Missouri it has been held that persons may be jointly indicted for selling intoxicating liquor without having a license to do so, but there should be no such joinder where the testimony shows, on the part of each defendant, distinct and independent violations of the license law, and does not exhibit any common design or concert of action in their individual infractions of the statute. But it was also held that where, notwithstanding the failure of such proof, it appears clearly that each of a number of defendants so jointly indicted are guilty of acts which would warrant a separate indictment and conviction, such misjoinder does not work such "prejudice to

⁵³ Ryan v. State, 32 Tex. 280.

⁵⁶ State v. Wadsworth, 30 Conn.

⁵⁴ Brown v. State, 48 Ind. 38;

⁵⁵; Tracy v. Perry, 5 N. H. 504;

Isley v. State, 8 Blackf. 403.

State v. Simmons, 66 N. C. 622.

⁵⁵ State v. Sterns, 28 Kan. 154.

the substantial rights of the defendant upon the merits'' as to warrant the interference of the Supreme Court.⁵⁷

Sec. 938. Sale to "person unknown."

Where it is alleged in an indictment or complaint that the name of the purchaser is unknown to the grand jurors or to the complainant, the authorities differ upon the necessity of proving that fact. In some States it is held absolutely necessary to prove that the grand jurors or the complainant did not know his name at the time the indictment was found or the prosecution begun, and if they or he did know it there must be a finding for the defendant.⁵⁸ In all such States it must be proven that the name of the purchaser was not known to the grand jury or the complainant, but this fact may be proven by the person to whom the sale was made, and when such proof is put in it raises the presumption that the grand jurors or the complainant did not know such purchaser's name, but this presumption may be overcome by the accused showing that they or he did, in which event there must be a verdict for him.⁵⁹ And where the complainant did not know at the time he brought the suit the person to whom he actually did make the sale, proof of that fact will sustain the allegation that he did not know him.⁶⁰ So where the charge is a joint sale to two persons, the name of one of whom is given and it is alleged the name of the other is unknown, a several sale to the unknown person cannot be shewn.⁶¹ But there are cases which hold that proof the grand jurors did know the name of the

⁵⁷ State v. Edwards, 60 Mo. 420.

⁵⁸ Moore v. State, 79 Ga. 498; 5 S. E. 51; Commonwealth v. Pratt, 145 Mass. 248; 13 N. E. 886; Yost v. Commonwealth, 6 Ky. L. Rep. 110; Hays v. State, 13 Mo. 246; Commonwealth v. Her-
rick, 12 Gray, 125. See Common-
wealth v. Luddy, 143 Mass. 563;
10 N. E. 448, and State v. Coulter,
40 Kan. 87; 19 Pac. 368; Morgen-

stern v. Commonwealth, 27 Gratt.
1018; Commonwealth v. Blood, 4
Gray, 31; Commonwealth v.
Burke, 14 Gray, 81.

⁵⁹ Commonwealth v. Thornton,
14 Gray, 41.

⁶⁰ Commonwealth v. Hendrie, 2
Gray, 503.

⁶¹ Moore v. State, 79 Ga. 498;
5 S. E. 51. *Contra*, State v. Wolf,
46 Mo. 584.

purchaser is not a variance nor a defense.⁶² Under a charge of a sale to M and certain other persons unknown, proof of one sale sustains the charge, the charge being only of a single joint sale,⁶³ and a sale to one person may be shown.⁶⁴

Sec. 939. Sale to minors.

Where the charge is that the accused sold liquor to a minor, the burden is in all instances upon the prosecution to show that the purchaser was in fact a minor.⁶⁵ And if the statute make it an offense only where the vendor knowingly sold to a minor, then the burden is upon the prosecution to show he knew the purchaser was a minor.⁶⁶ Even where the purchaser was only sixteen years old, evidence that the vendor knew he was a minor was held necessary where the statute made it an offense only in knowingly selling to a minor.⁶⁷ And while it is permissible to show the physical appearance of the minor at the time of the purchase, both by the prosecution and the accused, as that he had a beard or that he shaved;⁶⁸ yet the jury cannot determine the minor's age by his personal appearance at the trial.⁶⁹ The prosecution cannot ask a witness if

⁶² *State v. Ladd*, 15 Mo. 430; *Hustead v. Commonwealth*, 5 Leigh, 724; *Commonwealth v. Luddy*, 143 Mass. 563; 10 N. E. 448.

⁶³ *People v. Haren*, 35 N. Y. Misc. Rep. 590; 72 N. Y. Supp. 205.

⁶⁴ *People v. Seeley*, 183 Ind. 544; 76 N. E. 1102; affirmed 105 N. Y. App. Div. 149; 93 N. Y. Supp. 982.

⁶⁵ *Behler v. State*, 112 Ind. 140; 13 N. E. 272; *State v. McCance*, 110 Mo. 398; 19 S. W. 648 (overruling *State v. McGinnis*, 38 Mo. App. 15); *Gaines v. State* (Tex. Cr. App.), 21 S. W. 367; *State v. Walterstradt*, 74 Minn. 292; 77 N. W. 48.

⁶⁶ *Hunter v. State*, 18 Tex. App. 444; 51 Am. Rep. 319; *Gaines v. State* (Tex. Cr. App.), 21 S. W.

367; *Reynolds v. State*, 32 Tex. Cr. App. 36; 22 S. W. 18.

⁶⁷ *Hunter v. State*, *supra*; *Stone v. State* (Tex. Cr. App.), 39 S. W. 367; *Smith v. State* (Tex. Cr. App.), 66 S. W. 780; *Earl v. State* (Tex. Cr. App.), 66 S. W. 839; *Cleveland v. State* (Tex. Cr. App.), 66 S. W. 550.

⁶⁸ *Swigart v. State*, 99 Ind. 111; *Wakefield v. State* (Tex. Cr. App.), 28 S. W. 470; *Gaines v. State* (Tex. Cr. App.), 21 S. W. 367; *Dittforth v. State*, 46 Tex. Cr. App. 424; 80 S. W. 628.

⁶⁹ *McGuire v. State* (Tex. App.), 15 S. W. 917; *Stephenson v. State*, 28 Ind. 272; *Ihinger v. State*, 53 Ind. 251; *Smith v. State* (Tex. Cr. App.), 66 S. W. 780; *Robinius v. State*, 63 Ind. 235; *Earl v. State* (Tex. Cr. App.), 66 S. W. 839.

the purchaser by his physical appearance would be taken as a minor, that being a question for the jury.⁷⁰ The minor may himself testify to his age, this being one of those instances where hearsay evidence is admissible, and he may testify from information he has received from his parents or family relations or from the entry of the date of his birth in the family Bible or from the record of his baptism.⁷¹ His age may be shown at any designated date prior to the date of sale.⁷² Efforts on the part of the accused to conceal the sale or forging the parent's permit may be shown.⁷³ The defendant may, where a sale made in good faith is a defense, show that the purchaser was unknown to him, or that he looked like an adult or that he represented himself to be of age, or of all these together, to show he had reason to believe that he was an adult and that it would not be a violation of law to sell him intoxicating liquor.⁷⁴ If the minor is a witness for the State, the accused may ask him on cross-examination if he had not voted at the last or any other election.⁷⁵ But if the accused testify in his defense, he may not be asked if he had any intention in making the sale to violate the law.⁷⁶ The accused cannot show that the general reputation was that the minor was an adult,⁷⁷ but he may show that the minor circulated

⁷⁰ *Randall v. State* (Tex. Cr. Rep.), 22 S. W. 411; *Walker v. State*, 25 Tex. App. 448; 8 S. W. 644. But he may give his opinion as to his age. *Commonwealth v. O'Brien*, 134 Mass. 198; *Garner v. State*, 28 Tex. App. 561; 13 S. W. 1004.

⁷¹ *Edgar v. State*, 37 Ark. 219; *Pounders v. State*, 37 Ark. 399; *Capron v. State*, 11 Ind. App. 95; 38 N. E. 491.

⁷² *Ehlert v. State*, 93 Ind. 76.

⁷³ *Sears v. State*, 35 Tex. Cr. Rep. 442; 34 S. W. 124.

⁷⁴ *State v. Kalb*, 14 Ind. 403; *Schurzer v. State* (Tex. Cr. App.), 25 S. W. 23; *Thomasson v. State*, 15 Ind. 449; *Goetz v. State*, 41 Ind. 162; *Ross v. State*, 116 Ind.

495; 19 N. E. 451; *Behler v. State*, 112 Ind. 140; 13 N. E. 272; *Farbach v. State*, 24 Ind. 77; *Rineman v. State*, 24 Ind. 80; *Swigart v. State*, 99 Ind. 111; *Hunter v. State*, 101 Ind. 241; *Mulread v. State*, 107 Ind. 62; 7 N. E. 884; *Faulks v. People*, 39 Mich. 200; 33 Am. Rep. 374; *People v. Welch*, 71 Mich. 548; 39 N. W. 747; 1 L. R. A. 385; *Jones v. State*, 32 Tex. Cr. App. 110; 22 S. W. 149; *Sears v. State*, 35 Tex. Cr. Rep. 442; 34 S. W. 124.

⁷⁵ *Brown v. State*, 24 Ind. 113.

⁷⁶ *Ross v. State*, 116 Ind. 495; 19 N. E. 451.

⁷⁷ *Peterson v. State*, 83 Md. 194; 34 Atl. 834.

the report that he was of age, where it is necessary to prove he sold liquor to the minor knowing him to be such, in order to show the defendant's knowledge of the minor's age.⁷⁸ The proof that the sale was made by the accused's agent, in the regular course of business, is sufficient to convict the accused; but he may show that the sale was made in direct violation of his orders, and the burden is on him to do that if he desires to avail himself of it as a defense.⁷⁹ It may be shown that the minor had been in the saloon before, to the knowledge of the accused, where the proof shows a sale by his agent, though it be not shown that any sale then took place.⁸⁰ It may not be shown that the sale, though made to a minor, was in fact to his parent.⁸¹ The accused may not show he was accustomed to inquire the age of persons who desired to purchase liquors, when they appeared to be minors.⁸² Another minor who was present when the sale was made may not testify that the accused refused at the time of the sale to sell to him. It is not admissible to show that the accused sold to the purchaser in a good-faith belief he was of full age.⁸³ Nor can the accused put in his reputation as a law-abiding man,⁸⁴ because the commission of such a crime does not involve acts of moral turpitude.⁸⁵ The defendant cannot show that the minor had been given his freedom by his parents.⁸⁶ If a statute provides

⁷⁸ Pressler v. State, 13 Tex. App. 95; Harkey v. State, 89 Ga. 478; 15 S. E. 552; Carville v. State (Tex. Cr. App.), 72 S. W. 376.

⁷⁹ State v. McCance, 110 Mo. 398; 19 S. W. 648, overruling State v. McGinnis, 38 Mo. App. 15; Commonwealth v. Stevens, 155 Mass. 291; 29 N. E. 508. But it is error to rule that a sale by a servant in his master's shop is *prima facie* a sale by the master. Commonwealth v. Briant, 142 Mass. 463; 8 N. E. 338; 56 Am. Rep. 707; Commonwealth v. Stevenson, 142 Mass. 466; 8 N. E. 341.

⁸⁰ Commonwealth v. Rooks, 150 Mass. 59; 22 N. E. 436.

⁸¹ Commonwealth v. Gould, 158 Mass. 499; 33 N. E. 656.

⁸² Randall v. State (Tex. Cr. App.), 22 S. W. 411.

⁸³ Cross v. State, 49 Tex. Cr. App. 437; 94 S. W. 1015.

⁸⁴ Chung Sing v. United States, 36 Pac. 205.

⁸⁵ Commonwealth v. Nagle, 157 Mass. 554; 32 N. E. 861.

It is error to permit the minor's father to testify he told defendant's father that the accused was selling whisky to his son. Dick v. People, 47 Ill. App. 223.

⁸⁶ Slaughter v. State (Tex. Cr. App.), 21 S. W. 247.

The accused cannot be asked, on cross-examination, if complaint

that a sale cannot be made to a minor except upon the written consent of his parent, the production of such written consent is a complete bar to the prosecution.⁸⁷ Other States occasionally permit sales to a minor with the consent of the parent, but mere proof that the parent consented that his son might drink a particular liquor, generally is no defense.⁸⁸ The rule is that the parent must be present and consenting at the time the sale is made.⁸⁹

Sec. 940. Sale to intoxicated person.

Where the charge is that the defendant sold liquor to a person in a state of intoxication, evidence of a sale to a person in such a state makes out a *prima facie* case, and it is not necessary to show that the accused knew the purchaser was intoxicated, or that he purchased liquor as a beverage.⁹⁰ If he purchased it for medicinal or mechanical purposes, that is a matter of defense.⁹¹ Any person who is competent to judge and who saw the alleged drunken person may testify

had not been made to him concerning his selling to minors, and if he did not say he intended to keep on selling to them. *People v. Werner*, 174 N. Y. 132; 66 N. E. 667, reversing (N. Y. App. Div.) 66 N. Y. Supp. 1139.

⁸⁷ *Payne v. State* (Tex. Cr. App.), 19 S. W. 677; *Slaughter v. State* (Tex. Cr. App.), 21 S. W. 247. The burden is on the accused to show it. *State v. Gary*, 124 Mo. App. 175; 101 S. W. 614.

⁸⁸ *Adler v. State*, 55 Ala. 16.

⁸⁹ *Ridling v. State*, 56 Ga. 601.

In Missouri, upon a trial of a sale of wine to a minor under a statute forbidding wine growers to sell to them wine without the parent's consent, the State must prove that the accused was a wine grower. *State v. Gary*, 124 Mo. App. 175; 101 S. W. 614.

Proof of a sale to one minor

sustains a charge of a sale to three. *Southern Express Co. v. State*, 1 Ga. App. 700; 58 S. E. 67.

On the question of the reasonableness of the accused's precautions to prevent sales to minors, the number of sales charged on the accused's books, who was a druggist, near the time of the alleged sale, it was held could be shown. *Commonwealth v. Stevens*, 153 Mass. 421; 26 N. E. 992; 11 L. R. A. 357; 25 Am. St. 647.

⁹⁰ *Brow v. State*, 103 Ind. 133; 2 N. E. 296. Other sales to drunkards on same day not admissible. *Campbell v. State*, 55 Tex. Cr. App. 277; 116 S. W. 581. See *State v. Pritchard*, 16 S. D. 166; 91 N. W. 583.

⁹¹ *Brow v. State*, 103 Ind. 133; 2 N. E. 296; *Payne v. State*, 74 Ind. 203.

that he was drunk.⁹² Where the purchaser had been seen on the street drunk the evening on which he purchased and drank the liquor alleged in the indictment to have been sold him by the defendant, it was held that the evidence of a sale to an intoxicated person was sufficient.⁹³ Of course, in such a case the jury must consider whether he had not become sober when he made the purchase.⁹⁴ The purchaser is a competent witness to testify to the purchase and the condition he was in when he made it; but his testimony on the latter point that he was sober has little weight, because of the known fact that drunken men are prone to claim they are sober. Thus it was said by a judge in New Zealand: "I do not think I can accept his testimony as to the state of another person, whilst on his own admission he was overindulging in intoxicating liquors. It is well known that drunken men and half-drunken men will insist that they are sober, and that their companions are drunk when the positions are the opposite."⁹⁵ Where the offense can only be committed by a licensed person, then the State must prove that the defendant held a license.⁹⁶

Sec. 941. Sale to habitual drunkard.

Upon a charge of a sale or gift to an intemperate person or habitual drunkard, the prosecution must prove the sale or gift to the person named in the indictment as the purchaser or donee,⁹⁷ but it need not prove the defendant knew of the habits of the purchaser or donee, that being a matter of defense,⁹⁸

⁹² *State v. Pike*, 49 N. H. 399; *People v. Eastwood*, 14 N. Y. 562; *Piers v. State*, 53 Ga. 365; *Stanley v. State*, 26 Ala. 26; *Palmer v. Schurz* (S. D.), 117 N. W. 150. Such testimony is not an opinion, but a statement of a fact. *Kuhlman v. Weiben*, 129 Iowa, 188; 105 N. W. 445. See § 972*a*.

⁹³ *Kammann v. People*, 124 Ill. 481; 16 N. E. 661.

⁹⁴ *Kammann v. People*, 26 Ill. App. 48.

⁹⁵ *Brown v. Bowden*, 19 N. Z. 98.

⁹⁶ *State v. Nethken*, 60 W. Va. 673; 55 S. E. 742.

⁹⁷ *Wickwire v. State*, 19 Conn. 477; *Brow v. State*, 103 Ind. 133; 2 N. E. 296; *Zeiger v. State*, 47 Ind. 129; *Miller v. State*, 107 Ind. 152; 7 N. E. 898; *State v. Smith*, 122 Ind. 178; 23 N. E. 714; *Wilson v. State*, 19 Ind. App. 389; 46 N. E. 1050.

⁹⁸ *Allison v. State*, 47 Ind. 140; *State v. Ward*, 75 Iowa, 637; 36 N. W. 765; *State v. Skillicorn*, 104 Iowa, 97; 73 N. W. 503.

unless the offense consists of a sale to a known person of intemperate habits, or to a person known by the accused to be a person of such habits. In the latter instance the prosecution must prove that the accused knew the purchaser was a person with such habits;⁹⁹ but in order to do this it may show his general reputation in the accused's neighborhood for drunkenness, in order to show that the accused knew he was such a person.¹ The prosecution may show he was accustomed to drink daily, openly and frequently to a state of intoxication in the community where the accused lived.² It may be shown that the accused had been in the habit of selling liquor, to be drunk by him to excess.³ It is not error to permit a witness to say the purchaser was a person "of known intemperate habits,"⁴ but the purchaser when called as a witness, is not bound to say he is a common drunkard.⁵ Evidence that the accused purchased liquors at other places and became repeatedly drunk therein, is admissible, even though no evidence be put in to connect the accused with such sales.⁶ It may be shown that he continued to drink, after the sale proven, for several weeks.⁷ It may be shown that the intoxicated person had been seen coming from the accused's saloon.⁸ What is sufficient proof to show the purchaser or donee was a person in the habit of becoming intoxicated or an habitual drunkard, is a question for the jury. Thus evidence that from three to five times in two years the purchaser had been drunk was held sufficient to justify the jury in finding that he was such a person.⁹ A constant intoxication need not be shown, though it must be shown that the purchaser had acquired an involun-

⁹⁹ State v. Fleming, 86 Iowa, 294; 53 N. W. 234; Smith v. State, 55 Ala. 1.

¹ Tatum v. State, 63 Ala. 147; Stallings v. State, 33 Ala. 425; Adams v. State, 25 Ohio St. 584. But see Smith v. State, 55 Ala. 1. *Contra*, Stanley v. State, 26 Ala. 26.

² Atkins v. State, 60 Ala. 45; Mapes v. State, 69 Ill. 523.

³ Wickwire v. State, 19 Conn. 477; State v. McConnell, 90 Iowa, 197; 57 N. W. 707.

⁴ Stanley v. State, 26 Ala. 26.

⁵ Barnes v. State, 19 Conn. 398.

⁶ Smith v. State, 19 Conn. 493; McCormack v. State, 133 Ala. 202; 32 So. 268.

⁷ Barnes v. State, 20 Conn. 232.

⁸ Commonwealth v. Meaney, 151 Mass. 55; 23 N. E. 730.

⁹ Murphy v. People, 90 Ill. 59.

tary tendency to become drunk.¹⁰ No rule can be laid down on this question, for what will make one person an habitual drunkard will not another. No particular number of instances can be taken to show the acquisition of the habit.¹¹ The purchaser himself is a competent witness.¹² Where a written notice forbidding sales to the purchaser is relied upon, it must be shown that the accused received a proper notice.¹³ The accused may show that he made inquiries of persons, even giving their names, as to whether the purchaser was an habitual drunkard, and also put in evidence their answers.¹⁴ Whether or not the defendant had knowledge of the intemperate habits of the accused is a question for the jury.¹⁵

Sec. 942. Sunday sales.

In the instance of a sale on a Sunday, the sale may be shown on any Sunday within the statute of limitations.¹⁶ The pre-

¹⁰ *Murphy v. People*, 90 Ill. 59; *Mapes v. People*, 69 Ill. 523; *State v. Pratt*, 34 Vt. 323; *Insurance Co. v. Foley*, 105 U. S. 350.

¹¹ *Gallagher v. People*, 120 Ill. 179; 11 N. E. 335.

¹² *Tatum v. State*, 63 Ala. 147.

"I do not think I can accept his testimony as to the state of another person, whilst on his own admission he was overindulging in intoxicating liquors. It is well known that drunken men and half drunken men will contend that they are sober, and that their companions are drunk when the positions are the opposite." *Brown v. Bowden*, 19 N. Z. 98.

¹³ *State v. Smith*, 122 Ind. 178; 23 N. E. 714; *O'Leary v. State*, 44 Ind. 91; *Lathrope v. State*, 51 Ind. 192; *Miller v. State*, 107 Ind. 152; 7 N. E. 898; *Wilson v. State*, 19 Ind. App. 389; 46 N. E. 1050; *Harvey v. State*, 80 Ind. 142; *Dolan v. State*, 122 Ind. 141; 23 N. E. 761.

¹⁴ *Crabtree v. State*, 30 Ohio St. 382.

¹⁵ *Elam v. State*, 25 Ala. 53.

The purchaser may be asked if he had not been arrested for drunkenness, it not being necessary to produce a warrant showing his arrest. *Jones v. State*, 100 Ala. 88; 14 So. 772.

On a charge of a sale to an habitual drunkard, an instruction to the jury as to the liability of the accused if he sold liquor to minors is harmless, where it is subsequently stated that the question for their consideration is whether the purchaser was an habitual drunkard when he bought the liquor. *State v. Skillicorn*, 104 Iowa, 97; 73 N. W. 503.

¹⁶ *Marre v. State*, 36 Ark. 222; *Megowan v. Commonwealth*, 2 Met. (Ky.), 3; *People v. Ball*, 42 Barb. 324; *State v. Bryson*, 90 N. C. 747; *Territory v. Wong Fear*, 17 Hawaii, 353; *Webb City v. Parker*, 103 Mo. App. 295; 77 S. W.

cise Sunday need not be proven; it is sufficient if the sale be proven to have been made within the statute;¹⁷ yet the year must be shown.¹⁸ Where the prosecution was for keeping liquors for sale on Sunday, the witnesses testified that there were four pails of freshly drawn beer in the saloon, a bottle of whisky and glasses on the counter, a number of persons and two barkeepers in their shirt sleeves. This was held to sustain the prosecution, although the accused testified he had instructed his barkeepers not to sell on Sunday.¹⁹ But proof that on Sunday accused stood behind the bar with his sleeves rolled up and apron on; that back of the bar were all the paraphernalia of a saloon, and on the bar stood two glasses containing liquor of some kind which were removed before the witness could reach them; that there were persons in the saloon, but the doors were locked, was held not to show that accused made a sale or exposed liquors on that day.²⁰

Sec. 943. Sale of liquor to be drunk on premises.

Where the statute makes it an offense to sell intoxicating liquors to be drunk upon the premises, or with the intent that they shall be there drunk, then it is necessary to show that they were sold for that purpose or with the intent that they should be there drunk. Sometimes the statute makes it an offense to suffer them to be drunk upon the premises, and that fact must likewise be proven.²¹ Where the charge is a sale of liquor to be drunk upon the premises, the offense is a sale for that purpose, but in the commission of the offense it is not

119; *Breeland v. State* (Tex. Cr. App.), 50 S. W. 722; *Koop v. People*, 47 Ill. 327; *Frasier v. State*, 5 Mo. 536. *Contra*, *People v. Lavin*, 4 N. Y. Cr. Rep. 547.

¹⁷ *Pancake v. State*, 81 Ind. 93.

¹⁸ *Lehritter v. State*, 42 Ind. 383.

¹⁹ *Commonwealth v. McNeese*, 156 Mass. 231; 30 N. E. 1021; *State v. Meagher*, 49 Mo. App. 571.

²⁰ *People v. Owens*, 148 N. Y. 648; 43 N. E. 71; affirming 91 Hun, 344; 36 N. Y. Supp. 755.

A sale of liquor on Sunday by a person not licensed lays him liable to a sale without a license. *Moran v. Atlanta* (Ga.), 30 S. E. 298.

A sale to a minor cannot be converted into a sale on Sunday. *Queen v. Hawkins*, 7 Juta, 69.

²¹ *State v. Chipp*, 121 Mo. App. 556; 97 S. W. 236.

necessary that the liquor be actually drunk on the premises, that act not necessarily being a part of the offense.²² Where the evidence showed that the accused sold the liquor over his bar, but told the purchaser he must not there drink it, and the purchaser then went into a rear room, used as a bowling alley, and there drank the liquor, where other purchasers had been in the habit of drinking liquors they had purchased of the accused, not over twenty feet from the rear door of the saloon, it was held that this showed the liquor had been sold to be drunk upon the premises.²³ The same result was reached where the liquor was drunk in the back yard.²⁴ Words of request not to drink the liquor on the premises will not always enable the accused to escape, especially if it is evident there was a mere play upon words.²⁵ But where the sale was not made at or near the accused's house, but from his wagon standing in the highway just out of the beaten track it was held there could be no conviction.²⁶ Where a statute forbade a sale of liquor "at a place of public resort," a witness was permitted to say he went to the accused's house to get liquor, because he thought he could there get it from what he had heard about the place.²⁷ Usually the circumstances under which a sale was made show whether or not the sale was of liquor to be drunk upon the premises. Thus a sale of beer in an ordinary beer glass or of whisky in an ordinary whisky glass fully warrants the conclusion that the beer or whisky was to be drunk upon the premises; while a sale of beer in a can of the size of a gallon or half-gallon, or of whisky in a flask would not necessarily raise such a presumption. The common practice in matters of this kind may always be con-

²² *Commonwealth v. Luddy*, 143 Mass. 563; 10 N. E. 448. See *Gulick v. State*, 50 N. J. L. 468; 14 Atl. 751.

²³ *Stout v. State*, 93 Ind. 150.

²⁴ *Eisenman v. State*, 49 Ind. 511.

²⁵ *Wood v. State*, 9 Ind. App. 42; 36 N. E. 158.

²⁶ *Schilling v. State*, 116 Ind. 200; 18 N. E. 682. See *Compler v. State*, 18 Ind. 447, and *Powell v. State*, 63 Ala. 177; *Howard v. State*, 5 Ind. 516.

²⁷ *State v. Spaulding*, 61 Vt. 505; 17 Atl. 844.

sidered in determining the intent of the seller in making the sale.²⁸

Sec. 944. Club sales.

Statutes are in force in many States for the purpose of preventing a social club from being converted into the maintenance of a place for the sale of liquors, or from being used covertly to cover up what otherwise would be illegal sales or an evasion of the licensing or prohibitory statutes. In order to show that the object of a social club has been prostituted to a scheme to evade the liquor laws and cover up illegal sales, it is permissible to show that between given dates large quantities of liquors were received at the club house or were shipped to it.²⁹ And upon a charge of keeping a place for the sale of liquors, it is no defense that the place was also kept for club purposes.³⁰ Books and papers used by the accused in the conducting of the club's business may be used against the accused,³¹ for it is no defense for him that he was working for the club, if its business be illegal.³² The method in which the club conducts its business, its organization, how it selects its members—whether it in fact has any method, as merely buying tickets which the alleged steward of the club accepted for liquors—and that the literary or other like features are in fact mere shams may be shown.³³ Where a statute provided that “any member of a club shall be taken conclusively to be the person who keeps such liquors for sale,” proof of consumption of liquors on the premises occupied by a club by any of its members, was held conclusively to constitute a sale.³⁴

²⁸ When the State elected to rely upon a sale made “after C H had come into defendant's place of business,” this did not require it to prove the sale relied upon was made in the “defendant's place of business.” *State v. Mitchell*, 4 Kan. App. 743; 46 Pac. 541.

²⁹ *Arnold v. State*, 38 Tex. Cr. Rep. 1; 40 S. W. 734.

³⁰ *Commonwealth v. Jacobs*, 152 Mass. 276; 25 N. E. 463.

³¹ *Commonwealth v. Jacobs*, *supra*.

³² *McLemore v. State* (Tex. Cr. App.), 110 S. W. 900.

³³ *Commonwealth v. Ryan*, 152 Mass. 283; 25 N. E. 465; *Commonwealth v. Jacobs*, 152 Mass. 276; 25 N. E. 463.

³⁴ *King v. Lightburne*, 4 Can. Cr. Cas. 358.

What is and what is not a sale on a written order given in a club

Sec. 945. Quantity of liquor sold.

Where sales without a license, to be illegal, must be of a certain specified quantity, the indictment must aver, as we have seen, that the quantity sold was such a quantity as required a license, and of course that allegation must be proven.³⁵ Proof of a sale of a "drink" of liquor is sufficient to show that it was less than a quart.³⁶ So proof that the purchaser ordered a glass of beer for himself—less than a quart in amount—and several glasses, at the same time—amounting in the aggregate to more than a quart—for his friends whom he was treating, and he paid for them in a lump sum, shows a sale of less than a quart.³⁷ And where the offense is a sale of less than a quart it is not necessary that any witness testify to the exact amount sold, it being sufficient if the evidence shows that the amount sold was less than a quart.³⁸ Of course, the exact amount charged to have been sold need not be proven, it being sufficient to prove that the quantity sold was such as the statute forbids.³⁹ Where it was an offense to sell a quart *or more*

room, and what is and what is not secondary evidence of a sale or loan. *Wilson v. State* (Tex. Cr. App.), 111 S. W. 1018.

The usual club room, for the use of its members, is not a "public place" within the meaning of a statute forbidding card playing in public places. *Grant v. State*, 33 Tex. Cr. Rep. 527; 27 S. W. 127. See *Winters v. State*, 33 Tex. Cr. Rep. 395; 26 S. W. 839.

³⁵ *State v. Brossius*, 39 Mo. 534; *Olmstead v. State*, 90 Ala. 634; 8 So. 668.

³⁶ *Sappington v. Carter*, 67 Ill. 482. Such would undoubtedly be the case of a sale of whisky, wine, brandy or gin. *Hamilton v. State*, 103 Ind. 96; 2 N. E. 299; 53 Am. Rep. 491; *Dant v. State*, 83 Ind. 60; *State v. Blands*, 101 Mo. App. 618; 74 S. W. 3. Proof of a sale of a "bottle" of beer shows a sale

of less than four gallons. *State v. Hale*, 72 Mo. App. 78. So proof of a "dram" shows a sale of less than a quart. *Lacy v. State*, 32 Tex. 227. Usually the question of the amount sold is one for the jury. *State v. Turner*, 125 Mo. App. 21; 102 S. W. 599.

³⁷ *Weireter v. State*, 69 Ind. 269; *Klein v. State*, 76 Ind. 333. But a sale of three pint bottles to one person at one time and carried away at one time is a sale of more than a quart. *Olmstead v. State*, 90 Ala. 634; 8 So. 668.

³⁸ *Keiser v. State*, 84 Ind. 229; *State v. Paddock*, 24 Vt. 312.

³⁹ *Commonwealth v. Buck*, 12 Met. 524; *State v. Connell*, 38 N. H. 81; *Commonwealth v. Dillane*, 11 Gray, 67; *State v. Cooper*, 16 Mo. 551; *State v. Moore*, 14 N. H. 451; *State v. Andrews*, 28 Mo. 17.

at one time, it was held proper to instruct the jury that the State need not show the quantity sold was not a drop less than a quart.⁴⁰

Sec. 946. Proof of license.

The best evidence of the proof of a license is the license itself. Its production is a complete bar to a charge of a sale without a license during the time it is in force. It proves itself on production. No evidence usually need be given to identify it, nor to show that all the preliminary steps had been taken which authorized its issuance. It cannot be collaterally attacked.⁴¹ Of course, a license is not admissible upon a charge of a sale on a Sunday or at prohibited times, or to a minor or intoxicated person, or at a place not licensed, or in a district other than the one for which it was issued. Nor is a license to sell malt liquors admissible in evidence where the charge is a sale of spirituous or alcoholic liquors.⁴² And upon a charge of being a common seller of liquors during a certain period of time, part of which time the accused held a license, such license is no defense.⁴³ A license is not retroactive. Therefore it cannot be put in as a defense on a charge of a sale made before it was issued.⁴⁴ To show the interest of accused in a shop or place of business,

⁴⁰ *Scott v. State*, 25 Tex. Supp. 168. This was a sale of an alleged quart contained in the usual brandy bottle. As is well known, the usual alleged quart wine bottle does not hold a quart, five bottles being necessary usually to make a gallon.

In determining the amount sold, witnesses may testify they measured the liquor in officially tested and stamped measures, without testifying they were correct. *People v. Nylin*, 236 Ill. 19; 86 N. E. 156; affirming 139 Ill. App. 500.

⁴¹ *State v. Evans*, 83 Mo. 319. But it may be shown it was issued

without any authority to issue it. *Mayson v. Atlanta*, 77 Ga. 662; *State v. Shaw*, 32 Me. 570; *State v. Laborde*, 119 La. 410; 41 So. 156; *State v. Roy*, 119 La. 417; 44 So. 159; *State v. Sherman* (Mo. App.), 119 S. W. 479; *State v. Repetto*, 66 Mo. App. 251.

⁴² *Commonwealth v. Thayer*, 8 Met. 525; *Huffstater v. State* 5 Hun, 23; *Lucio v. State*, 35 Tex. Cr. Rep. 320; 33 S. W. 358.

⁴³ *Commonwealth v. Putnam*, 4 Gray, 16.

⁴⁴ *United States v. Angell*, 11 Fed. 34.

the record of the court issuing the license may be put in evidence.⁴⁵ Where a license issued by a municipality superseded a license issued by the county in which the municipality lay, it was held that the accused, on a charge of selling without a county license, had the right to show the incorporation of the municipality within which the sale was made, and then show an ordinance authorizing the sale and his compliance with it.⁴⁶ But where a license was no protection to one making a sale under it unless the State tax was also paid, it was held that it could not be put in evidence without proof of payment of such tax.⁴⁷ So where the town authorities could only issue so many licenses at a time, and their records showed that the limit had been reached, a license issued thereafter was held inadmissible in evidence.⁴⁸ So the Government may prove, to overturn a license put in evidence by the accused, that he neither paid the license tax nor filed the requisite bond.⁴⁹ But the accused cannot put in evidence the records of the licensing board to correct a misdescription in his license, when the license is absolutely necessary for his protection, because until the license is actually issued covering the place of the sale in controversy there is no license in existence.⁵⁰ Nor upon a charge of a sale to an habitual drunkard can the accused put in evidence a license showing that he and two others were jointly in the liquor business at the place the sale was made.⁵¹ Nor is evidence admis-

⁴⁵ Waller v. State, 34 Ark. 656. But see State v. Barnett, 110 Mo. App. 584; 85 S. W. 613.

⁴⁶ Prather v. People, 85 Ill. 36.

⁴⁷ Smith v. Commonwealth, 4 Ky. L. Rep. 261.

The receipt of the officer to whom the tax is payable is evidence of the payment. Curry v. State, 35 Tex. 364. But it is also held that the issuance of the license is *prima facie* evidence that the license fee or tax had been paid. State v. Gorham, 65 Me. 270; State v. O'Connell, 82 Me.

30; 19 Atl. 86. See also Commonwealth v. Putnam, 4 Gray, 16.

⁴⁸ State v. Shaw, 32 Me. 570.

⁴⁹ Commonwealth v. Welch, 144 Mass. 356; 11 N. E. 423.

⁵⁰ Commonwealth v. Cauley, 150 Mass. 272; 22 N. E. 909; Commonwealth v. Keefe, 150 Mass. 272; 22 N. E. 910.

⁵¹ Dahmer v. State, 56 Miss. 787.

An accused cannot set up that he is not in fact a common victualer when he is licensed as such. Commonwealth v. Rourke, 141 Mass. 321; 6 N. E. 383.

sible to show that the licensing officers told the accused he could run a saloon without any license.⁵² Where the accused made a sale as a servant of his employer, which sale his employer could lawfully have made, the latter's license is available to him as a defense, but if his employer could not have made the sale, then such license is not available for such servant in his defense.⁵³ But if his employer had no license, then such servant may be convicted upon a charge that he made the sale, "not having then and there a license, authority or appointment to make such sale."⁵⁴ Evidence of the registration of a practicing physician under whose prescription the sale was made is admissible in Missouri in a prosecution of a druggist for an illegal sale of liquor.⁵⁵ Where it is necessary for the prosecution to prove that the accused had no license, the dockets and minutes of the court or tribunal that issue licenses may be put in evidence before their records are made up, to show no license had been issued to the defendant.⁵⁶ It is not necessary, however, to resort to the records if the accused has admitted that he has no license, and his admission is proven.⁵⁷ So the officer who has charge of the records may testify that he has examined them and that they do not show a license has been issued to the accused, or that the license that had been issued had expired (giving the date of issuance), and this he may do, of course, as to records transmitted to him by his predecessor.⁵⁸ Of course, if the law

⁵² *English v. State*, 7 Tex. App. 171; *Steinberger v. State*, 35 Tex. Rep. 492; 34 S. W. 617.

⁵³ *Provo v. Shurtliff*, 4 Utah, 15; 5 Pac. 302.

⁵⁴ *Commonwealth v. Hoyer*, 125 Mass. 209.

⁵⁵ *State v. Morgan*, 96 Mo. App. 343; 70 S. W. 267. See *State v. Barnett*, 110 Mo. App. 584; 85 S. W. 613.

It is no excuse for a failure to produce a license that the licensing officers refused to hear the accused's application for a license.

Montpelier v. Mills, 171 Ind. 175; 85 N. E. 6.

⁵⁶ *Commonwealth v. Kimball*, 7 Met. 304; *Commonwealth v. Bolkom*, 3 Pick. 281; *State v. Sannerud*, 38 Minn. 229; 36 N. W. 497; *State v. Peterson*, 38 Minn. 146; 36 N. W. 443; *State v. Barnett*, 110 Mo. App. 584; 85 S. W. 613.

⁵⁷ *Commonwealth v. Cameron*, 141 Mass. 83; 63 N. E. 547; *Pendergast v. Peru*, 20 Ill. 51.

⁵⁸ *State v. Schmidt*, 34 Kan. 399; 8 Pac. 867; *State v. Schwei-*

does not require a record to be kept of the issuance of a license, the licensing officer may testify that none was issued, that being the best evidence available.⁵⁹ And if no license can be issued until the fee or tax for it has been paid, then the officer to whom the fee should be paid may testify that none had been paid, his testimony being the best evidence obtainable.⁶⁰ A record containing a list of licenses issued is admissible to show that accused's is not in the list.⁶¹ The word "revoked," written opposite the name of the licensee-defendant on the record showing the issuance of licenses is not sufficient to show his license had been revoked, where the licensing board had the power to revoke it.⁶² But if a full record of the proceedings revoking a license be entered, such entry is admissible to show its revocation.⁶³ In order to prove the accused held a license, the record of the court issuing it may be put in evidence.⁶⁴ A clerical error in the name of the accused will not render the record inadmissible.⁶⁵

ter, 27 Kan. 499. The testimony should show that the record contains a statement of all licenses issued. *State v. Nye*, 32 Kan. 201, 204; 4 Pac. 134, 136.

⁵⁹ *Elkins v. State*, 13 Ga. 435; *Mayson v. Atlanta*, 77 Ga. 662; *Hornberger v. State*, 47 Neb. 40; 66 N. W. 23.

⁶⁰ *People v. Paquin*, 74 Mich. 34; 41 N. W. 852.

⁶¹ *Commonwealth v. Tuttle*, 12 Cush. 502; *Commonwealth v. Foss*, 14 Gray, 50; *Briggs v. Rafferty*, 14 Gray, 525; *Reed v. Territory*, 1 Okla. Cr. App. 481; 98 Pac. 583.

⁶² *Commonwealth v. Moylan*, 119 Mass. 109.

⁶³ *Commonwealth v. Hamer*, 128 Mass. 76.

⁶⁴ *Waller v. State*, 38 Ark. 656. See *State v. Barnett*, 110 Mo. App. 584; 85 Pac. 613.

⁶⁵ *State v. Sannerud*, 38 Minn. 229; 36 N. W. 447.

In Missouri proof of the granting of a license is conclusive evidence that the license was granted, but not evidence that the license was delivered to licensee. *State v. Madeira*, 25 Mo. App. 508; 102 S. W. 1046. And in this same State it was held, where it was necessary for the prosecution to prove accused held a license, that the defendant gave a merchant's license bond covering the period of the alleged illegal sale was sufficient evidence that he held a license at that time. *State v. Spence*, 87 Mo. App. 577.

Where the defendant is described as "R. M. Bradford," a license issued to "Roy M. Bradford" is admissible in evidence, and *prima facie* is a license issued to the accused. *State v. Bradford*, 79 Mo. App. 346; 2 Mo. App. Rep. 425.

A licensed druggist has the burden to show he could lawfully

Sec. 947. Sale unauthorized—License.

Where the offense is a sale without a license, it is an essential averment of the indictment that the sale was made without a license, and if it is not so averred it will be fatally defective. But the fact that the accused had no license need not be proven, and the excuse for the Government not proving that fact is that if he has a license to make the sale, that is a fact peculiarly within his own personal knowledge, and he can readily produce his license as a defense. "But where the subject matter of a negative averment," says Greenleaf,⁶⁶ "*lies peculiarly within the knowledge of the other party, the averment is taken as true, unless disproved by that party. Such is the case in civil and criminal prosecutions for a penalty for doing an act which the statutes do not permit to be done by any persons except those who are duly licensed therefor, as for selling liquors, exercising a trade or profession, and the like. Here the party, if licensed, can immediately show it, without the least inconvenience, whereas if proof of the negative were required, the inconvenience would be very great.*"⁶⁷ In all cases, therefore, of a sale without a license, the prosecution need not prove it was made without a license, but the burden is upon the defendant to show it was authorized by a license he held at the time the sale

make the sale charged. *State v. Searcey*, 111 Mo. 236; 20 S. W. 186.

If an accused be notified to produce his license, and refuse to do so, secondary license of it may be given, and that will be sufficient. *State v. Walker* (Mo.), 119 S. W. 1198, affirming 129 Mo. App. 371; 108 S. W. 615; and the fact that it has been deposited as a security, where that can be done, is no excuse for its non-production so as to exclude secondary evidence of its contents. *Elliott v. Levy*, 19 W. N. (N. S. W.) 2.

A witness may testify to the con-

tents of a license he had seen in a saloon, in order to identify its proprietor. *People v. Bauman*, 52 Mich. 584; 18 N. W. 369.

⁶⁶ Greenleaf Evidence (13th Ed.), § 79.

⁶⁷ *Rex v. Turner*, 5 M. & S. 506; *Smith v. Jeffries*, 9 Price, 257; *Sheldon v. Clark*, 1 Johns. 513; *United States v. Hayward*, 2 Gall. 485; *Gen'g v. State*, 1 McCord. 573; *Commonwealth v. Kimball*, 7 Met. 304; *Haskell v. Commonwealth*, 3 B. Mon. 342; *State v. Morrison*, 3 Dev. 299; *Shearer v. State*, 7 Blackf. 99.

was made.⁶⁸ Occasionally statutes so declare the rule to be, as in Massachusetts.⁶⁹ If the accused sold as the agent of a licensed dealer, then he must show that such dealer possessed

⁶⁸ *United States v. Devlin*, Fed. Cas. No. 14955; *Tinker v. State*, 96 Ala. 115; 11 So. 383; *State v. Cloughly*, 73 Iowa, 626; 35 N. W. 652; *Williams v. State*, 35 Ark. 430; *Flower v. State*, 35 Ark. 209; *Taylor v. State*, 49 Ind. 555; *Has-kill v. Commonwealth*, 3 B. Mon. 342; *Lambie v. State*, 151 Ala. 86; 44 So. 51; *State v. Crowell*, 25 Me. 171; *State v. Woodward*, 34 Me. 293; *State v. Bach*, 36 Minn. 234; 30 N. W. 464; *State v. Stephens*, 70 Mo. App. 554; *State v. Ahern*, 54 Minn. 195; 55 N. W. 959; *East-erling v. State*, 35 Miss. 210; *State v. Shelton*, 16 Wash. 590; 48 Pac. 258; *Thomas v. State*, 37 Miss. 353; *Pond v. State*, 47 Miss. 39; *Schmidt v. State*, 14 Mo. 137; *State v. Edwards*, 60 Mo. 490; *State v. Wilson*, 39 Mo. App. 114; *State v. Geise*, 39 Mo. App. 189; *Hornberger v. State*, 47 Neb. 40; 66 N. W. 23; *State v. Foster*, 3 Fost. (N. H.) 348; 5 Am. Dec. 191; *Jackson v. Camden*, 48 N. J. L. 89; 2 Atl. 668; *Plainfield v. Watson*, 57 N. J. L. 525; 31 Atl. 1040; *Smith v. Joyce*, 12 Barb. 21; *Jefferson v. People*, 101 N. Y. 19; 3 N. E. 797; *People v. Max-well*, 83 Hun. 157; 31 N. Y. Supp. 564; *State v. Morrison*, 14 N. C. 299; *State v. Sorrell*, 98 N. C. 738; 4 S. E. 630; *State v. Hig-gins*, 13 R. I. 330; *State v. Gening*, 1 McCord (S. C.), 573 Lucio v. State, 35 Tex. Cr. Rep. 320; 33 S. W. 358; *State v. Nulty*, 57 Vt. 543; *United States v. Nelson*, 29

Fed. 202; *Sharp v. State*, 17 Ga. 290; *State v. Crow*, 53 Kan. 662; 37 Pac. 170; *State v. Brady*, 41 Conn. 588; *State v. McNeary*, 14 Mo. App. 410; *Fredericks v. Pas-saic*, 42 N. J. L. 87; *State v. Cut-ting*, 3 Ore. 260; *State v. O'Con-nor*, 65 Mo. App. 324; *Common-wealth v. Dilbo*, 29 Leg. Int. 150; *State v. Hoxsie*, 15 R. I. 1; 22 Atl. 1059; 22 Am. St. 838; *Josey v. State* (Ark.), 114 S. W. 216; *State v. Lewis*, 116 La. 762; 41 So. 63; *Cathcart v. Hardy*, 2 M. & S. 534; *Regina v. Herrell*, 12 Manitoba, 198, 522; *Regina v. Young*, 7 Ont. 88; *State v. Terry*, 73 N. J. 554; 64 Atl. 113; affirming 72 N. J. L. 375; 61 Atl. 148; *Commonwealth v. Wenzel*, 24 Pa. Sup. Rep. 467; *In re Barrett*, 28 Up. Can. 559; *Regina v. Flynn*, 20 Ont. 638; *Rex v. Gillingham*, 2 Hawaii, 750; *Turner v. Johnson*, 51 J. P. 22; *United States v. Nelson*, 29 Fed. 202; *Pumphrey v. Anderson* (Iowa), 119 N. W. 528.

⁶⁹ *Commonwealth v. Ryan*, 9 Gray, 137; *Commonwealth v. Cur-ran*, 119 Mass. 206; *Commonwealth v. Carpenter*, 100 Mass. 204; *Commonwealth v. Belou*, 115 Mass. 139; *Commonwealth v. Dean*, 110 Mass. 357; *Commonwealth v. Leo*, 110 Mass. 414; *Commonwealth v. Kelly*, 10 Cush. 69; *Commonwealth v. Tuttle*, 12 Cush. 502; *Common-wealth v. Shea*, 115 Mass. 102; *Commonwealth v. Lahy*, 8 Gray, 459; *State v. Storm*, 74 Kan. 859; 86 Pac. 145.

a license authorizing the sale.⁷⁰ And he who justifies under a license must show one broad enough to protect himself from the charge made against him.⁷¹ And the fact that the license is a matter of record does not change the rule of burden.⁷² Upon a charge of keeping liquor with intent to illegally sell it, and proof of a sale is made, then the accused must produce a license authorizing him to sell liquor in the manner and form he did, if he desires to escape a conviction.⁷³ So where a defendant is a registered druggist the burden is on him to show that fact.⁷⁴ Likewise if local option has been adopted forbidding the issuance of a license, upon a charge of a sale without a license, the prosecution is not bound to show that no license could have been granted, even though by the adoption of such law an illegal sale would have to be prosecuted under it and not under the general license law.⁷⁵ Upon a prosecution for a violation of a city ordinance requiring a license to sell liquors, a county license for the same place cannot be put in evidence.⁷⁶ But where the charge was aiding and abetting another to make an unlawful sale, it was held that the burden was on the State to prove that the person so aided did not have a license to sell.⁷⁷ So in Alabama, on a charge of having illegally issued a prescription for intoxicating liquors in the name of a licensed physician, the prosecution has the burden to show that such physician was licensed, if it be averred he was a licensed physician.⁷⁸ And where an ordinance provided that "no person shall keep open any sa-

⁷⁰ *Rana v. State*, 51 Ark. 481; 21 S. W. 692; *State v. McNeary*, 14 Mo. App. 410; *State v. O'Connor*, 65 Mo. App. 324.

⁷¹ *Commonwealth v. Rafferty*, 133 Mass. 574; *State v. Lewis*, 116 La. 762; 41 So. 63; *Shea v. Muncie*, 148 Ind. 14; 46 N. E. 138.

⁷² *State v. Morrison*, 14 N. C. 299; *State v. Emery*, 98 N. C. 688; 3 S. E. 636.

⁷³ *State v. Honsie*, 15 R. I. 1; 22 Atl. 1059; 2 Am. St. Rep. 838.

⁷⁴ *Catheart v. Hardy*, 2 M. & S. 534; *Regina v. Herrell*, 12 Manitoba. 198, 522; *State v. Terry*, 73 N. J. L. 554; 64 Atl. 113; affirming 72 N. J. L. 375; 61 Atl. 148.

⁷⁵ *Smith v. Adrain*, 1 Mich. 495; *State v. Goff*, 10 Kan. App. 286; 61 Pac. 683; reversing 61 Pac. 680.

⁷⁶ *Shea v. Muncie*, 148 Ind. 14; 46 N. E. 138.

⁷⁷ *Berning v. State*, 51 Ark. 550; 11 S. W. 882.

⁷⁸ *McAllister v. State (Ala.)*, 47 So. 161.

loon or place licensed under this ordinance on Sunday," it was held that as the provisions of the ordinance applied only to licensed places, it was a necessary part of the prosecution to aver and show that the accused held a license for the place at the time he kept his saloon open.⁷⁹ So in Massachusetts, where by statute the burden is cast on the defendant to show he lawfully acted under a license, it was held that such statute had no application to a prosecution for a nuisance by keeping a building used for unlawfully keeping and selling liquors.⁸⁰ In a few States, however, the burden of proof that the sale was without a license has been held to rest upon the prosecution.⁸¹ And upon a sale to a slave it was held necessary for the State to prove that the sale was without a license;⁸² and where it was only an offense for a licensed person to sell liquor to an intoxicated person, it was held necessary to prove that the accused had a license.⁸³

Sec. 948. Special authority to make the sale.

Where the vendor must have a special authority to make the particular sale before he can do so, then the burden is upon him to show such an authority. Such is the case of a sale to a minor where the accused can sell to him only upon the written permission of his parent. He must prove such permission.⁸⁴ And where the parent gave only a verbal order

⁷⁹ *Bloomington v. Strehl*, 47 Ill. 72. See *State v. Whitten*, 18 W. Va. 306.

⁸⁰ *Commonwealth v. Lahy*, 8 Gray, 459; *Commonwealth v. Leo*, 110 Mass. 414.

⁸¹ *State v. Evans*, 5 Jones L. 250; *State v. Kuhuke*, 26 Kan. 405; *State v. Nye*, 32 Kan. 201, 204; 4 Pac. 134, 136; *Mehan v. State*, 7 Wis. 670; *Liggett v. People*, 26 Colo. 364; 58 Pac. 144; *Hepler v. State*, 58 Wis. 46; 16 N. W. 42. See *Commonwealth v. Thurlow*, 24 Pick. 374.

⁸² *State v. Evans*, 50 N. C. 250.

⁸³ *State v. Nethken*, 60 W. Va. 673; 55 S. E. 742.

Evidence that accused held a license pending the contest over the constitutionality of a prohibitory law, is not admissible to show his lack of an intention to commit a crime. *Collins v. State*, 152 Ala. 90; 44 So. 571.

⁸⁴ *State v. Cain*, 9 W. Va. 559; *Farrell v. State*, 32 Ala. 557; *Freiberg v. State*, 94 Ala. 91; 10 So. 703; *Edgar v. State*, 37 Ark. 219; *Pounders v. State*, 37 Ark. 399; *Monroe v. People*, 113 Ill. 670; *Jones v. State*, 32 Tex. Cr.

for the liquor to be furnished to the child for him, the parent, the defendant had the burden to show that the child actually delivered the liquor to the parent.⁸⁵ And if a sale can be made to a person of known habits of intoxication only upon a physician's prescription, then the burden is upon the vendor to show that he made the sale upon a sufficient prescription.⁸⁶ So where the sale can only be made to a purchaser who certifies in writing the use for which the liquor is wanted, the burden is upon the vendor to show he had such a certificate at the time of the sale.⁸⁷

Sec. 949. Documentary evidence.

Where the evidence of a fact is embraced in some document kept by law or in the course of business, it is the best evidence of such fact and must be produced or its absence properly accounted for. Thus if the prosecution be for a violation of the local option law, the record of the proceedings before the proper tribunal to secure the holding of an election, and the report of the election officers, together with the action of the tribunal or person to whom they made their return is admissible to show the adoption of the law.⁸⁸ So where the accused is required to make a report of his sales, the original of such a report is admissible, and his signature to it need not be proven, when it is shown that the report came from the legal custodian or from the proper officer, or is properly identified.⁸⁹ Such a report does not compel the accused to testify against himself.⁹⁰ So certificates of purchases of liquor from

Rep. 110; 22 S. W. 149; Reynolds v. State, 32 Tex. Cr. Rep. 36; 22 S. W. 18; Kuhn v. State, 34 Tex. Cr. Rep. 85; 29 S. W. 272; Hamman v. State (Tex. Cr. Rep.), 33 S. W. 538.

⁸⁵ Dixon v. State, 89 Ga. 785; 15 S. E. 684.

⁸⁶ Atkins v. State, 60 Ala. 45.

⁸⁷ Commonwealth v. Perry, 148 Mass. 160; 19 N. E. 212.

In all these instances the written certificate is the best evidence.

⁸⁸ State v. Emery, 98 N. C. 768;

3 S. E. 810; Crouse v. State, 57 Md. 327; Simons v. State (Tex. Cr. App.), 67 S. W. 502; Nelson v. State (Tex. Cr. App.), 75 S. W. 502.

⁸⁹ State v. Thompson, 74 Iowa, 119; 37 N. W. 104.

The original license may be put in evidence by the State instead of a certified copy. *Componovo v. State* (Tex. Cr. App.), 39 S. W. 1114.

⁹⁰ State v. Smith, 74 Iowa, 580; 38 N. W. 492; State v. Cummins,

the accused, upon a charge of maintenance of a liquor nuisance, are competent to show an admission on his part that he had made the sales as well as in corroboration of the witnesses' testimony that they purchased the liquor, although not shown to be public records.⁹¹ So tags bearing names and words taken from the boxes and casks of liquor in defendant's custody are admissible to show his possession of liquor upon a charge of keeping liquor for illegal sales;⁹² and so are the books of an express company to show shipments and delivery of liquors to the consignee purchasers, upon a charge of selling liquors illegally, and to show the date of the sale.⁹³ Where it is alleged that the offense is a second violation of the liquor law by the accused, in order to have a heavier penalty assessed, the record of the first conviction is the proper⁹⁴ and only evidence admissible, unless it be the admission of the accused that he had formerly been convicted of such an offense, and this is true even though the record is a conviction of being a common seller and the second charge is that he maintained a liquor nuisance.⁹⁵ But upon a charge of keeping liquor with intent to sell it unlawfully, the Government cannot put in evidence the record of proceedings for the seizure and forfeiture of certain liquors, alleged to have been kept by the accused on the same day with intent to sell them unlawfully, and which resulted in his favor, unless the times relied upon were the same in both cases, and this is true even though it be shown the liquor was the same in both cases.⁹⁶ Nor can the assessments of taxes be put in evidence by the accused to show the building was assessed to another, on the question of ownership.⁹⁷ The record of the proper official showing the issuance of licenses,

76 Iowa, 133; 40 N. W. 124; State v. Elliott, 45 Kan. 525; 26 Pac. 55.

⁹¹ State v. Huff, 76 Iowa, 200; 40 N. W. 720.

⁹² Commonwealth v. Patten, 151 Mass. 536; 25 N. E. 20. But oral testimony of what was on the tags, labels and casks can be given without producing them. Commonwealth v. Blood, 11 Gray, 74.

⁹³ State v. Kriechbaum, 81 Iowa, 633; 47 N. W. 872.

⁹⁴ Maguire v. State, 47 Md. 485.

⁹⁵ Commonwealth v. Austin, 97 Mass. 595.

⁹⁶ Commonwealth v. Doyle, 132 Mass. 244; State v. Wold, 96 Me. 401; 52 Atl. 909.

⁹⁷ State v. Beaumier, 87 Me. 214; 32 Atl. 881.

the location of the place licensed, the amount of fees paid, may be put in evidence to prove such facts.⁹⁸ It has been held that a search warrant cannot be used to prove that the liquors described in it had been found in the possession of the accused, but that fact must be proven by competent evidence under oath.⁹⁹ But liquor seized under a search warrant need not be put in evidence, though testimony is admissible to show what kind it was.¹ Bills of sales of liquor made out by the accused, even though he was only a partner of a firm selling the liquor, are admissible to prove sales of liquors by him.² And upon a charge of a sale of liquor within a prohibited distance of the "boundary line of the lands occupied by any" soldiers' home, the location and boundaries of the home need not be proven by documentary evidence, but these may be shown by parol as well as the existence of the home and its occupation by soldiers.³ The officer to whom the law requires liquor taxes to be paid may testify that none has been paid by the accused, as charged, and it is not necessary to put in his official report covering the period stated in the indictment, that being only presumptive evidence of non-payment.⁴ So where the accused was required to keep a register of all sales of liquor he made, and this was open to the inspection of any public officer, it was held proper for a police officer to testify that he had inspected the register and to state the number of sales shown thereon to have been made within a given time, although no notice had been served on the accused to produce it.⁵ If it is necessary to prove that the accused is a corporation, that may be done by parol, and it is not necessary to put in evidence the articles of incorporation. The use of the word "incorporated" on the stationery may be

⁹⁸ *State v. Peterson*, 38 Minn. 143; 36 N. W. 443; *State v. Olson*, 38 Minn. 150; 36 N. W. 446; *State v. Sannerud*, 38 Minn. 229; 36 N. W. 447.

⁹⁹ *State v. Stevens*, 47 Me. 357.

¹ *Commonwealth v. Welch*, 142 Mass. 473; 8 N. E. 342.

² *State v. Munger*, 15 Vt. 290;

Gorman v. State, 52 Tex. Cr. App. 327; 106 S. W. 384.

³ *Driggs v. State*, 52 Ohio St. 37; 38 N. E. 882.

⁴ *People v. Paquin*, 74 Mich. 34; 41 N. W. 852; *Reed v. Territory*, 1 Okla. Cr. App. 481; 98 Pac. 583.

⁵ *Commonwealth v. Stevens*, 155 Mass. 291; 29 N. E. 508.

shown, either by actual production of a sheet of paper or by parol evidence.⁶ Parol evidence is not admissible to show that the accused had a prescription for the sale of the liquor sold, where the statute prescribes what the prescription shall be in form.⁷ Where an unlicensed druggist was charged with making a sale of liquor (which, of course, would be illegal because he had no license), a physician's prescription filed on a spindle in his drug store, though dated in a different handwriting, was held admissible, as tending to show that it had been filled and a sale thereon made.⁸

Sec. 950. Time of violation of statute—Election.

In the case of a charge of a sale without a license or to a minor or a drunkard or an intoxicated person, proof of the time when the offense was committed is essential in so far as it must be shown to have taken place before the indictment was found, and also so as to show that the statute of limitations has not barred the prosecution; but it is not necessary to prove that it took place upon the date laid in the indictment.⁹ But the year in which the offense was committed must

⁶ *Goodman Co. v. Commonwealth* (Ky.), 99 S. W. 252; 30 Ky. L. Rep. 519.

⁷ *State v. Davis*, 76 Mo. App. 586; *Rowe v. Commonwealth* (Ky.), 70 S. W. 407; 24 Ky. L. Rep. 974.

⁸ *Commonwealth v. Duprey*, 180 Mass. 523; 62 N. E. 726; *State v. Russell*, 99 Mo. App. 373; 73 S. W. 297.

It is not error for a witness to testify that certain books show the accused bought beer where the witness testifies of his own knowledge it was sold to him. *People v. Dippold*, 30 N. Y. App. Div. 62; 51 N. Y. Supp. 859.

Copies of an express company's books, or slips of paper from them, are not admissible to show ship-

ments of liquor to accused. The books themselves must be put in evidence, if admissible. *Gorman v. State*, 52 Tex. Cr. App. 327; 106 S. W. 384.

⁹ *Josephdaffer v. State*, 32 Ind. 402; *State v. Papp*, 45 Md. 432; *Buckner v. State*, 56 Ind. 207; *Foster v. State*, 38 Ala. 425; *State v. Curley*, 33 Iowa, 359; *Tiffany v. Driggs*, 13 Johns. 253; *Commonwealth v. Dillane*, 1 Gray, 483; *State v. Anderson*, 3 Rich. (S. C.) 172; *United States v. Burch*, 1 Cranch C. C. 36; *Fed. Cas. No. 14682*; *Fowler v. State*, 85 Ind. 538; *Virginia v. Smith*, 1 Cranch C. C. 46; *Tiffany v. Driggs*, 13 Johns. 253; *Fed. Cas. No. 16966*; *State v. Small*, 31 Mo. 197; *Wheeler v. State*, 4 Ga. App. 325; 61 S. E.

be shown.¹⁰ Even in case of a charge of being a common seller the date laid need not be proven,¹¹ or of exposing liquor for sale,¹² or keeping a saloon,¹³ or a keeping of a liquor nuisance.¹⁴ This is true where a particular date is laid with a *continuendo*.¹⁵ If the evidence shows that the transaction took place after the prosecution was begun or indictment found, there can be no conviction.¹⁶ In fact, evidence to show

409; *Edwards v. Woodbury*, 156 Mass. 21; 30 N. E. 175; *Clapton v. Commonwealth (Va.)*, 63 S. E. 1022; *State v. Rundlett*, 33 N. H. 70; *Dansey v. State*, 23 Fla. 316; 2 So. 692; *State v. Elliott*, 45 Kan. 525; 26 Pac. 55; *Commonwealth v. Dillane*, 11 Gray, 67; *Commonwealth v. Kelly*, 10 Cush. 69; *Commonwealth v. Maloney*, 16 Gray, 20; *Miazza v. State*, 36 Me. 612; *State v. Heinze*, 45 Mo. App. 403; *Hans v. State*, 50 Neb. 150; 69 N. W. 838; *State v. Lantz*, 90 Mo. App. 15; *Thomasson v. State*, 80 Ark. 364; 97 S. W. 297; *State v. Burton*, 138 N. C. 575; 50 S. E. 214; *Cole v. State*, 120 Ga. 485; 48 S. E. 156; *Webb v. State (Tex. Cr. App.)*, 58 S. W. 82; *State v. Stover*, 111 La. 92; 35 So. 405; *State v. Bradford*, 79 Mo. App. 346; 2 Mo. App. Rep. 425; *Pitts v. State*, 124 Ga. 79; 52 S. E. 147; *People v. Dieterich*, 142 Mich. 527; 105 N. W. 1112; 12 Det. L. N. 798; *Utsler v. Territory*, 10 Okla. 463; 62 Pac. 287 (permitting gambling); *State v. Barnett*, 110 Mo. App. 584; 85 S. W. 615 (music in a saloon); *State v. Carnahan*, 63 Mo. App. 244; 1 Mo. App. Rep. 766; *New York v. Mason*, 4 E. D. Smith, 142; *People v. Krank*, 110 N. Y. 488; 18 N. E. 242; affirming 46 Hun, 632; *Monford v. State*, 35 Tex. Cr. Rep. 237; 33

S. W. 351; *State v. Munger*, 15 Vt. 290; *State v. Whipple*, 57 Vt. 637; *Loveless v. State (Tex. Cr. App.)*, 44 S. W. 508. *Contra*, *Boldt v. State*, 72 Wis. 7; 38 N. W. 177; reversing 35 N. W. 935.

¹⁰ *State v. Tissing*, 74 Mo. 72; *White v. State*, 93 Ga. 47; 19 S. E. 49.

¹¹ *Commonwealth v. Maloney*, 16 Gray, 20. *Contra*, *Commonwealth v. Elwell*, 1 Gray, 463; *Commonwealth v. Wood*, 4 Gray, 11; *Commonwealth v. Armstrong*, 7 Gray, 494.

¹² *State v. Moriarty*, 50 Conn. 415.

¹³ *State v. Wambold*, 72 Iowa, 468; 34 N. W. 213 (by statute); *Commonwealth v. Higgins*, 16 Gray, 19.

¹⁴ *State v. Arnold*, 98 Iowa, 253; 67 N. W. 252 (by statute); *State v. Reno*, 41 Kan. 674; 21 Pac. 803; *State v. Moore*, 129 Iowa, 514; 106 N. W. 268 (by statute); *Commonwealth v. Galligan*, 156 Mass. 270; 30 N. E. 1142; *Commonwealth v. Maloney*, 16 Gray, 20.

¹⁵ *State v. Small*, 80 Me. 452; 14 Atl. 942; *State v. Whipple*, 57 Vt. 637.

¹⁶ *Patton v. State*, 80 Ga. 714; 6 S. E. 273; *State v. Reno*, 41 Kan. 674; 21 Pac. 803; *State v. Wambold*, 72 Iowa, 468; 34 N. W. 213;

the commission of the offense subsequent to that time is not admissible;¹⁷ and if it be doubtful from the proof whether the sale took place before or after the indictment was found, there must be an acquittal.¹⁸ Although a witness cannot tell the exact date of the sale charged, yet if he testifies that it was some time during the month immediately previous to the time the prosecution was commenced, that will be sufficient.¹⁹ But proof cannot be made of a sale against which the statute of limitations has run.²⁰ In the case of a charge of a mere sale the State is not compelled to secure a conviction to prove the sale that was testified to before the grand jury, but may prove any other within the statute of limitations.²¹ And upon appeal from a conviction, and a trial *de novo* is had in the court to which the appeal is taken, a sale entirely different from the one shown in the court below, if the indictment will admit of the evidence, may be shown.²² If the

White v. State, 93 Ga. 47; 19 S. E. 49; Dixon v. State, 67 Ark. 495; 55 S. W. 850. As to the case of a nuisance, however, see Commonwealth v. Galligan, 156 Mass. 270; 30 N. E. 1142.

¹⁷ Megowan v. Commonwealth, 2 Met. (Ky.) 3; Dixon v. State, 67 Ark. 495; 55 S. W. 850.

¹⁸ State v. Reick, 43 Kan. 279; 23 Pac. 577; Patton v. State, 80 Ga. 714; 6 S. E. 273; Bragg v. State, 126 Ga. 442; 55 S. E. 232; Regina v. Blair, 24 N. B. 74; State v. Madeira, 125 Mo. App. 508; 102 S. W. 1046; Billings v. State, 41 Tex. Cr. App. 253; 53 S. W. 854; DeArmon v. State (Tex. Cr. App.), 97 S. W. 479; Vaughn v. State (Tex. Cr. App.), 93 S. W. 741; Witherspoon v. State, 39 Tex. Cr. App. 65; 44 S. W. 164, 1096; Dillard v. State, 152 Ala. 86; 44 So. 537.

¹⁹ Commonwealth v. Carroll, 15 Gray, 409; Stelle v. State, 77 Ark.

441; 92 S. W. 530; State v. Burton, 138 N. C. 575; 50 S. E. 214; DeArmon v. State (Tex. Cr. App.), 97 S. W. 479; Henry v. State, 71 Ark. 574; 76 S. W. 1071.

²⁰ State v. Cofran, 48 Me. 364; Erwin v. State, 121 Ga. 580; 49 S. E. 689; Lane v. State (Tex. Cr. App.), 82 S. W. 1034; Dawson v. State, 55 Tex. Cr. App. 315; 117 S. W. 136; Commonwealth v. Burk, 15 Gray, 404; State v. Farrell, 22 W. Va. 759.

²¹ Loftus v. Commonwealth, 13 Gratt. 631; Davis v. State, 105 Ga. 783; 32 S. E. 130; Commonwealth v. Maloney, 16 Gray, 20.

²² State v. White, 70 Vt. 225; 39 Atl. 1085; People v. Bennett, 107 Mich. 430; 65 N. W. 280.

Evidence that the witness had gone before the grand jury shortly after the sale was admitted, in connection with the time he had so gone, to show that the sale was within a year, was admitted.

offense has been committed shortly after the statute creating it has been enacted, then it must clearly appear that the offense was committed after it went into force.²³ On proof of a single sale, the prosecution cannot be compelled to elect on what date they will insist the offense was committed.²⁴ But the general rule is that if the State prove several distinct sales, it may be required to elect on which act it will rely for a conviction, and this it may be required to do before the defendant has put in any testimony, so that he may know to which act to direct his evidence.²⁵ The election of the State must designate with reasonable certainty which particular transaction it relies upon.²⁶ But on a dismissal of one

Wynne v. State (Ala.), 46 So. 459. See also *Thomasson v. State*, 80 Ark. 364; 97 S. W. 297, and *Sweatt v. State*, 153 Ala. 70; 45 So. 588. Evidence that the witness recollected the time some ladies called on the accused, to get him to close his place of business is hearsay, if the witness was not present. *Murray v. State* (Tex.), 120 S. W. 438.

²³ *Newlan v. Aurora*, 14 Ill. 364; *Bennett v. People*, 16 Ill. 160.

²⁴ *White v. Commonwealth*, 107 Va. 901; 59 S. E. 1101; *Clapton v. Commonwealth* (Va.), 63 S. E. 1022.

²⁵ *Hatcher v. Commonwealth*, 106 Va. 827; 55 S. E. 677; *Jones v. Commonwealth*, 106 Va. 833; 55 S. E. 697; *Kittrell v. State*, 89 Miss. 666; 42 So. 609; *Stick v. State*, 23 Ohio Cir. Ct. Rep. 392; *State v. Collins*, 8 Kan. App. 398; 57 Pac. 38; *State v. Barr*, 78 Vt. 97; 62 Atl. 43; *State v. Rudy*, 9 Kan. App. 69; 57 Pac. 263; *Commonwealth v. O'Hanlon*, 155 Mass. 198; 29 N. E. 518; *Walker v. State* (Tex. Cr. App.), 72 S. W. 401; *Durein v. State*, 208 U. S. 613; 28 S. Ct. 567; 52 L. Ed. —;

affirming 70 Kan. 1; 78 Pac. 152; 80 Pac. 987.

An election to rely upon the sale made "after C H had come into the defendant's place of business" does not require the State to prove the sale was made in "the defendant's place of business." *State v. Mitchell*, 4 Kan. App. 743; 46 Pac. 541.

²⁶ *State v. Collins*, 8 Kan. App. 398; 57 Pac. 38; *Hughes v. State*, 35 Ala. 351 (what is not an election). If indefinite, the accused must move to have it made more definite. *State v. Nagley*, 8 Kan. App. 812; 57 Pac. 554.

"The State relies, for conviction, on the fourth count of the complaint on the testimony of J who testified that he purchased a glass of whisky from defendant in July, A. D. 1898, for which he paid defendant ten cents," is sufficiently definite. *State v. Rudy*, 9 Kan. App. 69; 57 Pac. 263. See also *State v. Durein*, 70 Kan. 1; 78 Pac. 152; 80 Pac. 987; *Webb v. State* (Kan. App.), 53 Pac. 276. *Contra*, *State v. Stephens*, 70 Mo. App. 554.

count of an indictment the State cannot be required to designate as to which specific sale it expected to rely upon for a conviction on such count.²⁷ If the accused do not require the State to elect on which sale it will rely, and no specific instruction be asked to be given to the jury on the question of a particular sale, the entire evidence may be submitted to the jury without the commission of error.²⁸ In such an instance a conviction is a bar to any other prosecution for any sale to the same party within the same time.²⁹ Even if the State elects to rely upon a sale to a certain person *on a certain day*, it is not error for the court to instruct the jury they may convict on proof of a sale to the same person made within the period of the statute of limitations, there being evidence of other sales.³⁰ It is error to say to the jury that they must find that the sales were made to the several persons *at the time alleged* in the several counts before they can convict accused on each count.³¹ If the State introduce evidence

²⁷ State v. Gomes, 9 Kan. App. 63; 57 Pac. 262; Clopton v. Commonwealth (Va.), 63 S. E. 1022.

²⁸ State v. Ferguson, 8 Kan. App.), 810; 57 Pac. 555.

²⁹ State v. Nunnally, 43 Ark. 68; Deshazo v. State, 65 Ark. 38; 44 S. W. 453. See State v. Stephens, 70 Mo. 554. Effect of a reversal on granting of a new trial. State v. Pianpetti, 79 Vt. 236; 65 Atl. 84.

³⁰ State v. Elliott, 45 Kan. 525; 26 Pac. 55.

³¹ State v. Mallings, 11 Iowa, 239.

In Ohio it has been held sufficient to prove that a number of sales took place about the time alleged in the indictment. Kock v. State, 32 Ohio St. 353; while in Wisconsin the evidence must be addressed to some specific sale. Boldt v. State, 72 Wis. 7; 38 N. W. 177.

Upon a trial of several sales,

alleged in as many counts, to the same person, and the evidence shows only one sale, if there be a conviction as to all of them, the accused is entitled to a new trial on those counts where no sales were proven. Commonwealth v. Remby, 2 Gray, 508.

Where the witness testified he bought a bottle of whisky at the defendant's store of a woman who said she was the defendant's wife, and other witnesses testified they bought liquors from the defendant, it was held not error to not require the State to elect on which sale it would rely. Guarreno v. State, 148 Ala. 637; 42 So. 833.

If there be two indictments against accused for two sales to the same party on different dates, yet the State is not required to prove a sale on the day alleged. Loveless v. State (Tex. Cr. App.), 44 S. W. 508.

Having proven one sale, the

of a distinct sale it thereby elects to claim a conviction on that sale, and may not put in evidence of another sale.³²

State cannot follow it by proof of another. *People v. Hoffman*, 24 N. Y. App. Div. 233; 48 N. Y. Supp. 482; unless to show the intent with which the first sale was made. *Commonwealth v. Coughlin*, 182 Mass. 558; 66 N. E. 207.

Where some of the sales proven are beyond a two year statute of limitations, it is error to charge the jury that if any one of the sales is proven, there may be a conviction. *Hynum v. State*, 74 Miss. 829; 21 So. 971.

To refresh a witness's memory as to the date of a sale of liquor, he may examine a statement he made before the grand jury to enable him to testify as to the date when he was there and that the sale took place before that time. *Wagner v. State*, 53 Tex. Cr. App. 306; 109 S. W. 169; *Wottan v. State (Tex.)*, 121 S. W. 703.

³² *Wilson v. State*, 136 Ala. 144; 33 So. 831; *People v. Hoffman*, 24 N. Y. App. Div. 233; 48 N. Y. Supp. 482.

The court may allow the State to amend its election as to which count it will proceed upon, by more particularly stating the sale it relied upon. *State v. Keenan*, 7 Kan. App. 813; 55 Pac. 102.

An indictment contained several counts on sales and one on maintaining a nuisance where liquor was illegally sold. On motion the State filed a statement of such election, but made no mention of the nuisance count. This was held to be an election only as to the

counts on sales. *State v. Bailey*, 74 Kan. 873; 87 Pac. 189.

Where a charge of a sale, a gift or otherwise dispose of liquors on Sunday could be made in the disjunctive in one count, it was held not error to require the prosecution to elect as to which charge it would rely upon. *Liberty v. Moran*, 121 Mo. App. 682; 97 S. W. 948.

If there be a charge of a sale without a license, a sale of less than a quart without a license and a sale of liquor to be drunk upon the premises without a license, the State is not required to elect for which offense it will prosecute. *Untriner v. State (Ala.)*, 41 So. 170.

In Vermont, in a prosecution for keeping liquors illegally, it was held to be within the discretion of the court to require the State to elect as to a date upon which it would rely as to the time the offense was committed. *State v. White*, 70 Vt. 225; 39 Atl. 1085.

On a charge of soliciting orders and also for selling, the State is not required to elect on which count it will proceed. *Williams v. State (Ga.)*, 33 S. E. 641.

It is no ground for quashing an indictment that another one is pending for the same offense. *Robinson v. State*, 53 Tex. Cr. App. 567; 110 S. W. 905.

The prosecution is not bound, at the commencement of the trial, to disclose the day on which the alleged sale was made. *Clopton v. Commonwealth (Va.)*, 63 S. E. 1022.

Sec. 951. Proof of time in a continuing offense.

In several States the rule is that where it is charged that the offense was committed on a certain day, and on divers other days, there cannot be a conviction on proof of an offense committed before the time alleged.³³ Under the rule adopted in those States, proof of the commission of the offense upon any day laid in the indictment is sufficient. Thus, where the accused was charged with maintaining a liquor nuisance "on June 1, 1886, and on divers other days between said day and June 25th and on said June 25th," it was held there could be a conviction on proof of the commission of the offense on any one of the days specified.³⁴ But these cases have not always been accepted as sound, and some courts and authors have declined to follow them.³⁵

Sec. 952. Ownership and possession of liquor.

Upon the question of ownership or possession of liquors it may be shown that packages were received at the railroad station, consigned to the defendant, although no proof is offered that they contained liquor, if they resemble packages in which liquor is usually shipped. This is true even though there be no proof that the packages were actually delivered

³³ This is known as the Massachusetts rule. *Brevaldo v. State*, 21 Fla. 789; *Commonwealth v. Briggs*, 11 Met. 573; *Commonwealth v. Elwell*, 1 Gray, 463; *Commonwealth v. Wood*, 4 Gray, 11; *Commonwealth v. Armstrong*, 7 Gray, 49; *State v. Small*, 80 Me. 452; 14 Atl. 942; *Commonwealth v. Purdy*, 146 Mass. 138; 15 N. E. 664; *Commonwealth v. Slosson*, 152 Mass. 489; 25 N. E. 835; *Commonwealth v. Carney*, 152 Mass. 566; 26 N. E. 94.

³⁴ *Commonwealth v. Hersey*, 144 Mass. 297; 11 N. E. 116. 9 N. E. 838; *Commonwealth v. Kersey*, 141 Mass. 110; 4 N. E. 820;

Commonwealth v. Wood, 4 Gray, 11; *Commonwealth v. Armstrong*, 7 Gray, 49; *Commonwealth v. Lamere*, 11 Gray, 319; *Commonwealth v. Moore*, 147 Mass. 528; 18 N. E. 403; *Commonwealth v. Shea*, 14 Gray, 386; *State v. Collins*, 28 R. I. 439; 67 Atl. 796.

This seems to be the rule in Ohio. *Clinton v. State*, 33 Ohio St. 27, and in Virginia. *Harding v. Commonwealth (Va.)*, 52 S. E. 832.

³⁵ *State v. Reno*, 41 Kan. 674; 21 Pac. 803; *State v. Ah Sam*, 14 Ore. 347; 13 Pac. 303; *State v. Haley*, 52 Vt. 476; *State v. Knott*, 5 R. I. 293.

to the accused.³⁶ And where the charge is a carrying on of the liquor business, such shipments may be shown, even if made after the date of the sale charged in the indictment.³⁷ On the question of ownership it may always be shown that liquors were in the accused's possession, though not kept at the place where it is alleged he sold liquor,³⁸ and especially so if concealed.³⁹ But where the charge was a sale, and a servant of the accused testified that no liquors had been sold on the day it is charged the sale was made, it cannot be asked the witness on cross-examination if he had not seen liquors in the store the next day.⁴⁰ For the purpose of showing that the accused had kept liquors as his own, evidence of jugs,⁴¹ implements and materials for selling liquor,⁴² decanters, although only containing colored water,⁴³ counters, "a pitcher that contained something that looked like beer," and "a pump which looked like a beer pump,"⁴⁴ bottles, a bar and a barroom,⁴⁵ casks of liquor⁴⁶ found upon the accused's premises, may be put in evidence or shown by the testimony of witnesses, even though such articles be found by means of a search warrant.⁴⁷ Evidence is also admissible that the accused had the liquors concealed and attempted to deceive the witness about his having them.⁴⁸ It may be shown that liquors in large quantities were on adjoining premises and

³⁶ *State v. Mead's Liquors*, 46 Conn. 22. This is upon the ground that the consignee is the ostensible owner of goods shipped to him.

³⁷ *Klepper v. State*, 121 Ind. 491; 23 N. E. 287.

³⁸ *State v. Illsley*, 81 Iowa, 49; 46 N. W. 977; *State v. Pferferle*, 36 Kan. 90; 12 Pac. 406.

³⁹ *State v. Beaumier*, 87 Me. 214; 32 Atl. 881.

⁴⁰ *Commonwealth v. Page*, 6 Gray, 361.

⁴¹ *Commonwealth v. Timothy*, 8 Gray, 480; *Commonwealth v. Murphy*, 153 Mass. 290; 26 N. E. 860; *Commonwealth v. Sullivan*, 156 Mass. 229; 30 N. E. 1023.

⁴² *Commonwealth v. Lincoln*, 9 Gray, 288.

⁴³ *Commonwealth v. Blood*, 11 Gray, 74.

⁴⁴ *Commonwealth v. Lamere*, 11 Gray, 319.

⁴⁵ *Commonwealth v. Boyden*, 14 Gray, 101; *Commonwealth v. Wallace*, 123 Mass. 400; *Commonwealth v. Pierce*, 107 Mass. 487.

⁴⁶ *Commonwealth v. Whalen*, 16 Gray, 23.

⁴⁷ *Commonwealth v. Welsh*, 110 Mass. 359; *Hammock v. State* (Ga.), 65 S. E. 1096.

⁴⁸ *Commonwealth v. Doe*, 108 Mass. 418.

connected with accused's premises by a door.⁴⁹ Marks on bottles found in the accused's room and marks like them on bottles dug up from the ground on the same premises may be shown where the accused claims other tenants on the premises had buried the bottles dug up, claiming the liquor was theirs.⁵⁰ It may be shown that liquor was not only found in the accused's public house, but also in his barn or outhouse connected therewith.⁵¹ It may be shown that liquor was carried by the accused's family, to his knowledge, from a neighboring house into his own house.⁵² On a charge of keeping liquor for sale, evidence of a keeping after the dates laid in the indictment is admissible.⁵³ In such a case bills for liquor sent the accused may be put in evidence,⁵⁴ and evidence of liquors kept in any part of the building used by the accused may be put in.⁵⁵ Delivery of liquor on the premises by strangers may be shown.⁵⁶ Evidence that the house in which liquor was shown to have been sold was under the immediate control of a person with whom accused lived as a member of his family was held insufficient to show the liquor was sold in his house.⁵⁷

⁴⁹ *Commonwealth v. McCullow*, 140 Mass. 370; 5 N. E. 165. The unlikelihood of the person on whose premises they are found to need so large a supply of liquor may be shown.

⁵⁰ *Commonwealth v. Finnerty*, 148 Mass. 162; 19 N. E. 215. It was shown that the bottles were buried on that part of the premises used exclusively by the accused.

⁵¹ *Commonwealth v. Tenney*, 148 Mass. 452; 19 N. E. 556.

⁵² *Commonwealth v. Vahey*, 151 Mass. 57; 23 N. E. 659; *Commonwealth v. Lyons*, 160 Mass. 174; 35 N. E. 312.

⁵³ In this case twenty-two days after. *Commonwealth v. Neylon*, 159 Mass. 241; 34 N. E. 1078.

⁵⁴ *Commonwealth v. Neylon*, *supra*.

⁵⁵ *Commonwealth v. Hurle*, 160 Mass. 10; 35 N. E. 89.

⁵⁶ *Commonwealth v. Hughes*, 165 Mass. 7; 42 N. E. 121; *Fossdahl v. State*, 89 Wis. 482; 62 N. W. 185. But upon a charge of selling "whisky" evidence of delivery of "beer" is not admissible. *Fossdahl v. State*, *supra*.

⁵⁷ *Plunkett v. State*, 69 Ind. 68.

It is impossible to set out the facts which have been held to show that the evidence was sufficient to show that the accused was in charge of the premises where the liquor was sold, without making this section a mere digest. We therefore cite those cases in which it has been held that the

Sec. 953. Keeping liquors for unlawful sale.

A distinction must be drawn between keeping intoxicating liquors for unlawful sale and the mere possession of them with no intent to sell them where such possession is made an offense. So the distinction must be borne in mind between carrying on the liquor business and the keeping of liquors for illegal sale, or the keeping of a house for the sale of intoxicating liquors. It is the instance of keeping liquors for illegal sale that we are dealing with in this section. Under a statute making such keeping an offense, of course, it is not a violation of it to merely keep the liquors, so long as there is no intent to sell them. In all such instances, in order to secure a conviction of the accused, the unlawful intent must be shown; not only that, but it must be shown the liquor kept was intoxicating, or such as the statute condemns.⁵⁸ In some States the mere proof of an unlawful sale of such liquor is sufficient proof of a keeping with an unlawful intent,⁵⁹ while

evidence was sufficient to show that the accused was criminally responsible, because of his control over them, for illegal sales or keeping of liquors upon the premises, leaving to the practitioner the task of searching for such a precedent as he may desire. *State v. Wambold*, 74 Iowa, 65; 38 N. W. 429; *State v. Neeson* (Iowa), 64 N. W. 409; *State v. Hughes*, 3 Kan. App. 95; 45 Pac. 94; *Commonwealth v. Hoye*, 9 Gray, 292; *Commonwealth v. Dow*, 12 Gray, 133; *Commonwealth v. Shaw*, 116 Mass. 8; *Commonwealth v. Sisson*, 126 Mass. 48; *Commonwealth v. Merriam*, 148 Mass. 425; 19 N. E. 405; *Commonwealth v. Hughes*, 165 Mass. 7; 42 N. E. 121. And also those in which it was held not sufficient. *State v. Hart*, 84 Iowa, 215; 50 N. W. 981; *State v. Johnson*, 92 Iowa, 768; 61 N. W. 195; *Commonwealth v. Dunbar*, 9 Gray, 298.

⁵⁸ *Hollingsworth v. Atlanta*, 79 Ga. 503; 5 S. E. 37; *Commonwealth v. Hayes*, 114 Mass. 282; *Commonwealth v. Berry*, 109 Mass. 366. But in some instances the mere keeping of liquor is all that need be proven, no intent being necessary to make the act unlawful. This is so by reason of the terms of the statute. *State v. McCann*, 61 Me. 116.

The defendant may be convicted of an offense committed prior to that alleged in the indictment. *State v. White*, 70 Vt. 225; 39 Atl. 1085.

⁵⁹ *State v. Munzemeier*, 24 Iowa, 87; *State v. Arie*, 95 Iowa, 375; 64 N. W. 268; *Regina v. Bennett*, 3 Ont. 45; *Commonwealth v. Hoar*, 121 Mass. 375; *Commonwealth v. Coolidge*, 138 Mass. 193; *Commonwealth v. Cleary*, 105 Mass. 384; *State v. Sartori*, 55 Iowa, 340; 7 N. W. 604; *Commonwealth v. Fitzgerald*, 14 Gray, 14; *Common-*

in others a statute expressly raises the presumption of such an intent on mere proof of sale,⁶⁰ while in still others statutes provide that proof of a mere keeping or possession of them shall be sufficient to raise the presumption that they were kept for an unlawful purpose.⁶¹ The finding of whisky in a bar or under it or under the counter in a grocery, and glasses that smelt of liquor, is admissible and may be sufficient with other exculpatory evidence to sustain a conviction of the accused.⁶² The proof of such facts, even though liquor be not actually found on the premises, are questions for consideration of the jury, and their conclusions drawn from them will not be disturbed.⁶³ The conduct of the accused in his endeavors to keep the officers out of his house when they came to search or investigate for liquors, the locking of doors, the breaking of jugs on the premises supposed to have contained liquor, the smashing of whisky glasses, the fact of liquor glasses on the premises, the keeping of such articles or material, though not liquor, as is usually or frequently found in saloons or in drinking premises, may be shown.⁶⁴ So it

wealth v. Gavin, 148 Mass. 449; 18 N. E. 675; State v. Hartwick, 49 Conn. 101; Sawyer v. Blakely, 2 Ga. App. 159; 58 S. E. 399; People v. Moore, 155 Mich. 107; 118 N. W. 742; 15 Det. L. N. 920.

⁶⁰ State v. Cunningham, 25 Conn. 195; State v. Raymond, 24 Conn. 204; Appling v. State (Ark.), 114 S. W. 927. This presumption may be rebutted. State v. Cunningham, 25 Conn. 195.

⁶¹ Commonwealth v. Cleary, 105 Mass. 384; Lincoln v. Smith, 27 Vt. 238; State v. Hoxsie, 15 R. I. 1; 22 Atl. 1059; King v. Nugent, 9 Can. Cr. Cas. 1; State v. McIntyre, 139 N. C. 599; 52 S. E. 63 (over two gallons at a time).

⁶² Commonwealth v. Hayes, 114 Mass. 282. The liquor need not be put in evidence. Commonwealth v. Welch, 142 Mass. 473; 8 N. E. 343.

⁶³ Commonwealth v. Shaw, 116 Mass. 8; Commonwealth v. Intoxicating Liquors, 116 Mass. 24; Commonwealth v. Gallagher, 124 Mass. 29; Commonwealth v. Levy, 126 Mass. 240; Commonwealth v. Berry, 109 Mass. 366; Commonwealth v. Fisher, 138 Mass. 504; Commonwealth v. Purtle, 11 Gray, 78; Commonwealth v. Tuney, 148 Mass. 452; 19 N. E. 556.

⁶⁴ Commonwealth v. Shaw, 116 Mass. 8; Commonwealth v. Certain Liquors, 116 Mass. 27; Commonwealth v. Intoxicating Liquors, 116 Mass. 24; Commonwealth v. Gallagher, 124 Mass. 29; Commonwealth v. Shaw, 116 Mass. 8; Commonwealth v. Levy, 126 Mass. 240; Commonwealth v. Hurley, 158 Mass. 159; 33 N. E. 342; Commonwealth v. Hurley, 160 Mass. 10; 35 N. E. 89; Riggs v. State (Neb.), 121 N. W. 588;

may be shown that the place where it is claimed liquor was kept was a common resort for persons, that intoxicated persons were seen to come from there (especially so is this if they come from there on Sunday), and that persons were found on the premises.⁶⁵ So false denials that liquor is or was on the premises is admissible, when accompanied by evidence that it was found there.⁶⁶ A charge of keeping for unlawful sale may, of course, be made without proof of any sale, and there need be no sale to render the keeping unlawful.⁶⁷ Evidence of the possession of liquor several days after the time it is claimed he kept liquor for unlawful sale may be shown, the rule in this respect being stated as follows: "Upon the question of intent, in such a case, the acts of the defendant soon after, as well as shortly before, the act complained of, may have a bearing."⁶⁸ And if a person may lawfully keep liquors for sale for certain limited purposes, proof that the accused kept large quantities of liquors, or larger quantities than the purposes for which he might make such sales may be shown.⁶⁹ So where it was only unlawful

Commonwealth v. Mead, 140 Mass. 300; 3 N. E. 39; *Commonwealth v. McKenna*, 158 Mass. 207; 33 N. E. 389; *Commonwealth v. Dearborn*, 109 Mass. 368; *State v. Collins (R. I.)*, 67 Atl. 796; *Commonwealth v. Canny*, 158 Mass. 210; 33 N. E. 340; *Commonwealth v. Shea*, 160 Mass. 6; 35 N. E. 83; *Commonwealth v. Morten*, 162 Mass. 402; 38 N. E. 708; *Commonwealth v. Powers*, 123 Mass. 244; *Commonwealth v. Lynch*, 151 Mass. 358; 23 N. E. 1137; *Commonwealth v. Patten*, 151 Mass. 536; 25 N. E. 20; *Commonwealth v. Ham*, 150 Mass. 22; 22 N. E. 704; *Commonwealth v. O'Connor*, 11 Gray, 94; *Commonwealth v. Timothy*, 8 Gray, 480; *Commonwealth v. Lincoln*, 9 Gray, 288.

⁶⁵ *Commonwealth v. Mead*, 140 Mass. 300; 3 N. E. 39; *Common-*

wealth v. Shea, 160 Mass. 6; 35 N. E. 83; *Commonwealth v. Leighton*, 140 Mass. 305; 6 N. E. 221; *State v. Krinski*, 78 Vt. 162; 62 Atl. 37; *Commonwealth v. Shaw*, 116 Mass. 8; *Poston v. State (Neb.)*, 119 N. W. 520.

⁶⁶ *Commonwealth v. Lynch*, 164 Mass. 541; 42 N. E. 95; *Commonwealth v. Wallace*, 123 Mass. 400.

⁶⁷ *State v. McGlynn*, 34 N. H. 422.

⁶⁸ *Commonwealth v. Matthews*, 129 Mass. 487; *State v. White*, 70 Vt. 225; 39 Atl. 1085; *Myers v. State*, 52 Tex. Cr. App. 558; 108 S. W. 392 (six weeks after is not contemporaneous); *State v. Collins*, 28 R. I. 439; 67 Atl. 796.

⁶⁹ *State v. Shank*, 74 Iowa, 649; 38 N. W. 523; *State v. Costa*, 78 Vt. 198; 62 Atl. 38.

to keep spirituous liquors for unlawful sale, proof that the accused at the same time and place kept malt liquors for sale was admissible, to show with what intent he kept the spirituous liquors.⁷⁰ Recent purchases of liquor by the accused may be shown.⁷¹ Common report or the reputation of the place as a place where liquors are kept or kept for sale, is not admissible,⁷² nor is a promise made by the accused several months before the alleged time of the keeping not to keep liquors any longer admissible, because the promise was not made "shortly before"⁷³ the act complained of.⁷⁴ If the accused claims he gave away the liquors, but did not sell them, then he has the burden to show that the transaction was a sale and not a gift; and if he does not call the donees as witnesses the jury may take his neglect into consideration as a circumstance against him.⁷⁵ As bearing upon the keeping of liquors with intent to sell them, it may be shown that the accused had paid the United States liquor tax as a retailer, and this fact may be proven by an examined copy of the record or by anyone who knows the fact.⁷⁶ So evidence of United States revenue stamps upon kegs in accused's possession is admissible to show the kegs contained malt liquors.⁷⁷ Where it was shown that the accused had on the premises a "drainer" for liquors, it was held, as bearing on his intent, that he might put in evidence a conversation concerning the object of his purchasing it, which he had had with the person who made it, at the time he ordered it.⁷⁸ Upon a charge against two, a statement of one, not in

⁷⁰ *State v. Gorman*, 58 N. H. 77; *Weinandt v. State*, 80 N. H. 161; 113 N. W. 1040.

⁷¹ *Commonwealth v. Mead*, 140 Mass. 300; 3 N. E. 39; *State v. Wright*, 68 N. H. 351; 44 Atl. 519.

⁷² *Cobleigh v. McBride*, 45 Iowa, 116.

⁷³ *Commonwealth v. Matthews*, 129 Mass. 487.

⁷⁴ *Commonwealth v. Purdy*, 147 Mass. 29; 16 N. E. 745.

⁷⁵ *Commonwealth v. Cummins*, 121 Mass. 63.

⁷⁶ *State v. White*, 70 Vt. 225; 39 Atl. 1085; *State v. Momberg*, 14 N. D. 291; 103 N. W. 566 (statute); *State v. Howard*, 91 Me. 396; 40 Atl. 65; *Colby v. Fitzgerald* (Iowa), 94 N. W. 491; *Guy v. State*, 96 Md. 692; 54 Atl. 879.

⁷⁷ *State v. Wright*, 68 N. H. 351; 44 Atl. 519; *State v. Stockman*, 9 Kan. App. 422; 58 Pac. 1032.

⁷⁸ *Commonwealth v. O'Connor*, 11 Gray, 94.

the presence of the other, that they kept liquor, is admissible, but only against the one making it.⁷⁹ A search warrant and return thereon is not admissible in evidence.⁸⁰ Nor is liquor or liquor barrels found on the premises of an adjoining owner or in the same building, though it was possible for the defendant to reach his hand through a hole in the partition wall to a faucet in the barrel and open it and convey the liquor by a nearby rubber hose onto his own premises.⁸¹ The books of an express company, it has been held, are not admissible to show shipments of liquor to the accused to the town where it is charged he kept the liquors.⁸² Nor can it be shown, on a charge of keeping liquor in a named town, that the accused kept liquor outside of it.⁸³ If an unlawful intent be once raised by the evidence, as by proof of unlawful sales, it will be presumed that it continued, on proof as to a subsequent keeping of the liquor.⁸⁴ In a case where the accused is a registered pharmacist or druggist and he is entitled as such to sell spirituous liquors under his license, handbills advertising certain remedies, distributed by him, is not admissible in evidence unless it be shown that intoxicating liquor was

⁷⁹ *State v. Kennard*, 74 N. H. 76; 65 Atl. 376.

⁸⁰ *State v. Collins*, 28 R. I. 439; 67 Atl. 796; *State v. Bradley*, 96 Me. 121; 51 Atl. 816; *Myers v. State*, 52 Tex. Cr. App. 558; 108 S. W. 392; *Nelson v. State*, 53 Neb. 796; 74 N. W. 279; *State v. Stoffels*, 89 Minn. 205; 94 N. W. 675; *Weinandt v. State*, 80 Neb. 161; 115 N. W. 1040. But evidence of liquors found on the premises by means of a search warrant may be put in. *King v. McNutt*, 11 Can. Cr. Cas. 26; *State v. Costa*, 78 Vt. 198; 62 Atl. 38; *Hardesty v. United States*, 164 Fed. 420; *Taylor v. State*, 5 Ga. App. 237; 62 S. E. 1048; *Smith v. State*, 3 Ga. App. 326; 59 S. E. 934 (search illegal); *Commonwealth v. Henderson*, 140 Mass.

303; 5 N. E. 832; *State v. Intoxicating Liquors (Vt.)*, 73 Atl. 586.

⁸¹ *State v. Suitor*, 78 Vt. 391; 63 Atl. 182.

⁸² *Stanley v. State*, 89 Miss. 63; 42 So. 284. But other cases lead to a different result. See *Ray v. State*, 46 Tex. Cr. App. 176; 79 S. W. 535.

⁸³ *Stanley v. State*, 89 Miss. 63; 42 So. 284.

⁸⁴ *State v. Johns (Iowa)*, 118 N. W. 295. But one inference or presumption cannot be based upon another. *State v. Jacobs*, 133 Mo. App. 182; 113 S. W. 244.

Of course, it must be shown that the liquor is such liquor as the statute forbids being kept. *State v. York*, 74 N. H. 125; 65 Atl. 685; *State v. Costa*, 78 Vt. 198; 62 Atl. 38.

used in compounding such remedies.⁸⁵ A direction to the purchaser of liquor given by the accused, that he must go outside the building to drink it, is admissible, and so is the defendant's refusal to open it for him.⁸⁶ Expressions of the accused of a desire to sell liquor made several months before the day it is alleged and proven he had possession of liquor is admissible, in the discretion of the court, upon the question of intent.⁸⁷ And so it may be shown that the same conditions existing at the time laid existed both before and after that date.⁸⁸ Of course, it must be proven that the liquors laid in the indictment were the ones kept.⁸⁹ The accused may show that he was in possession of the liquor as a member of a club, and that it belonged to such club and was merely for the use of its members.⁹⁰ It is no defense to evidence of a finding of the liquor in accused's possession that the warrant under which the liquors were seized was illegally issued,⁹¹ nor is it a defense that other liquors were kept in the same building at the same time the liquors in question were kept.⁹²

⁸⁵ *State v. Hitchcock*, 68 N. H. 244; 44 Atl. 296.

⁸⁶ *State v. Costa*, 78 Vt. 198; 63 Atl. 38.

An accused charged with selling liquor cannot be convicted of keeping liquor, where a sale was made in his absence and without his knowledge. *Ex parte Doherty*, 33 N. B. 15.

⁸⁷ *State v. Collins*, 28 R. I. 439; 67 Atl. 796.

⁸⁸ *State v. Collins*, 28 R. I. 439; 67 Atl. 796.

⁸⁹ *Weinandt v. State*, 80 Neb. 161; 113 N. W. 1040.

⁹⁰ *Commonwealth v. Geary*, 146 Mass. 139; 15 N. E. 363.

⁹¹ *State v. McCann*, 61 Me. 116.

⁹² *Commonwealth v. Moore*, 157 Mass. 324; 31 N. E. 1070

Upon a charge of keeping liquor for sale, where it was claimed that the bottles found on the premises

contained medicinal Jamaica ginger, the State's chemist was permitted to testify that he had never seen it put up in such bottles as were so found; that he never saw such a bottle used in pharmacy, and that there was a standard form of bottles used for Jamaica ginger. *State v. Kriniski*, 78 Vt. 162; 62 Atl. 37.

Proof of what the purchasers did with the liquor after they had left the premises is not admissible where they told the defendant they wanted the liquors for medicine at the time they purchased them. *People v. Thompson*, 147 Mich. 444; 111 N. W. 96; 13 Det. L. N. 1122.

Where the evidence showed accused was a pharmacist, samples of handbills which he had distributed advertising certain remedies were held inadmissible, in the

And a record of a plea of guilty to a complaint charging an unlawful keeping of intoxicating liquors for sale at a certain time and place, is admissible in evidence at the trial of the same defendant on a complaint for keeping and maintaining at the same time and place a tenement used for the illegal sale and keeping of such liquor.⁹³ And an indictment for keeping a tenement in the basement of a building for such illegal purpose will be sustained if the evidence shows that the tenement was kept as a "saloon," and that in it were a counter and a beer pump, and bottles and tumblers, some of which had recently contained whisky, that intoxicating liquors

absence of an offer to show that liquor was used in compounding such remedies. *State v. Hitchcock*, 68 N. H. 244; 44 Atl. 296.

Sales of liquor from the same wagon in the same town four months before was held admissible. *Commonwealth v. Cotton*, 138 Mass. 500. So sales on the premises two days before. *Commonwealth v. Henderson*, 140 Mass. 303; 5 N. E. 832.

In prohibition territory, the intent to sell liquors may be inferred from facts which do not warrant the inference of an intent to sell other merchandise in the form in which it was found; as where the possessor had a right to sell them if properly marked, and had the right to so mark it after receiving it, and before he intended to sell it. *Commonwealth v. Mills*, 157 Mass. 405; 32 N. E. 360; *Lewis v. State* (Ga.), 64 S. E. 701.

A person in possession of liquor is presumed to be its owner. *State v. Fullman* (Del.), 74 Atl. 1.

An officer discovering liquor on the premises by means of a search warrant may so testify without producing the warrant. *Common-*

wealth v. Keenan, 148 Mass. 470; 20 N. E. 101.

If the accused be a witness in his own behalf, denying he sold the liquor in question, he may be asked if he did not have in his possession at the time of the alleged sale whisky of the brand claimed to have been sold, and had whisky at all time. It is admissible to show he was selling whisky, and not objectionable as an attempt to show the system or prove the offense of having whisky in his possession. *Myers v. State* (Tex.), 118 S. W. 1032.

Evidence of police officers of what they had seen in the accused's place of business seven months before, and also his conduct and management of the place, was held admissible on a charge of exposing and keeping liquor for sale. *Commonwealth v. Gagne*, 153 Mass. 205; 26 N. E. 449; 10 L. R. A. 442.

Evidence sufficient for jury. See *Commonwealth v. Certain Intoxicating Liquors*, 107 Mass. 386, 392, *note*.

⁹³ *Commonwealth v. Hazeltine*, 108 Mass. 479.

were found in it, and in the story above it, where the defendant lived, and that the defendant admitted that he had sold liquors.⁹⁴

Sec. 954. Carrying on the liquor business.

There is some slight difference between carrying on liquor selling without a license and maintaining a house for the illegal sale of liquor, or keeping liquor for illegal sales, or maintaining a liquor nuisance, or even being a common seller of liquor without a license. Proof of barrels and casks and boxes on the accused's premises is admissible, that they were brought there by draymen or expressmen, and other facts showing the receipt of liquors or packages resembling such packages as liquor is wont to be shipped in.⁹⁵ Statements of the accused that he intended to sell liquors are likewise admissible.⁹⁶ Sales, of course, may be shown, even a single sale though usually insufficient to itself show a carrying on of the business.⁹⁷ It may be shown that large quantities of liquor were received at the railroad station in the town and delivered to the defendant.⁹⁸ But it is not admissible to show that the general reputation of accused was that he was engaged in the liquor business.⁹⁹ Witnesses may testify to sales they have seen without calling the purchasers as witnesses.¹ Possession of a United States revenue tax stamp by the accused, such as are issued to licensees under the Federal statutes, may be shown,² but not where it is issued

⁹⁴ Commonwealth v. Conneally, 108 Mass. 480.

⁹⁵ Commonwealth v. Davenport, 2 Allen, 299; People v. Moore, 155 Mich. 107; 118 N. W. 742; 15 Detroit L. N. 920.

⁹⁶ Commonwealth v. Davenport, *supra*.

⁹⁷ Commonwealth v. Coolidge, 138 Mass. 193; Lawson v. State, 55 Ala. 118. See Witherspoon v. State, 39 Tex. Cr. App. 65; 44 S. W. 164, 1096.

⁹⁸ Hanlon v. State, 51 Ark. 186; 10 S. W. 265; Klepper v. State, 121 Ind. 491; 23 N. E. 287; Peo-

ple v. Moore, 155 Mich. 107; 118 N. W. 742; 15 Detroit L. N. 920 (billed as mineral water).

⁹⁹ Warner v. Brooks, 14 Gray, 107.

¹ People v. Moore, 155 Mich. 107; 118 N. W. 742; 15 Detroit L. N. 920. It is not error for the prosecution to refuse to produce the witnesses.

² Hestand v. Commonwealth (Ky.), 92 S. W. 12; 28 Ky. L. Rep. 1315; State v. Intoxicating Liquors, 80 Me. 57; 12 Atl. 794; State v. O'Connell, 82 Mo. 30; 19 Atl. 86.

after the time it is alleged he carried on the business.³ Where a witness testified to a purchase of medicine from the accused, prescribed by a doctor, and also medicine not so prescribed, although he did not know the name of the latter purchase, and another witness testified that accused several times during the year had given him whisky, and another testified that he had purchased bitters of the accused, and still another that he also had purchased bitters of him, though he did not know they were intoxicating, although he bought six bottles in one day to sober up on, it was held that the evidence was not sufficient to show that the accused was carrying on the liquor business.⁴ But where it was shown that the accused had been seen "three or four or five times" distilling liquors, this was held to show that he was carrying on the liquor business.⁵ So proof of several sales without a license on a like number of occasions was held sufficient to sustain a conviction.⁶ Proof of a single sale of three pints of liquor by a farmer was held not sufficient to show he was engaged in or carrying on the liquor business as a retailer;⁷ but proof that the accused "on several occasions sold case whisky in quantities less than a quart" was held to show he was carrying on such business.⁸ In Massachusetts, by statute, proof of three distinct sales is enough to warrant a conviction of the defendant of the offense of carrying on the liquor business, and unless at least three sales be shown there can be no conviction.⁹ But if three distinct sales be shown the jury are required to find a verdict of guilty.¹⁰ There need not be direct proof of three sales,

³ Lane v. State, 49 Tex. Cr. App. 442; 92 S. W. 839.

⁴ Barnes v. State, 40 Tex. Cr. App. 473; 72 S. W. 177.

⁵ Grant v. State, 73 Ala. 13.

⁶ Lemons v. State, 50 Ala. 130.

⁷ Bryant v. State, 46 Ala. 302; Lawson v. State, 55 Ala. 118 (only one sale); Anderson v. State, 32 Fla. 242; 13 So. 435.

⁸ Lemons v. State, 50 Ala. 130; State v. Day, 37 Me. 244 (four deliveries).

⁹ Commonwealth v. Munn, 14 Gray, 361; Commonwealth v. Clark, 14 Gray, 367; Commonwealth v. Lamere, 11 Gray, 319; Commonwealth v. Whalen, 16 Gray, 23; Commonwealth v. Kirk, 7 Gray, 496; Commonwealth v. Barker, 14 Gray, 412.

¹⁰ Commonwealth v. Barker, 14 Gray, 412; Commonwealth v. Kirk, 7 Gray, 496.

but if the evidence as a whole, both direct and circumstantial, satisfies the jury that the accused has made that number during the time alleged, they may find him guilty.¹¹ Of course, where proof of three sales are relied upon, the sales must be three distinct transactions, and whether or not there were that many is a question for the jury.¹² It is not necessary for the Government to prove the three sales by direct evidence, "but if the evidence, positive and circumstantial, offered by the Government, tending to prove sales, and that there was a bar, bottles containing liquors, tumblers, and other things of like character in the defendant's shop," satisfies the jury "that the defendant had made as many as three sales during the time alleged," it is competent to find the defendant guilty.¹³ But under this statute an accused cannot be convicted by merely showing that he had a saloon and all the furniture, paraphernalia and liquors that one usually finds in such places.¹⁴

Sec. 955. Common seller.

Upon a charge of being a common seller of intoxicating liquors it may be shown that the accused had liquors in his possession that resembled beer or whisky, that he had bottles, barrels, casks, decanters, glasses, whisky barrels, beer casks, a bar and the usual paraphernalia of a saloon on his premises.¹⁵ Evidence, however, to show accused had a sign of an inn over his door is not admissible, for one may be an

¹¹ Commonwealth v. Dady, 7 Allen, 531; Commonwealth v. Tubbs, 1 Cush. 2; State v. Day, 37 Me. 244.

¹² Commonwealth v. Rumrill, 1 Gray, 388.

¹³ Commonwealth v. Mahony, 14 Gray, 46; Commonwealth v. Tubbs, 1 Cush. 2; Commonwealth v. Dady, 7 Allen, 531; State v. Hynes, 66 Me. 114; Commonwealth v. Cotter, 97 Mass. 336; Commonwealth v. Van Stone, 97 Mass. 548; Commonwealth v. Powderly,

148 Mass. 457; 19 N. E. 781.

¹⁴ Commonwealth v. Tubbs, 1 Cush. 2.

¹⁵ Commonwealth v. Lamere, 11 Gray, 319; Commonwealth v. Boyden, 14 Gray, 101; Commonwealth v. Whalen, 16 Gray, 23; Commonwealth v. Pierce, 107 Mass. 487; Commonwealth v. Colter, 97 Mass. 336; Commonwealth v. Van Stone, 97 Mass. 548; Commonwealth v. Webster, 6 Allen, 593; Commonwealth v. Munn, 14 Gray, 361; Commonwealth v. Tubbs, 1 Cush. 2.

innkeeper without being a common seller of liquor.¹⁶ In a prosecution for this offense such sales must be shown which the accused could not make without a license or proper authority.¹⁷ Of course, more than one sale must be shown, or such evidence must be produced as will show sales to such as apply for the liquor. The conditions of the place, as stated, may be shown, for it is not likely a person will fully equip a saloon without becoming a common seller of the liquors to such as apply to him for them. Statutes often provide that proof of certain facts shall be sufficient to show that the accused is a common seller. Thus, where one provided that proof of three sales should be *prima facie* evidence that the defendant was a common seller of liquors, it was held that the jury were required to convict upon proof of that number of sales within the time alleged;¹⁸ and these sales, if distinct and separate, may be made upon a single visit of the purchaser to the accused's place.¹⁹ Direct evidence of such sales, as in proof of any other sales, is not necessary, but may be shown by circumstantial evidence.²⁰ And where a statute in the same State provided that the delivery of liquor from any building other than a dwelling house should be *prima facie* evidence of a sale, this was held to apply to a charge of being a common seller, and, upon proof of three such deliveries, to raise the presumption that the accused was a common seller, upon which the jury must find him guilty unless other facts overturned the presumption.²¹

¹⁶ Commonwealth v. Madden, 1 Gray, 486.

¹⁷ Commonwealth v. Livermore, 2 Allen, 292.

¹⁸ Commonwealth v. Barker, 14 Gray, 412.

¹⁹ Commonwealth v. Graves, 97 Mass. 114. A case of purchase by a spy.

²⁰ Commonwealth v. Dady, 7 Allen, 531; Commonwealth v. Mahoney, 14 Gray, 46.

²¹ Commonwealth v. Pillsbury,

12 Gray, 127; Commonwealth v. Whalen, 16 Gray, 23; Commonwealth v. Kirk, 7 Gray, 496; Commonwealth v. Barker, 14 Gray, 412.

An advertisement in a newspaper, put there by the accused, notifying the public that he is engaged in the liquor business may be put in evidence, without showing that the accused wrote the advertisement. Commonwealth v. Hildreth, 11 Gray, 327.

Sec. 956. Exposing liquors.

Where the charge is an exposing and keeping of liquors for unlawful sale, proof of the keeping is sufficient to support the charge without proof of an exposing.²² An accused may be convicted of exposing liquors for sale on Sunday by proof of his admissions that he had in that respect violated the Sunday laws.²³ But proof that the accused was in his saloon on Sunday, the doors locked, three persons in the saloon, behind the bar the usual array of liquors in bottles, the accused behind the bar with his sleeves rolled up and an apron on, and two glasses on the bar containing liquor of some kind which were removed before the witness could reach them, does not show an exposure of liquor for sale.²⁴ In New Zealand it was held that if the slide of the bar of an hotel was up so that anyone looking into the bar could see what was in it, the contents of the bar was exposed, and if the circumstances were such as to lead to the conclusion that liquor could be had on paying for it, the liquor was exposed for sale.²⁵

Sec. 957. Keeping place for unlawful sale of liquors—Nuisance.

As pointed out in the section on keeping liquor for unlawful sale, there is a distinction between such an offense and the offense of keeping a place for unlawful sale of liquors, and this distinction must be constantly kept in mind. The distinction between keeping a place for unlawful sale of liquors and keeping a liquor nuisance is so thin that upon questions of evidence it may often be disregarded. These two offenses require proof of actual unlawful sale or sales or that the liquors were kept for unlawful sale, in a par-

²² Commonwealth v. Atkins, 136 Mass. 160; Commonwealth v. Tay, 146 Mass. 146; 15 N. E. 503; Commonwealth v. Henderson, 140 Mass. 303; 5 N. E. 832; Commonwealth v. Welch, 140 Mass. 372; 5 N. E. 166.

²³ Grimes v. Jersey City, 29 N. J. L. 320.

²⁴ People v. Owens, 148 N. Y. 648; 43 N. E. 71; affirming 91 Hun, 344; 36 N. Y. Supp. 755; City Council v. Talek, 3 Rich L. (S. C.) 299.

²⁵ *In re Biggins*, 19 N. Z. 630.

tiacular building—which is generally a sale without a license or permit—and mere proof of the establishment or maintenance of a building for that purpose and with the intent to so use them is not sufficient to justify a conviction.²⁶ Proof of a single illegal sale in the building is sufficient to show, under the usual statutes, that the place was kept for illegal sale or is a liquor nuisance,²⁷ but whether or not it is so is a question for the jury.²⁸ Proof of a maintenance even for a single day is sufficient to support the charge.²⁹ But actual sales need not be proven. Thus, the finding of liquor in a building not a dwelling house³⁰ and jugs and bottles and liquor glasses—even if found by means of a search warrant—in which are liquors, justifies a conviction.³¹ It may be shown that the accused kept liquor on the premises at a time when no claim is made that he kept it for an unlawful purpose.³² It is not sufficient, however, to prove the keeping of the place for the

²⁶ *State v. Harris*, 27 Iowa, 429; *Commonwealth v. Welsh*, 1 Allen, 1.

²⁷ *State v. Reyelts*, 74 Iowa, 499; 38 N. W. 377; *Commonwealth v. Greenan*, 11 Allen, 241; *Commonwealth v. Farrand*, 12 Gray, 177; *State v. Tierney*, 74 Iowa, 237; 37 N. W. 176. *Contra*, sale to minors when in company of two adults. *Commonwealth v. Hayes*, 150 Mass. 506; 23 N. E. 216.

²⁸ *Commonwealth v. Patterson*, 138 Mass. 498.

²⁹ *Commonwealth v. Higgins*, 16 Gray, 19; *Commonwealth v. Mitchell*, 115 Mass. 141. See *Reason v. Commonwealth*, 5 Ky. L. Rep. (abstract) 428.

³⁰ *State v. Norton*, 41 Iowa, 430; *State v. Farley*, 87 Iowa, 22; 53 N. W. 1089; *Commonwealth v. Boyle*, 145 Mass. 373; 14 N. E. 155.

³¹ *State v. Baskins*, 82 Iowa, 761; 48 N. W. 800; *State v. Fleming*, 86 Iowa, 294; 53 N. W. 234; *State v. Cleary*, 97 Iowa,

413; 66 N. W. 724; *Commonwealth v. Gaffey*, 122 Mass. 334; *Commonwealth v. McCloskey*, 123 Mass. 401; *State v. Illsley*, 87 Iowa, 49; 46 N. W. 977; *Commonwealth v. Kelley*, 152 Mass. 486; 25 N. E. 835; *Commonwealth v. Hughes*, 154 Mass. 298; 28 N. E. 1055; *Commonwealth v. Kohlmeier*, 124 Mass. 322; *Commonwealth v. Moore*, 147 Mass. 528; 18 N. E. 403; *Commonwealth v. Vahey*, 151 Mass. 57; 23 N. E. 659; *Commonwealth v. Lattinville* (Mass.), 25 N. E. 972; *State v. Fertig*, 70 Iowa, 272; 30 N. W. 633; *State v. Stoffels*, 89 Minn. 205; 94 N. W. 675; *State v. O'Connor*, 3 Kan. App. 594; 43 Pac. 859; *State v. Giroux*, 75 Kan. 695; 90 Pac. 249; *Commonwealth v. Doe*, 108 Mass. 418; *Commonwealth v. Glennan*, 116 Mass. 46.

³² *Commonwealth v. Carney*, 108 Mass. 417.

purpose of making illegal sales, without there be proof of an actual illegal keeping of liquors for sale.³³ In one case proof of keeping a grocery and of twice illegally selling liquor in an adjoining room was deemed sufficient to show a keeping of a tenement for illegal sales.³⁴ Where it was shown that accused kept a room for lawful business and that an elevator or dumb waiter ran from it to an upper room, wherein an officer found a quantity of liquor, it was held that this was sufficient evidence of a keeping of the first room for unlawful sales.³⁵ Sales in a duly licensed place on Sunday is sufficient to sustain a judgment that the accused kept the place for illegal sales.³⁶ Upon a charge of keeping a building upon a certain day and continuously until bringing the action, it is not necessary to prove that the entire building was kept for illegal sales,³⁷ nor that it was maintained during the entire period laid.³⁸ Proof of a sale by a charwoman or scrubwoman on Sunday is not sufficient, unless it be shown she was authorized to make the particular sale.³⁹ The proof must show that the place was kept for illegal sales at the time the action was brought, and it is not sufficient to show

³³ *Commonwealth v. Welsh*, 1 Allen, 1.

³⁴ *Commonwealth v. McArty*, 11 Gray, 456; *Commonwealth v. Far- rand*, 12 Gray, 177; *Commonwealth v. Ryan*, 136 Mass. 436; *Commonwealth v. Greness*, 11 Allen, 241; *Commonwealth v. Heywood*, 105 Mass. 187; *Commonwealth v. Everson*, 140 Mass. 292; 2 N. E. 839.

³⁵ *Commonwealth v. Kinsley*, 108 Mass. 24; *Commonwealth v. Connolly*, 108 Mass. 480; *Commonwealth v. Gaffey*, 122 Mass. 334; *Commonwealth v. Bulkley*, 147 Mass. 581; 18 N. E. 571; *Commonwealth v. Bryan*, 148 Mass. 455; 19 N. E. 555; *Commonwealth v. Kelley*, 152 Mass. 486; 25 N. E. 835.

³⁶ *Commonwealth v. McCurdy*, 109 Mass. 364.

³⁷ *Commonwealth v. Rooney*, 142 Mass. 474; 8 N. E. 411; *Commonwealth v. Bulkley*, 147 Mass. 581; 18 N. E. 571; *Commonwealth v. Godley*, 11 Gray, 454. But see *Commonwealth v. McCaughey*, 9 Gray, 296; *Commonwealth v. McArty*, 11 Gray, 456; *Commonwealth v. Hersey*, 144 Mass. 297; 11 N. E. 116; *Commonwealth v. Patterson*, 153 Mass. 5; 26 N. E. 136; *Commonwealth v. Lee*, 148 Mass. 8; 18 N. E. 586.

³⁸ *Commonwealth v. Mitchell*, 115 Mass. 141.

³⁹ *Commonwealth v. Hagan*, 152 Mass. 565; 26 N. E. 95; *Commonwealth v. Dunbar*, 9 Gray, 298. See *State v. Prater*, 59 S. C. 271; 37 S. E. 933.

that it was so kept in the past.⁴⁰ But it is not necessary for the prosecution to show the defendant's guilt "conclusively;" it is sufficient if it be shown beyond a reasonable doubt.⁴¹ It may be shown that persons had drunk liquor in the house, and that the accused had been seen in the several rooms of the house.⁴² So cards taken from the jugs of liquors, showing the kind of liquors they contained, and also the accused's name, are admissible.⁴³ And where the accused claimed he had sold out the place before the date of keeping laid in the indictment, evidence to show sales by him and his conduct about the premises, after the date fixed in the indictment, was held admissible as affecting his credibility as a witness.⁴⁴ Where a witness testified that he had often seen the accused in the barroom and almost every day around the door, he was permitted to say he had not seen him, during business hours, any other place.⁴⁵ Evidence is admissible to show accused's sign was upon the building,⁴⁶ but it is not admissible to show that prosecution had been commenced against another person for keeping the same place a short time before.⁴⁷ Where it is shown or admitted that the accused was the proprietor of a place and did "business thereat," it is evidence from which the jury may presume that the illegal sales made on the premises were made by the accused or with his consent.⁴⁸ So applications by the accused for a license and the license thereon are admissible to show his proprietorship of the premises and control of them.⁴⁹ A deed conveying the

⁴⁰ State v. Paige, 50 Vt. 445.

⁴¹ State v. Hoxsø, 15 R. I. 1; 22 Atl. 1059; 2 Am. St. 838.

⁴² Commonwealth v. Boyden, 14 Gray, 101; Commonwealth v. Stoehr, 109 Mass. 365; Commonwealth v. Dearborn, 109 Mass. 368; Commonwealth v. Haehr, 113 Mass. 207; Commonwealth v. McIvor, 117 Mass. 118; Commonwealth v. Mead, 153 Mass. 284; 26 N. E. 855.

⁴³ Commonwealth v. Stoehr, 109 Mass. 365.

⁴⁴ Commonwealth v. Mason, 116 Mass. 66.

⁴⁵ Commonwealth v. McIvor, 117 Mass. 118.

⁴⁶ Commonwealth v. Intoxicating Liquors, 122 Mass. 36.

⁴⁷ Commonwealth v. Brown, 136 Mass. 171.

⁴⁸ Commonwealth v. Chadwick, 142 Mass. 595; 8 N. E. 589.

⁴⁹ Commonwealth v. Andrews, 143 Mass. 23; 8 N. E. 643; Commonwealth v. Sullivan, 156 Mass. 229; 30 N. E. 1023.

premises to the accused is admissible, without specific testimony that the name of the grantee in it is the name of the accused, when they are identical, in connection with some evidence of his control of the premises, even though executed many years before.⁵⁰ As a rule, it is not admissible to show in defense that another was arrested for a violation of the liquor laws on the premises.⁵¹ So where the accused gave evidence that he had leased the premises to another, who held a license, it was held not admissible to show that he had been arrested a year before for keeping a disorderly house, unless a motive be first shown for making a pretended lease, as a practice to refuse licenses to such a person to the accused's knowledge, or a previous refusal of a license to him for that reason, or that he had reason to fear it would be refused him on that ground.⁵² It is always a question whether or not the accused is in the actual control of the place laid in the indictment, and any evidence throwing light upon that necessary fact is admissible. Thus, it is proper to show that the defendant's wife was on the premises where it is shown the liquor was sold.⁵³ And a witness who saw the accused upon the premises near the time of a sale may be asked "who assumed to be the proprietor and to control the premises,"⁵⁴ and his answer that the defendant had, based upon his sup-

⁵⁰ *Commonwealth v. Mead*, 153 Mass. 284; 26 N. E. 855. In many States identity of name is sufficient to secure the admission of the deed in evidence.

But a receipt for the rent given a third party, one pretending to be the owner, and who is beyond the State, is not admissible to show that the person to whom it was given was the keeper of the premises, and not the defendant. *Commonwealth v. Tobin*, 160 Mass. 156; 35 N. E. 454.

⁵¹ *Commonwealth v. Hughes*, 165 Mass. 7; 42 N. E. 121; *People v. Bradt*, 45 Hun, 445; 10 N. Y.

Supp. 157; 7 N. Y. Cr. Rep. 444.

⁵² *People v. Bradt*, *supra*.

⁵³ *Commonwealth v. Hogan*, 11 Gray, 315; *Commonwealth v. Stoebr*, 109 Mass. 365; *Commonwealth v. Dearborn*, 109 Mass. 368; *Commonwealth v. Clymer*, 150 Mass. 71; 22 N. E. 436; *Commonwealth v. Sisson*, 126 Mass. 48; *Commonwealth v. Mead*, 153 Mass. 284; 26 N. E. 855.

⁵⁴ *State v. Cook*, 30 Kan. 82; 1 Pac. 32; *State v. Arnold*, 98 Iowa, 253; 67 N. W. 252; *Commonwealth v. Fisher*, 138 Mass. 504.

But the accused cannot show

position that such was the case from the fact that the defendant kept his horses in the barn, where the liquor was sold, and had control of the hotel on the same premises, is not objectionable.⁵⁵ Proof of sales of liquors is always admissible,⁵⁶ even of sales in the absence of the accused, if there be evidence that he knew of them or the inference may be reasonably drawn that he knew they were being made.⁵⁷ Evidence of a prior conviction of the maintenance of the same place for illegal sales is admissible when in connection with other evidence showing the place is run as before.⁵⁸ Witnesses may testify they had heard liquor called for in the place and saw a delivery made pursuant to the call.⁵⁹ The accused's business card may be put in evidence, if properly identified.⁶⁰ Testimony of a witness that accused kept the saloon in question and that he knew him, tends to identify him as the proprietor of the saloon.⁶¹ Proof of acts of others on the premises with the apparent purpose of concealing liquors from police officers are admissible, because they furnish some reason to infer that they were acting in defendant's interests, under his employment. This is especially true if it be shown such others subsequently were with the accused when he applied for a license to keep the premises.⁶² And where the accused's premises were connected with his mother's

that a person he claims was the proprietor attempted to employ a third person as a bartender. *State v. Bane*, 1 Kan. App. 537; 42 Pac. 376; nor can it be shown that the accused had on his building an innkeeper's sign. *Commonwealth v. Madden*, 1 Gray, 486.

⁵⁵ *State v. Arnold*, 98 Iowa, 253; 67 N. W. 252.

⁵⁶ *State v. Oder*, 92 Iowa, 767; 61 N. W. 190; *State v. Reno*, 41 Kan. 674; 21 Pac. 803; *State v. Dugan*, 52 Kan. 23; 34 Pac. 409.

⁵⁷ *State v. Oder*, 92 Iowa, 767; 61 N. W. 190.

In one instance a man was seen coming from the suspected place

with a pitcher and glasses in his hand, and on being asked if he had water, said he had something better. This statement was put in evidence, though made out of the presence of the accused. *Commonwealth v. Gaffey*, 122 Mass. 334.

⁵⁸ *Commonwealth v. Line*, 149 Mass. 65; 20 N. E. 697.

⁵⁹ *Commonwealth v. Aaron*, 114 Mass. 255.

⁶⁰ *Commonwealth v. Twombly*, 119 Mass. 104.

⁶¹ *People v. Blake*, 52 Mich. 566; 18 N. W. 360.

⁶² *Commonwealth v. Sullivan*, 156 Mass. 229; 30 N. E. 1023.

where she lived alone, and which could only be reached from defendant's premises by passing through his own dwelling house, it was held admissible to show that under such a search warrant only half a bottle of liquor was found on his premises, and that under another search warrant two cases of beer and a bottle of whisky were found on her premises, although the liquor thus found on the mother's premises was returned to her.⁶³ So the situation of another tenement, occupied by the accused, may be shown to be such in connection to the one in which it is claimed the liquor was kept, that the use made of it was evidence that the latter was kept for the illegal sales.⁶⁴

Sec. 958. Liquor nuisance.

As pointed out in another section, there is not much difference between keeping a place for the illegal sale of liquor and the keeping of a liquor nuisance. A charge of the main-

⁶³ Commonwealth v. McCullow, 140 Mass. 370.

⁶⁴ Commonwealth v. Wallace, 143 Mass. 88; 9 N. E. 5.

An officer may testify what he found upon the premises searched. Commonwealth v. McCue, 121 Mass. 358.

The circumstances of the discovery of liquor on the premises may be shown. Commonwealth v. Locke, 145 Mass. 401; 14 N. E. 621.

The accused cannot show that he was ignorant that the doing or not doing of a certain thing made a difference in law. Commonwealth v. Everson, 140 Mass. 292; 2 N. E. 839.

Upon evidence tending to show that the accused was a barkeeper, and that in the absence of his master he made illegal sales, he may be convicted of maintenance of the place as a nuisance. Common-

wealth v. Brady, 147 Mass. 683; 18 N. E. 568.

Attempts of the defendant's servants to conceal the liquor which is on the premises may be shown. Commonwealth v. Locke, 145 Mass. 401; 14 N. E. 621.

It cannot be shown that the accused had been intoxicated at different times. People v. Converse (Mich.), 121 N. W. 475.

Evidence of sales not proved before the grand jury may be given by the prosecution. Commonwealth v. Edds, 14 Gray, 406; Commonwealth v. Phelps, 11 Gray, 73.

An affidavit made by an accused several weeks after the date when it is alleged he kept the place, to the effect that he owned the place at the time he made it, has been held admissible to show control and ownership. Commonwealth v. McCue, 121 Mass. 358.

tenance of a liquor nuisance can be shown by proof of unlawful sales of liquor in the place described in the indictment.⁶⁵ As the decree abating the nuisance must apply to the place laid in the indictment, it follows that the evidence must point out with certainty that place, but it is not necessary to show that the entire building was used for the purposes of illegal handling of liquor. Thus, where one room of a house was situated beyond the jurisdiction of the court, that fact was held not to prevent the court reaching with its decree a single room in the house within its jurisdiction, though it was charged that the entire house was a nuisance.⁶⁶ So where the charge was that accused kept "a building in north side of Main Street next door west from Chamber's store," in a particular city, proof that the place was in that street, but "next door west of Chamberlain's store," was held not a fatal variance.⁶⁷ Proof of a gift of liquor at the house of one P, where defendant lived, was held to support a charge that he maintained a liquor nuisance "at his residence."⁶⁸ But on a charge of maintaining a nuisance in a certain frame building on lots described, evidence may not be given that a nuisance was also maintained in another building on the same lots.⁶⁹ In order to show the character of the place and the

⁶⁵ *Commonwealth v. Farrand*, 12 Gray, 177. But not by showing the accused kept a saloon when a saloon may be lawfully kept. *Sopher v. State*, 169 Ind. 177; 81 N. E. 913. But statutes make, often, the mere finding of liquor in the accused's possession sufficient evidence of keeping a nuisance. *State v. Giroux*, 75 Kan. 695; 90 Pac. 249.

⁶⁶ *Commonwealth v. Hersey*, 144 Mass. 297; 11 N. E. 116.

⁶⁷ *State v. Verden*, 24 Iowa, 126.

⁶⁸ *State v. Marchbanks*, 61 S. C. 17; 39 S. E. 187.

⁶⁹ *State v. Poul*, 14 N. D. 557; 105 N. W. 717. To permit the admission of such evidence would be

to try the accused for the maintenance of two nuisances on one charge.

It need not be shown that the place was used for illegal purposes during the entire period named in the indictment; but proof that it was kept for the purpose of a sale or gift during any part of the time within the days named in the indictment is sufficient. *State v. Kapiesky* (Me.), 73 Atl. 830.

A barkeeper may be convicted of maintaining a nuisance in the absence of his employer, by showing he made illegal sales. *Commonwealth v. Brady*, 147 Mass. 683; 18 N. E. 568.

kind of business carried on in it, proof of intoxicated persons having been seen to come from it is admissible.⁷⁰ Where a statute provided that the notorious character of the premises might be proven to show that the place is a nuisance, witnesses may testify concerning its reputation as a place where liquors can be obtained, and even give the conversation of persons concerning the premises;⁷¹ but unless such a statute is in force the general reputation of the place cannot be shown.⁷² If a keeping be shown only once that will justify a finding that the place is a liquor nuisance.⁷³ Under an Iowa statute it was held that proof of an intention to use the premises as a liquor nuisance need not be made, and it was error to instruct the jury that such proof must be put in by the prosecution.⁷⁴ It is not necessary always to charge that a sale was made to a particular person, so that a person testifying that he purchased liquor as charged in one count of an indictment may testify that he purchased liquor at another time, where a second count charges that a sale was made or liquor kept for sale.⁷⁵ Of course, the liquor must be shown to be an intoxicating liquor.⁷⁶ Proof of a sale on Sunday cannot be objected to on the ground that it will subject the accused to double punishment.⁷⁷ A statement of the accused

When leading questions not erroneous. *Commonwealth v. Chaney*, 148 Mass. 6; 18 N. E. 572.

⁷⁰ *Commonwealth v. Meaney*, 151 Mass. 55; 23 N. E. 730; *Commonwealth v. Gay*, 153 Mass. 211; 26 N. E. 571; *State v. Marchbanks*, 61 S. C. 17; 39 S. E. 187.

⁷¹ *State v. Wilson*, 15 R. I. 180; 1 Atl. 415. See *State v. Kingston*, 5 R. I. 297; *State v. Spaulding*, 61 Vt. 505; 17 Atl. 844; *State v. Christian* (Mo. App.), 114 S. W. 549.

⁷² *Commonwealth v. Eagan*, 151 Mass. 45; 23 N. E. 494.

But where the Legislature declares a house in which liquors are sold or kept for illegal sale, a disor-

derly house, its general reputation may be put in evidence. *Joliff v. State*, 53 Tex. Cr. App. 61; 109 S. W. 176. So it may be to bring knowledge home to the owner who is charged with permitting his house to be run as a nuisance. *State v. Brooks*, 74 Kan. 175; 85 Pac. 1013.

⁷³ *Commonwealth v. Kerrissey*, 141 Mass. 110; 4 N. E. 820; *State v. Kapiscky* (Me.), 73 Atl. 830.

⁷⁴ *State v. Harris*, 27 Iowa, 429.

⁷⁵ *State v. Robinson*, 61 S. C. 106; 39 S. E. 247.

⁷⁶ *Florence v. Berry*, 61 S. C. 237; 39 S. E. 389.

⁷⁷ *State v. Moorhead*, 22 R. I. 272; 47 Atl. 545.

that he kept a "blind tiger" may be admitted,⁷⁸ and the prosecution may ask the accused on cross-examination if he had a Government license, as an affirmative answer would be evidence that he may have intoxicating liquor in his possession.⁷⁹ Evidence given under a count of charging a sale may be considered under a count charging the maintenance of a nuisance, embraced in the same indictment.⁸⁰ Evidence to show United States revenue stamps on kegs found on the premises is admissible to show that the kegs contained malt liquors.⁸¹ So a witness may testify he furnished a person money to buy liquor, who then went into the accused's house and soon returned with liquor.⁸² Bottles, jugs, kegs, barrels, glasses and liquors seized under a search warrant may be put in evidence as bearing on the question even though the search warrant be illegal.⁸³ Evidence that the accused several years

⁷⁸ *Rush v. Commonwealth* (Ky.), 47 S. W. 586; 20 Ky. L. Rep. 775.

⁷⁹ *Throckmorton v. Commonwealth* (Ky.), 49 S. W. 474; 20 Ky. L. Rep. 1508.

⁸⁰ *State v. Otten*, 10 Kan. App. 351; 59 Pac. 380; 60 Pac. 1132; *Commonwealth v. Maloney*, 16 Gray, 20.

⁸¹ *State v. Wright*, 68 N. H. 351; 44 Atl. 519.

⁸² *State v. O'Malley*, 132 Iowa, 696; 109 N. W. 491.

On a charge of keeping a disorderly house, the evidence must show that the accused's place became a place of common resort, where customers were furnished liquors by him, and became intoxicated. *State v. Rairort*, 64 N. J. 412; 45 Atl. 786.

Where the evidence showed that the city marshal, "by request" of the accused, visited his place of business, it was held error for the State's counsel to argue that

this evidence showed complaints had been made concerning the character of the establishment. *State v. Foley*, 45 N. H. 466.

⁸³ *State v. O'Connor*, 3 Kan. App. 594; 43 Pac. 859; *State v. Wright*, 98 Iowa, 702; 68 N. W. 440. But the warrant itself is not when not connected with the evidence of finding the articles. *McCade v. State* (Neb.), 122 Pac. 893.

Proof of an actual sale is not necessary to find that a place is a liquor nuisance. *State v. Lord*, 8 Kan. App. 257; 55 Pac. 503.

Efforts on the part of the accused's wife made on the premises to destroy liquor may be shown. *Commonwealth v. Downey*, 148 Mass. 14; 18 N. E. 584.

Statements of men on the premises that they had bought beer which they then held in their hands, made in the presence of the accused on the premises, although they did not say they had bought

prior to the time it is charged the nuisance was maintained permitted disorderly persons to gather on his premises may not be received;⁸⁴ nor, on a charge of a sale, may evidence be received concerning the condition of the place several days after the proceedings were begun.⁸⁵ Bills and accounts in the accused's name for liquor found on the premises are admissible to show the character of the business there carried on.⁸⁶ It cannot be shown that the accused at times other than those charged refused to sell liquors.⁸⁷

Sec. 959. Local option—Proof of adoption.

The usual local option statutes present two phases of the question whether the law is in force in a particular district, so far as the question of evidence is concerned. Thus, statutes in some States expressly require the courts, in a prosecution for a violation of the liquor laws, to take judicial notice whether the law has been put in force by an election, in which cases it is not necessary to either allege or prove that it is in force,⁸⁸ while in other States it must be specifically alleged and proven that it has been duly adopted, and each successive step necessary to secure its adoption must be

it of him, are admissible. *Commonwealth v. McCable*, 163 Mass. 98; 39 N. E. 777.

⁸⁴ *State v. Engleman*, 66 Kan. 340; 71 Pac. 859.

⁸⁵ *Topeka v. Chesney*, 66 Kan. 480; 71 Pac. 843.

⁸⁶ *State v. Corn*, 76 Kan. 416; 91 Pac. 1067.

On a trial for keeping a "blind tiger," testimony that a person could go to any closet or cupboard in the community and obtain liquor is not admissible, in the absence of evidence connecting the accused with such liquor. *Gorman v. State*, 52 Tex. Cr. App. 24; 105 S. W. 200.

⁸⁷ *State v. Linder*, 76 Ohio St. 463; 81 N. E. 753.

A sham lease is no defense to the person who made it. *Commonwealth v. Locke*, 148 Mass. 125; 19 N. E. 24.

Proof of illegal sales on two different days does not necessarily show the element of a continuing use of the tenement for an illegal purpose, though the jury may draw that conclusion from such proof. *Commonwealth v. McNeff*, 145 Mass. 406; 14 N. E. 616.

⁸⁸ *Rauch v. Commonwealth*, 78 Pa. St. 490; *Coombs v. State*, 81 Ga. 780; 8 S. E. 318; *Young v. Commonwealth*, 14 Bush, 161. The court may charge the jury it is in force. *State v. O'Brien*, 35 Mont. 482; 90 Pac. 514.

proven,⁸⁹ unless a statute makes the declaration of the election board, or court selected for that purpose, sufficient evidence of its adoption.⁹⁰ Where the court takes judicial notice when the law was adopted, the judge may read the minutes of the tribunal showing its adoption and inform the jury when the law went into force.⁹¹ But where the declaration of adoption is made *prima facie* evidence of the fact that the law is in force, the defendant may show that it was never duly adopted, as, that it did not receive the requisite number of votes.⁹² As a rule, where the State must show the adoption of the law, the evidence must be incorporated in the transcript on appeal or the case will be reversed.⁹³ As the adoption of the law is made a matter of record, proof of its adoption must be made by such record, either by the introduction in evidence of the original records or certified copies of them.⁹⁴ The

⁸⁹ Bryant v. State, 65 Miss. 435; 4 So. 343; Donaldson v. State, 15 Tex. App. 25; Butler v. State, 25 Fla. 347; 6 So. 67; Heney v. State (Tex.), 16 S. W. 342; Carnes v. State, 23 Tex. App. 449; 5 S. W. 133; Crowder v. State (Tex. Cr. App.), 49 S. W. 375. Upon such proof the court may say it is in force. Teague v. State, 51 Tex. Cr. App. 526, 529; 102 S. W. 1141, 1144; Byrd v. State, 51 Tex. Cr. App. 539; 103 S. W. 863; Crigler v. Commonwealth (Ky.), 83 S. W. 587; Gue v. Eugene (Ore.), 100 Pac. 254; Dills v. State (Tex.), 117 S. W. 835.

⁹⁰ Neighbors v. Commonwealth (Ky.), 9 S. W. 718.

The fact that the judge trying the case had been a party to a contest of election for the adoption of local option does not disqualify him to sit as judge. Truesdell v. State, 42 Tex. Cr. App. 544; 61 S. W. 935.

⁹¹ Coombs v. State, 81 Ga. 780; 8 S. E. 318.

⁹² Neighbors v. Commonwealth

(Ky.), 9 S. W. 718; Lively v. State (Tex. Cr. App.), 73 S. W. 1048 (injunction restraining the publication of the result of the election); Keller v. State, 46 Tex. Cr. App. 588; 81 S. W. 1214; Truesdell v. State, 42 Tex. Cr. App. 544; 61 S. W. 935; Bowman v. State, 38 Tex. Cr. App. 14; 40 S. W. 796; 41 S. W. 635; Fitze v. State (Tex. Cr. App.), 85 S. W. 1156; State v. Kline (Tex. Cr. App.), 93 Pac. 237; Blackwell v. Commonwealth (Ky.), 54 S. W. 843 (petition not sufficiently signed). *Contra*, Young v. Commonwealth, 14 Bush, 161.

⁹³ Carnes v. State, 18 Tex. App. 375. But the accused may admit it is in force, and thereby waive proof of its adoption. Starnes v. State (Tex. Cr. App.), 107 S. W. 555; Parker v. State, 39 Tex. Cr. App. 262; 45 S. W. 812.

⁹⁴ Carnes v. State, 23 Tex. App. 449; 5 S. W. 133; Gable v. State, 42 Tex. Cr. App. 501; 60 S. W. 968 (slight variance is immaterial).

State has the burden to show that the offense was committed within the district that has adopted the law, and the proper record of its metes and bounds is admissible to show the boundaries of the district.⁹⁵ If the law has been twice adopted, and both adoptions cover the time of the offense, then the conviction may be had upon proof of the adoption at either time.⁹⁶ Usually courts will not take judicial knowledge that local option has been adopted in a particular district or political division of the State. That is a question for proof.⁹⁷ But a statute may be broad enough to require the court to take judicial notice of the proclamation bringing the statute into force in a particular district,⁹⁸ or even of the result of the balloting.⁹⁹ And although a statute may require that a record or certificate be made of the publication of the

⁹⁵ *Lively v. State* (Tex. Cr. App.), 73 S. W. 1048; *Casey v. State* (Tex. Cr. App.), 59 S. W. 884; *Matkins v. State* (Tex. Cr. App.), 62 S. W. 911; *Crowder v. State* (Tex. Cr. App.), 49 S. W. 375.

⁹⁶ *Tippett v. State*, 53 Tex. Cr. App. 180; 109 S. W. 161. See *Ladwig v. State*, 40 Tex. Cr. App. 585; *Thornton Intoxicants Barney* 349 51 S. W. 390; and also *Stephens v. State*, 50 Tex. Cr. App. 251; 96 S. W. 7.

In some States statutes forbid the impeachment of election proceedings; in which case evidence of irregularities are not admissible. *State v. O'Brien*, 35 Mont. 482; 90 Pac. 514.

In reading from the original record of the proceedings for adoption of local option, it is not error to read other proceedings in the record intermixed with the former proceedings. *Coleman v. State*, 53 Tex. Cr. App. 578; 111 S. W. 1011.

Preamed proceedings of county commissioners were regular, and

special sessions properly held. *Ladwig v. State*, 40 Tex. Cr. App. 585; 51 S. W. 390; *Douglass v. State*, 21 Ind. App. 302; 52 N. E. 238; *Bowman v. State*, 38 Tex. Cr. Rep. 14; 40 S. W. 796; 41 S. W. 635.

Where it is necessary to prove the law has been adopted, it is a question for the jury to determine whether it has been adopted. *Savage v. State* (Tex. Cr. App.), 88 S. W. 351.

⁹⁷ *Regina v. Bennett*, 1 Ont. 445; *Regina v. Walsh*, 2 Ont. 206; *Regina v. Elliott*, 12 Ont. 524; *Ex parte White*, 20 N. B. 552; *Mathieu v. Wentworth* [1895], 4 Quebec Q. B. 343; *Regina v. Cameron*, 12 Ont. 524; *State v. O'Brien*, 35 Mont. 482; 90 Pac. 514; *Green v. State*, 53 Tex. Cr. App. 466; 110 S. W. 919; *Commonwealth v. Adair*, 6 Ky. L. Rep. (abstract) 306.

⁹⁸ *Ex parte Phillips*, 26 N. B. 397; *Ex parte Doherty*, 27 N. B. 292.

⁹⁹ *Hall v. South Norfolk*, 8 Manitoba, 430.

order declaring prohibition in force, yet that is not the only way in which the adoption may be proven. Thus, the newspapers in which the notice was published may be produced and put in evidence to prove the fact of publication.¹ But where the only evidence was the testimony of the publisher that he had published the notice as required by law, and the order of the court declaring the result and prohibiting sales of liquor in the district, and there was no certificate of publication of the judge as the statute required, it was held that there was no showing that the law was in force.² In the State where this decision was rendered it is held that the State makes a *prima facie* case by proving the order for the election, the order of declaration of the result and prohibiting the sale, the publication of such order, and a sale within the district.³ This declaration and order of the court and the judge's certificate of the publication are admissible in evidence.⁴ The order for the election raises the presumption that all the steps necessary to give validity to the proceedings have been complied with, and it is not necessary to put in evidence the petition for an election.⁵ Where the copy of the order put in

¹ *Armstrong v. State* (Tex. Cr. App.), 47 S. W. 1006; *Crouse v. State*, 57 Md. 327.

² *Aston v. State* (Tex. Cr. App.), 49 S. W. 393.

³ *Morton v. State*, 37 Tex. Cr. App. 131; 38 S. W. 1019; *Bennett v. Commonwealth*, 11 Ky. L. Rep. (abstract) 370.

⁴ *Wright v. State*, 37 Tex. Cr. App. 3; 38 S. W. 811; *Beaty v. State*, 53 Tex. Cr. App. 432; 110 S. W. 449; *Fields v. State*, 52 Tex. Cr. App. 451; 107 S. W. 857; *State v. Kline* (Ore.), 93 Pac. 237.

⁵ *Wright v. State*, 37 Tex. Cr. App. 3; 35 S. W. 150; 38 S. W. 811; *Morton v. State*, 37 Tex. Cr. App. 131; 38 S. W. 1019; *Barton v. State*, 43 Fla. 477; 31 So. 361; *Johnson v. State*, 52 Tex. Cr.

App. 624; 108 S. W. 683; *State v. Melton*, 130 Mo. App. 262; 109 S. W. 858; *McCrory v. Commonwealth*, 8 Ky. L. Rep. (abstract) 437; *Harryman v. State*, 53 Tex. Cr. App. 474; 110 S. W. 926; *Commonwealth v. Anderson*, 10 Ky. L. Rep. 307; *Carnes v. State* (Tex. Cr. App.), 110 S. W. 928; *Efird v. State*, 44 Tex. Cr. App. 447; 71 S. W. 957; *Cantwell v. State*, 47 Tex. Cr. App. 521; 85 S. W. 18; *Holley v. State*, 46 Tex. Cr. App. 324; 81 S. W. 957; *Young v. Commonwealth*, 14 Bush 161; *Nelson v. State* (Tex. Cr. App.), 75 S. W. 502; *Skipwith v. State* (Tex. Cr. App.), 68 S. W. 278; *State v. Carmody*, 50 Ore. 1; 91 Pac. 446, 1081; *State v. O'Brien*, 35 Mont. 482; 90 Pac. 514.

evidence did not show in what court it was entered, but the clerk of the county court testified it was from the records of that court, that was held sufficient to show it was an order of that court.⁶ The original minutes are admissible in evidence, and it is not necessary to produce certified copies of them.⁷ The Legislature may determine what shall be sufficient proof, *prima facie* or conclusive.⁸ Where the poll list and return showed an election was held in election precinct No. 1, but the order was for an election in justice's precinct No. 1, the officer's return thoroughly identifying the election as held in the latter precinct was held admissible.⁹ In New York the certificate of the town clerk attached to a copy of the result of the election, with details taken by him from the returns filed with him, are held sufficient, though the result has never been determined by the town board, and the county treasurer is bound thereby.¹⁰ In New Brunswick it is held that a statute reciting that an order in council had been made bringing the local option act into force in a county was not evidence it was in force there.¹¹ The presumption in some States is raised by statute that the order of the result of the election was rightfully entered, and the burden to show that it was not is upon the party attacking it.¹² The fact that the

⁶ *Blackwell v. Commonwealth* (Ky.), 54 S. W. 843; 21 Ky. L. 1240.

⁷ *Holley v. State*, 46 Tex. Cr. App. 324; 81 S. W. 957.

Evidence of injunction proceedings to prevent putting the law into force is not admissible for the defense. *Keller v. State*, 46 Tex. Cr. App. 588; 81 S. W. 1214.

⁸ *Lloyd v. Dollison*, 23 Ohio Cr. Ct. 571; *Allen v. State* (Tex. Cr. App.), 59 S. W. 264.

⁹ *Nelson v. State* (Tex. Cr. App.), 75 S. W. 502.

¹⁰ *People v. Adair*, 44 N. Y. Misc. Rep. 444; 89 N. Y. Supp. 376; *People v. Foster*, 27 N. Y.

Misc. Rep. 576; 58 N. Y. Supp. 574.

¹¹ *Ex parte Mercer*, 25 N. B. 517.

In New York it is held that the holding of a local option election is a matter of such notoriety that the county treasurer may take notice of it and refuse to issue tax certificates in order that the applicant may secure a license. *People v. Foster*, 27 N. Y. Misc. Rep. 576; 58 N. Y. Supp. 574; *People v. Hamilton*, 27 N. Y. Misc. Rep. 360; 58 N. Y. Supp. 959.

¹² *Bowman v. State*, 38 Tex. Cr. App. 14; 40 S. W. 796; 41 S. W. 635; *Allen v. State* (Tex. Cr. App.), 59 S. W. 264.

judge's certificate as to publication of the order does not give the dates of the publication is immaterial if he certifies that the publication was made "for the time and in the manner required by law."¹³ Nor is it immaterial that it was not made when the result of the election was ascertained, but some time after, and on the evening before it is sought to be put in evidence.¹⁴ If the entry certifying to the publication has been made and entered of record, then oral evidence of the publication cannot be given, nor can oral evidence be given until it is shown that such an entry has not been made.¹⁵ The entry is admissible in evidence though made by the judge upon the testimony of his predecessor in office and upon that of the publisher, a year or longer after publication.¹⁶ But if a statute makes no provision for recording notice of publication, the fact that a record was made will not entitle it to admission in evidence.¹⁷ If a proper certificate of publication of the order putting the law in force be shown, it is not necessary for the State to show that notices for an election were given, for that will be presumed.¹⁸ The fact that the order embraced improper matters will not be sufficient to exclude its introduction in evidence.¹⁹ If the accused claims the election was invalid because held within a period during which it could not be held because of a prior election, he must show that fact if he wishes to avail himself of it;²⁰ and if it be shown there was such an election he must show it was a valid

¹³ *Harryman v. State* (Tex. Cr. App.), 110 S. W. 926; *Carnes v. State* (Tex. Cr. App.), 110 S. W. 928. Sufficient publication. *People v. Whitney*, 105 Mich. 622; 63 N. W. 765.

¹⁴ *Casey v. State* (Tex. Cr. App.), 59 S. W. 884.

¹⁵ *Armstrong v. State* (Tex. Cr. App.), 47 S. W. 981. *Contra*, *Gorman v. State*, 52 Tex. Cr. App. 327; 106 S. W. 384.

¹⁶ *Barham v. State* (Tex. Cr. App.), 53 S. W. 109.

[Citing *Crockett v. State* (Tex. Cr. App.), 49 S. W. 392; *Love-*

less v. State, *Id.* 892; *Ex parte Burge*, 32 Tex. Cr. R. 459; 24 S. W. 289; *Dreschsel v. State*, 35 Tex. Cr. R. 579; 34 S. W. 932.]

¹⁷ *Toole v. State*, 88 Ala. 158; 7 So. 42.

¹⁸ *Neal v. State*, 51 Tex. Cr. App. 513; 102 S. W. 1139; *Huff v. State* (Tex. Cr. App.), 102 S. W. 1144; *State v. Carmody*, 50 Ore. 1; 91 Pac. 446; 91 Pac. 1081.

¹⁹ *Neal v. State*, *supra*; *Huff v. State*, *supra*.

²⁰ *Holland v. State*, 51 Tex. Cr. App. 147, 157; 101 S. W. 1002, 1004.

election, for it will be presumed such prior election was invalid.²¹ If there be a paper designated in the order for the publication of notice, and it is the duty of the judge to select a paper, it will be presumed he made the selection.²² The adoption is sufficiently proved by the introduction of a county court record showing that the clerk and two judges cast up the votes, reported the result to the court which showed a majority against the sale, and an order for publication, followed by a certified copy of the affidavit of the publisher of a newspaper showing its publication.²³ Where a statute made no provision for the entering the fact of publication upon record, nor the publication itself, and the record disclosed that the notices were ordered published, it was held that it would be presumed notice by publication of the adoption had been duly given, and it was not necessary for the State to prove it, the burden being on the defendant to show it was not published if he desired to avail himself of the omission.²⁴ Where the record failed to disclose that the county clerk called to his assistance two county judges to assist in canvassing the election returns, it was held sufficient to show that he did so by his oral testimony.²⁵ Whether local

²¹ *Holland v. State, supra.*

²² *Holland v. State, supra.*

²³ *State v. O'Brien*, 35 Mont. 482; 90 Pac. 514; *State v. Hitchcock*, 124 Mo. App. 101; 101 S. W. 117; *State v. Swearingen*, 128 Mo. App. 605; 107 S. W. 1.

²⁴ *State v. Oliphant*, 128 Mo. App. 252; 107 S. W. 32; *State v. Haines* (Mo. App.), 107 S. W. 36.

²⁵ *State v. Swearingen*, 128 Mo. App. 605; 107 S. W. 1.

Unnecessary recitals will not vitiate the certificate of publication. *Walker v. State*, 52 Tex. Cr. App. 293; 106 S. W. 376.

Where the county judge should have made the publication, an allegation in an indictment that

"the commissioners' court of said county did pass and publish an order declaring the result of said election and prohibiting the sale of intoxicating liquors," was held not sufficient to withstand a motion to quash. *Smitham v. State*, 53 Tex. Cr. App. 173; 108 S. W. 1183.

In Arkansas the election returns are forwarded to the county election commissioners, who lay them before the county court at its next term; and this court determines whether a majority of the voters were for licensing the sale of liquors, and if so issues licenses accordingly. It was held that the issuance of a license raised a presumption that the

option has been adopted is a question for the jury trying the case.²⁶ But in Texas, where the certificate of the court in evidence shows that the local option law has been put in force, the court may inform the jury that it is in force.²⁷ Still if there be doubt whether the order was properly published, the court may not charge the jury the law was in force, but must leave that question for it to decide.²⁸ Where a statute provided that it should "be competent to introduce the record, or a transcript thereof, of the preamble and resolution of the board of supervisors, and such record and transcript should be evidence that the provisions of this act are in full force within such county," and the statute required that the preamble to the resolution of the board prohibiting the sale of liquors in the territory should set forth the fact that the election had been duly called and held in the county, with the result of the election, it was held that a resolution without such a preamble was not sufficient to show that the statute was in force in such county.²⁹ But under such statute it was also held that it was not necessary to prove a promulgation of such a preamble and the adoption of such resolution.³⁰ And where the statute provided that the regularity of the proceedings prior to the adoption of the prohibitory resolution should not be open to question, it was held that the introduction in evidence of the preamble and prohibitory resolution was sufficient evidence of the existence of prohibition in the county, and proceedings prior thereto need not be put in evidence.³¹ If the statute makes the report of the election

court found there was a majority in favor of licenses. *State v. Sanger*, 76 Ark. 169; 88 S. W. 903.

²⁶ *State v. Brown*, 130 Mo. App. 214; 109 S. W. 99; *Jones v. State*, 38 Tex. Cr. App. 533; 43 S. W. 981.

²⁷ *Sebastian v. State*, 44 Tex. Cr. App. 508; 72 S. W. 849; *Nelson v. State* (Tex. Cr. App.), 75 S. W. 502; *Johnson v. State*, 52 Tex. Cr. App. 624; 108 S. W. 683; *Wright v. State*, 37 Tex. Cr.

Rep. 3; 35 S. W. 150, 38 S. W. 811; *Shields v. State*, 38 Tex. Cr. Rep. 252; 42 S. W. 398.

²⁸ *Jones v. State*, 38 Tex. Cr. App. 533; 43 S. W. 981.

²⁹ *People v. Murphy*, 93 Mich. 41; 52 N. W. 1042.

³⁰ *People v. Adams*, 95 Mich. 541; 55 N. W. 461

³¹ *People v. Whitney*, 105 Mich. 622; 63 N. W. 765. See also *Neighbors v. Commonwealth*, 9 S. W. 718; 10 Ky. L. Rep. 594.

commissioners conclusive of the fact of adoption, then no proceedings prior thereto can be attacked.³² A record is not defective because it does not show that proof of the notice of the election was presented to the court, nor even that the publication was made.³³ The deputy of the officer whose duty it is to keep the record and make certified copies of it may certify to the result of the election.³⁴ A recital in the record that a petition for a local option election had been presented with the requisite number of signers—over one-tenth of the qualified voters of the district in this instance—that is sufficient proof that a sufficient number of voters signed the petition.³⁵ It is not necessary that the minutes of the court declaring the result of the election be signed by the judge of the court to entitle them to put them in evidence.³⁶ The fact that the county commissioners made the order for the election and also another declaring the result while sitting as a board of equalization, or at a time when by statute they are required to sit, does not render their actions in local option proceedings void.³⁷ An order is valid which selects the places for holding the election as the regular voting places in the territory and the election officers as its regular election officers.³⁸ A record is not defective because it does not disclose how the board or court ascertained the petition was signed by qualified voters.³⁹

³² *Conrad v. State*, 70 Miss. 733; 12 So. 851.

³³ *State v. Hutton*, 39 Mo. App. 410.

³⁴ *In re Rothwell*, 44 Mo. App. 215.

In Missouri it is held that evidence of the result of the election is the clerk's certificate filed with the county records. *In re Rothwell*, 44 Mo. App. 215; *State v. Searcy*, 46 Mo. App. 421; *State v. Searcy*, 111 Mo. 236; 20 S. W. 186, 240; *State v. Mackin*, 51 Mo. App. 299.

³⁵ *State v. Dugan*, 110 Mo. 138; 19 S. W. 195.

³⁶ *Wright v. State*, 36 Tex. Cr. App. 35; 35 S. W. 287.

³⁷ *Abbott v. State*, 42 Tex. Cr. App. 8; 57 S. W. 97.

³⁸ *Matkins v. State* (Tex. Cr. App.), 58 S. W. 108.

³⁹ *State v. Forman*, 121 Mo. App. 502; 97 S. W. 269.

What is sufficient evidence that the voters of a town voted against the issuance of licenses, see *State v. Bollenbach* (Minn.), 108 N. W. 3.

The defense may show that the town in which the alleged offense had been committed had been vacated before the election was held, though no proper record of such vacation had ever been made. *Lewis v. State* (Tex. Cr. App.), 49 S. W. 603.

Where the certificate of the result of the election was made after the offense had been committed, it was held error to admit it in evidence unless supplemented by evidence showing the date of the publication of the order putting the law in force.⁴⁰

Sec. 960. Local option law—Evidence to show violation.

In proof of a violation of the local option law, the evidence resembles rather closely the evidence in a prosecution for keeping liquor with intent to unlawfully sell it, or keeping a house for the purpose of unlawfully selling liquors therein, or the keeping of a liquor nuisance. But here care must be used to distinguish between the general features or purposes of a local option law and the laws in the instance just mentioned, for in the case of local option laws the chief aim is to keep liquors out of the prohibited territory, and the mere bringing of liquor within them is usually made a crime, though the sale of liquor within such territory is also usually made an offense as well as the mere possession of it.

⁴⁰ *Loveless v. State*, 40 Tex. Cr. App. 221; 49 S. W. 892. See *Crockett v. State*, 45 Tex. Cr. App. 173; 49 S. W. 392.

In Missouri it was held that after the State had thus shown, *prima facie*, that the statute had been adopted and put in force prior to the date of the offense, it is open to the accused to show the contrary by proving that any of the essential steps named by the statute have not been taken, except as to those matters where the county court is required judicially to determine the existence of a fact, in which its record is conclusive, as, for instance, in respect of the question whether the petition for the election has been signed by the requisite number of qualified voters. It has also been

held that it is not essential to the validity of such a local option election, putting a local option law in force in any locality, that any certificate of the election should be signed by the two justices or the two judges of the county court called in to aid the county clerk in casting up the votes. *State v. Searey*, 39 Mo. App. 393, 407; *State v. Searey*, 46 Mo. App. 421, 433. See also *State v. Hutton*, 39 Mo. App. 410; *In re Rothwell* 44 Mo. App. 215; *State v. Dugan*, 110 Mo. 138; 19 S. W. 195; *State v. Searey*, 111 Mo. 236; 20 S. W. 186, 240; *State v. Mackin*, 51 Mo. App. 299; *State v. Foreman*, 121 Mo. App. 502; 97 S. W. 269; *State v. Campbell*, 214 Mo. 362; 113 S. W. 1081; 119 S. W. 494.

In the case of a charge of a sale the prosecuting witness may state that the accused had a house in the prohibited territory in which he had whisky, or beer, or gin, or the like.⁴¹ Jugs, bottles, casks and barrels, supposed to contain or to have contained liquor with the labels thereon, found upon accused's premises, may be put in evidence, although only found at the time the accused is arrested on the charge,⁴² and so are those secured by a search warrant;⁴³ but bottles are not admissible if not identified as the same bottles as those secured from the defendant.⁴⁴ Of course, a bottle of liquor purchased from the accused may be put in evidence.⁴⁵ And where it was claimed the liquor sold was a medicine, evidence was permitted to show a large number of empty bottles back of accused's place of business labeled the same as that sold the prosecuting witness, as tending to show the large amounts of liquor drank at such place, from which the jury might draw the inference that the liquor was sold as a beverage and not as a medicine.⁴⁶ Upon the question whether the accused sold the liquor or ordered it for another, it was held competent to show that the express companies doing business at the place had not brought any liquor for the accused.⁴⁷ As to who owns or controls the premises where it is claimed the liquor was sold

⁴¹ *Dryer v. State* (Tex. Cr. App.), 55 S. W. 65; *Sparks v. State* (Tex. Cr. App.), 45 S. W. 493; *Tooke v. State*, 4 Ga. App. 495; 61 S. E. 917.

⁴² *State v. Stockman*, 9 Kan. App. 422; 58 Pac. 1032; *Myers v. State*, 52 Tex. Cr. App. 558; 105 S. W. 392.

⁴³ *State v. O'Connor*, 3 Kan. App. 594; 43 Pac. 859; *State v. Wright*, 98 Iowa, 702; 68 N. W. 440.

⁴⁴ *Holler v. State* (Tex. Cr. App.), 73 S. W. 961.

⁴⁵ *Harris v. State* (Tex. Cr. App.), 97 S. W. 704.

⁴⁶ *Murray v. State*, 48 Tex. Cr. App. 128; 79 S. W. 568 *Holloway v. State*, 54 Tex. Cr. App. 115; 111 S. W. 937, 939.

⁴⁷ *Ray v. State*, 46 Tex. Cr. App. 176; 79 S. W. 535; *Curtis v. State*, 52 Tex. Cr. App. 606; 108 S. W. 380; *Carnes v. State*, 51 Tex. Cr. App. 437; 103 S. W. 403; *Louisville, etc., Ry. Co. v. Commonwealth*, 126 Ky. 279; 103 S. W. 349; 31 Ky. L. Rep. 383; *Adams Express Co. v. Commonwealth* (Ky.), 103 S. W. 353; 31 Ky. L. Rep. 811; *McKinley v. State*, 47 Tex. Cr. App. 222; 82 S. W. 1042.

a witness may testify that he owns them and that he rented them to the accused, even though they are not generally used for the sale of liquors.⁴⁸ It may be shown that the accused followed the occupation of a saloon keeper before the adoption of the local option law.⁴⁹ One charged with selling the liquor may show that he was merely an employe of the proprietor and in all things touching the sale he acted as an agent, and for that purpose may show what he did about the premises.⁵⁰ Where the charge was bringing liquors within the prohibited territory, telephone calls paid for by the defendant for persons without the territory, were held admissible on the claim that he had telephoned orders for liquor; but a custom of persons in the town to telephone for liquor to be shipped to them, or to be designated and supposed prospective purchasers for accused was held not admissible without showing he had knowledge of them.⁵¹ The usual evidence that the liquor sold or kept was intoxicating is admissible; as, for instance, though sold as or called "cider" it was, in fact, whisky or intoxicated the person drinking it.⁵² The accused may show that the liquor was sold for a lawful purpose or kept for such purpose, as wine for sacramental purposes;⁵³ but the State may show that such sales were a mere pretext used to evade the law.⁵⁴

⁴⁸ *Leftineh v. State* (Tex. Cr. App.), 55 S. W. 571.

⁴⁹ *Armstrong v. State* (Tex. Cr. App.), 47 S. W. 981; but not if it be shown that the accused was a mere assistant at the place it is charged a sale took place. *Rutherford v. State*, 48 Tex. Cr. App. 431; 88 S. W. 810.

⁵⁰ *Patrick v. State*, 45 Tex. Cr. App. 587; 78 S. W. 947; *Grimes v. State*, 44 Tex. Cr. App. 503; 72 S. W. 589.

⁵¹ *Sinclair v. State*, 45 Tex. Cr. App. 487; 77 S. W. 621.

⁵² *Matkins v. State* (Tex. Cr. App.), 62 S. W. 911; *Tucker v. Moultrie*, 122 Ga. 160; 50 S. E.

61; *Southworth v. State*, 52 Tex. Cr. App. 532; 109 S. W. 133; *Benson v. State*, 39 Tex. Cr. App. 56; 44 S. W. 167, 1091; *Tooke v. State*, 4 Ga. App. 495; 61 S. E. 917; *Sebastian v. State*, 44 Tex. Cr. App. 508; 72 S. W. 849; *Dowdy v. Commonwealth*, (Ky.), 101 S. W. 338; 31 Ky. L. Rep. 33. An analysis of liquor not shown to have any connection with accused is not admissible. *Magill v. State*, 51 Tex. Cr. App. 357; 103 S. W. 397.

⁵³ *White v. State*, 45 Tex. Cr. App. 597; 78 S. W. 1066.

⁵⁴ *White v. State*, 45 Tex. Cr. App. 597; 78 S. W. 1066.

If the accused claims the liquor in question was ordered and delivered to another, mere proof that liquor was delivered to that other is not admissible unless he shows the liquor claimed to have been delivered to him was the liquor delivered to such other person.⁵⁵ In all instances, however, the accused must in some way be shown to have been connected with the particular liquor in question, and if not so shown he cannot be convicted.⁵⁶ Evidence that liquor was in the accused's house is admissible, though it had been left there by another before local option was adopted.⁵⁷ Records of a railroad office accompanied by receipts signed by the accused or his agent, are admissible to show shipments of liquor to and by the accused.⁵⁸ So are bills for liquor, made out in accused's name, found on his premises, to show his ownership or control of the premises.⁵⁹ It may be shown that the witness gave a person money to buy him liquor, and that such person was told by the witness to go into the accused's place of business, though some distance away, and that after a while he came back with the liquor desired, though not shown to have come out of the accused's place of business.⁶⁰ Where the accused testified he never sold intoxicating liquor, it was held admissible to show he had a United States liquor license.⁶¹ Where

⁵⁵ Cook v. State (Tex. Cr. App.), 89 S. W. 641.

⁵⁶ Bruce v. State (Tex. Cr. App.), 92 S. W. 1092.

Occasionally a statute provides that a conviction may be had upon the uncorroborated evidence of a witness, in which event it is not error to refuse to instruct the jury that a conviction cannot be had unless the witness be corroborated. Ross v. State, 53 Tex. Cr. App. 295; 109 S. W. 152.

⁵⁷ Benson v. State, 51 Tex. Cr. App. 367; 101 S. W. 224.

The opinion of the prosecuting attorney concerning what was a violation of the law told the ac-

cused at a time he was formerly arrested for a violation of the local option law is not admissible, being his mere opinion as to what the law was. Roberts v. State, 52 Tex. Cr. App. 355; 107 S. W. 59.

⁵⁸ State v. Dahlquist (N. D.), 115 N. W. 81.

But freight bills in his name merely are not admissible. Gorman v. State, 52 Tex. Cr. App. 24; 105 S. W. 200.

⁵⁹ State v. Ford, 76 Kan. 424; 91 Pac. 1066.

⁶⁰ Starnes v. State, 52 Tex. Cr. App. 403; 107 S. W. 550.

⁶¹ Clark v. State, 40 Tex. Cr. App. 127; 49 S. W. 85. And

the offense is taking orders in a local option district, evidence is admissible to show his manner of taking such orders for his sales and his general system of transacting the business.⁶² In one instance the evidence showed that the accused hired another to sell liquor in local option territory, and the employe sold liquor there. This was held sufficient to warrant the conviction of the accused, though such employe at the time of the sale might have been making sales for himself or some third person. If that were true, the accused had the burden to show it.⁶³ It is always admissible to show the accused's system of doing business. Thus, it was held proper to show by witnesses that they got liquor from the accused, and that orders given him by them were sent them C. O. D.⁶⁴ Where two persons visited the accused's place, to one of whom he sold whisky and to the other cider, it was held not error to permit the latter to testify why he went there.⁶⁵ Of course, it is not admissible for the accused to show he had refused to supply certain persons with liquor, nor for them to show they had tried to get it of him and he had refused them.⁶⁶ Where the State's witnesses testify he made a sale and the accused denies it, the prosecution may show that at the time of the sale the accused had in his possession such an amount of

generally evidence that the accused had a United States license is admissible for the prosecution. *Treue v. State* (Tex. Cr. App.), 44 S. W. 829; *Gestenkorn v. State* (Tex. Cr. App.), 44 S. W. 501; *Barnes v. State* (Tex. Cr. App.), 44 S. W. 491; *Ma. gee v. State*, 50 Tex. Cr. App. 444; 98 S. W. 245; *King v. State*, 53 Tex. Cr. App. 101; 109 S. W. 182.

It is error to prove there were other places in the territory where liquors were sold. *Coleman v. State*, 53 Tex. Cr. App. 578; 111 S. W. 1011.

⁶² *Martin v. State* (Tex. Cr. App.), 61 S. W. 486; *Young v.*

State (Tex. Cr. App.), 66 S. W. 567.

⁶³ *McGovern v. State* (Tex. Cr. App.), 90 S. W. 502.

⁶⁴ *Young v. State* (Tex. Cr. App.), 66 S. W. 567.

⁶⁵ *Leftrich v. State* (Tex. Cr. App.), 55 S. W. 571.

⁶⁶ *Stewart v. State*, 37 Tex. Cr. App. 135; 38 S. W. 1143.

As a rule the accused may show that the liquor was sold as a medicine upon a prescription, although he once held a license to sell in a local option district within certain limitations. *Lindsay v. Commonwealth*, 99 Ky. 164; 35 S. W. 269.

liquor as forbids any reasonable presumption he had it for his own immediate use.⁶⁷

⁶⁷ *Wagner v. State*, 53 Tex. Cr. App. 306; 109 S. W. 169.

We here digest some of the cases on local option. Where the accused claimed he had no sale, it was held improper to refer in the instruction to the vote of the town on sale of liquors. *People v. Myers*, 115 N. Y. App. Div. 864; 101 N. Y. Supp. 291.

A witness cannot testify he heard liquor could be procured from the accused, and that he went to his restaurant to get it. *Thompson v. State* (Tex. Cr. App.), 97 S. W. 316; *Williamson v. State* (Tex. Cr. App.), 40 S. W. 286.

Where the evidence showed that a pint of "cider" was sold by the accused for fifty cents, evidence was admitted to show that other dealers in the place sold cider for fifty cents a gallon. *Sparks v. State* (Tex. Cr. App.), 45 S. W. 493.

Witness for the Government testified billiard tables were in the accused's saloon. The accused by witnesses showed there were none, and then offered to show that in two saloons near by were tables, but the evidence was excluded. This was held error. *Benson v. State* (Tex. Cr. App.), 44 S. W. 163.

Defendant was prosecuted for selling liquor in February. It was held error to allow testimony that liquor was found in his place the following September. *Castleman v. State* (Tex. Cr. App.), 44 S. W. 494.

It is not error for a witness to

testify that the liquor he purchased was drunk by others in his presence. *Morris v. State* (Tex. Cr. App.), 44 S. W. 510.

As corroborating a witness that a sale had been made, evidence that the accused at the time was in the possession of liquors is admissible, even though he had been convicted of a sale of some of the same liquors; but litigation respecting the seizure of the liquors belonging to the defendant cannot be shown. *Myers v. State*, 52 Tex. Cr. App. 558; 108 S. W. 392.

Even though the accused deny selling whisky, he cannot show that another was running a whisky business in the house in which the prosecuting witness says he bought whisky of the accused. *Loveless v. State* (Tex. Cr. App.), 49 S. W. 601.

Local option was adopted July 1st. The indictment charged a sale November 5th following, and the witness said he made the purchase "on or about November 5th." The court charged the jury that if they found the sale was made "within two years prior to the finding of the indictment" they could convict. This instruction was held unobjectionable, not authorizing a conviction for a sale made before the election was held. *Lerck v. State* (Tex. Cr. App.) 97 S. W. 1049. But see *Rutherford v. State*, 49 Tex. Cr. App. 21; 90 S. W. 172.

The prosecution cannot show that the accused was surety for persons charged with similar of-

Sec. 961. Intoxicating quality of liquor—Proof.

Of course, the indictment must allege that the liquor sold or given away, or illegally kept, was intoxicating.^{67*} But in

fenses, nor that he had been enjoined from running a ten-pin alley in a certain town, even as impeaching evidence. *Taylor v. State*, 54 Tex. App. 90; 111 S. W. 932.

It may be shown that the town in which the sale was made was located in the local option district. *Coleman v. State*, 53 Tex. Cr. App. 578; 111 S. W. 1011.

It was held permissible to show that three days after the sale a keg of whisky was found on accused's premises, which he claimed as his own, and said it had been there some time. *Starbeck v. State*, 53 Tex. Cr. App. 192; 109 S. W. 162.

Upon a charge of a sale in a local option district, evidence that the purchaser was a minor is not admissible, in aggravation of the punishment. *Campbell v. State*, 37 Tex. Cr. App. 572; 40 S. W. 282, though it might be on the question of identification in a proper instance.

A witness cannot say he heard the accused was running a "blind tiger." *Williamson v. State* (Tex. Cr. App.), 40 S. W. 286; *Harris v. State* (Tex. Cr. App.), 98 S. W. 842; *Gorman v. State*, 52 Tex. Cr. App. 24; 105 S. W. 200; *Trinkle v. State*, 52 Tex. Cr. App. 42; 105 S. W. 201.

It cannot be shown whisky was in other stores in a local option

district, unless accused be connected with it. *Efrd v. State*, 44 Tex. Cr. App. 447; 71 S. W. 957. Nor can sales by another be shown, unless it be claimed accused and such other were acting together. *Peterson v. State* (Tex. Cr. App.), 70 S. W. 977.

See *Hays v. State*, 49 Tex. Cr. App. 369; 91 S. W. 585.

If it is not shown that local option had been adopted, there can be no conviction where the court does not take judicial notice of the adoption. *Scott v. State* (Tex. Cr. App.), 44 S. W. 495; *Wartelsky v. State*, 38 Tex. Cr. App. 629; 44 S. W. 510; *Treue v. State* (Tex. Cr. App.), 44 S. W. 829; *Johnson v. State* (Tex. Cr. App.), 44 S. W. 834; *Taylor v. Commonwealth* (Ky.), 40 S. W. 383.

But the accused may admit it is in force and waive proof of it. *Starnes v. State* (Tex. Cr. App.), 107 S. W. 555.

If the accused purchased the liquor in a non-local option district for another, and had it sent to him to hold for such other until called for, he is not guilty of a sale, and it is error to charge the jury to find him guilty if they believe he was the agent of the shipper. *Newbury v. State* (Tex. Cr. App.), 44 S. W. 843.

It is not error for a witness to testify he was furnished money to

^{67*} *Kurz v. State*, 79 Ind. 488; *Scales v. State*, 47 Tex. Cr. App. 294; 83 S. W. 880; *Cassens v. State*, 48 Tex. Cr. App. 186; 88 S. W. 229.

establishing this fact if the liquor be such that the court takes judicial notice that it is intoxicating, then it is not neces-

buy whisky without showing he bought whisky with it. *Morris v. State* (Tex. Cr. App.), 44 S. W. 510.

Even though evidence only slightly connects accused with the commission of the alleged crime, yet it is admissible. *Goode v. State*, 50 Fla. 45; 39 So. 461.

The character of the accused cannot be impeached unless he first puts it into evidence. *Harris v. State* (Tex. Cr. App.), 98 S. W. 842.

Where the accused did not deny he had whisky, evidences of his purchases of whisky was held inadmissible. *Harris v. State* (Tex. Cr. App.), 98 S. W. 842.

Evidence admitted which does not connect accused with a transaction may be withdrawn, and there will be no error committed by its introduction. *State v. Brown* (Iowa), 109 N. W. 1011.

In tracing whisky, a witness may testify the prosecuting witness gave him a bottle of whisky and he gave it to the prosecuting attorney. *Henderson v. State*, 52 Tex. Cr. App. 514; 107 S. W. 820; but he cannot say what the prosecuting witness told him about it. *Smith v. State*, 52 Tex. Cr. App. 507; 107 S. W. 819.

Evidence to show the accused had no pecuniary interest in a package he received by express marked "glass," and made no profit out of, was excluded, in *Taul v. State* (Tex. Cr. App.), 61 S. W. 394.

It may be shown that accused frequently received express pack-

ages of about a certain weight, addressed to him, though not shown to contain liquor. *Goad v. State*, 73 Ark. 625; 83 S. W. 935; *Tooke v. State*, 4 Ga. App. 495 61 N. E. 917.

A witness may testify he saw letters of accused ordering whisky and containing checks, in the hands of the person to whom addressed, that he had a conversation with such person about the orders in the letters, and that such person gave the letters to him. *Goad v. State*, 73 Ark. 625; 83 S. W. 935. (In this case the orders and checks were put in evidence.)

Where a witness testifies to a conversation concerning sales of whisky between the accused and another person, it is not error to refuse to allow the witness to tell on cross-examination if he knew accused did or did not sell liquor to such other person. *Collins v. State*, 47 Tex. Cr. App. 497; 84 S. W. 585.

As to discrepancy in the boundaries of a local option district, see *Sutton v. State* (Tex. Cr. App.), 40 S. W. 501.

Accused claimed he had telephoned orders for whisky to another State. The manager of the telephone company was not permitted to testify that the tickets made by the operators of the company did not show accused had telephoned as he claimed, because hearsay. *Terry v. State*, 46 Tex. Cr. App. 75; 79 S. W. 317.

A juror cannot state to his fellows in consultation that he knows

sary to introduce evidence to show it was intoxicating.⁶⁸ So where a statute declares that certain liquors shall be taken as

of his own personal knowledge a witness testified falsely. *Winslow v. State*, 50 Tex. Cr. App. 465; 98 S. W. 241.

Evidence to show accused was endeavoring to fabricate testimony is admissible. *Riggs v. State* (Tex. Cr. App.), 96 S. W. 25.

Procuring whisky for another is not a violation of the local option law, where the violation charged is a sale made by the accused. *Armstrong v. State* (Tex. Cr. App.), 47 S. W. 981; *Starnes v. State*, 52 Tex. Cr. App. 403; 107 S. W. 550; *Gaston v. State* (Tex. Cr. App.), 102 S. W. 116.

Where the charge was that the accused illegally stored liquors in a local option district, it was held competent to show that his business was largely taking orders in the town, that tending to show he kept them in storage. *Teague v. State*, 51 Tex. Cr. App. 526, 529; 102 N. W. 1141, 1144. In this case his system of operating and storing liquors was also held admissible.

Of course, it may be shown that the person selling the liquor in a local option district was a servant or employe authorized to sell it. *Covington v. State* (Tex. Cr. App.), 100 S. W. 370; *Teague v. State*, 51 Tex. Cr. App. 526, 529; 102 S. W. 1141, 1144; *Huff v. State*, 51 Tex. Cr. App. 550; 103 S. W. 629; *State v. O'Brien*, 35 Mont. 482; 90 Pac. 514.

The State cannot show by cross-examination of accused's witnesses that they kept whisky in a locker

in a club room and drank it at their pleasure. *Ross v. State*, 53 Tex. Cr. App. 162; 109 S. W. 153.

Proof of other club rooms in the same town is an immaterial error. *Coleman v. State*, 53 Tex. Cr. App. 578; 111 S. W. 1011; and so is evidence of a witness that he had ordered whisky elsewhere than of the accused. *Beckham v. State*, 54 Tex. Cr. App. 28; 111 S. W. 1017.

Evidence as to instructions to accused how to get a package out of the express office excluded. *McNeely v. State*, 49 Tex. Cr. App. 286; 92 S. W. 419.

Legitimate sales by accused cannot be shown by the State on a charge of violating the local option law. *Blasingame v. State*, 47 Tex. Cr. App. 582; 85 S. W. 275.

The court will take judicial notice that the State University is located at a particular place, and determine the validity of ordinance of such place declaring the maintenance for the business of unlawful sale of liquor therein to be a nuisance. *Mayhew v. Eugene* (Ore.), 104 Pac. 727; *Henno v. Fayetteville* (Ark.), 119 S. W. 287.

Courts take judicial notice of prohibition statutes and when they took effect, and also that they did not apply to particular localities. *Bradgett v. State* (Ala.), 48 So. 54.

⁶⁸ *O'Connell v. State* (Ga. App.), 62 S. E. 1007; *State v. Pigg*, 78 Kan. 618; 97 Pac. 859 (*Manhattan cocktail*); *Cripe v.*

intoxicating, then it is not necessary to show that in fact they are such.⁶⁹ But if the court will not take judicial notice that the liquor sold was intoxicating, then proof must be introduced to show that fact.⁷⁰ And where judicial notice is not taken that "beer" is intoxicating, mere proof of a sale of "beer" is not enough to show it is intoxicating,⁷¹ unless it appear that the witness used the word "beer" in the sense of a "malt" or intoxicating liquor.⁷² If a statute declares that

State, 4 Ga. App. 832; 62 S. E. 567 (beer); *Locke v. Commonwealth* (Ky.), 74 S. W. 654; 25 Ky. L. Rep. 76 (beer); *Commonwealth v. Hurst*, 23 Ky. L. Rep. 365; 62 S. W. 1024; *State v. Moorhead*, 22 R. I. 272; 47 Atl. 545 (lager beer); *Pedigo v. Commonwealth* (Ky.), 68 S. W. 1113; 24 Ky. L. Rep. 535, 1029; affirmed 70 S. W. 659; *Williams v. State*, 72 Ark. 19; 77 S. W. 597; *Mitchell v. Commonwealth*, 106 Ky. 602; 51 S. W. 17; 21 Ky. L. Rep. 222 (Jamaica ginger); *The Kawaiiani*, 128 Fed. 879; 63 C. C. A. 347 (Okolihoa, a Hawaiian liquor); *State v. McKenna*, 16 R. I. 398; 17 Atl. 51; *State v. Hughes*, 16 R. I. 403; 17 Atl. 911.

But if there is no statute on the subject and there be a reasonable doubt as to whether it is intoxicating, the jury must acquit the accused. *Mayne v. State*, 48 Tex. Cr. App. 93; 86 S. W. 329; *Christian v. State* (Tex. Cr. App.), 39 S. W. 682; *Commonwealth v. Lufkin*, 167 Mass. 553; 46 N. E. 109; *Edwards v. State*, 124 Ga. 100; 52 S. E. 319; *Maddox v. State* (Tex. Cr. App.), 55 S. W. 832; *State v. Scampini*, 77 Vt. 92; 59 Atl. 201; *Smith v. State*, 120 N. W. 881; *People v. Anderson* (Mich.), 123 N. W. 605; *State v. Gibbs* (Minn.), 123 N. W. 810.

⁶⁹ *Commonwealth v. Shea*, 14 Gray, 386; *State v. Colvin*, 127 Iowa, 632; 103 N. W. 968; *State v. Ely* (S. D.) 118 N. W. 687; *State v. Costa*, 78 Vt. 193; 62 Atl. 38; *State v. O'Connell*, 99 Me. 61; 58 Atl. 59; *Stein v. Adams* (Miss.), 23 So. 269; *Chipman v. People*, 24 Colo. 520; 52 Pac. 677.

⁷⁰ *State v. Ritzman*, 8 Ohio S. & P. 685; *Potts v. State* (Tex. Cr. App.), 89 S. W. 836 (beer); *Regina v. Adams*, 5 Manitoba, 153; *Barnes v. State* (Tex. Cr. App.), 44 S. W. 491.

But the accused may show beer was not intoxicating, and the State may show it is. *State v. Volmer*, 6 Kan. 371.

A conviction on a sale of a liquid containing two per cent. of alcohol was sustained. *Commonwealth v. Burns*, 38 Pa. Super Ct. 514; *Poston v. State* (Neb.), 119 N. W. 520; *Stoner v. State*, 5 Ga. App. 416; 63 S. E. 602.

⁷¹ *Potts v. State* (Tex. Cr. App.), 89 S. W. 836; *Harris v. State* (Tex. Cr. App.), 86 S. W. 763; *Sullivan v. State*, 48 Tex. Cr. App. 201; 87 S. W. 150.

⁷² *Locke v. Commonwealth* (Ky.), 74 S. W. 654; 25 Ky. L. Rep. 76.

a particular liquor is intoxicating, then evidence that it is not is not admissible. Thus, a statute declared that the term "intoxicating liquor" should be construed to mean alcohol; it was held evidence was not admissible to show that a liquor containing one to two per cent. of alcohol was not intoxicating.⁷³ Anyone who knows that the liquor in question was in fact intoxicating may so testify, and he need not be an expert to qualify him to testify. Thus, he may testify that it intoxicated him, although sold under a name not commonly applied to an intoxicating liquor.⁷⁴ He may testify that the liquor in taste and color was similar to another liquor, as, beer.⁷⁵ So it may be shown that the person who drank the particular liquor was made drunk by it,⁷⁶ or even was made "foolish."⁷⁷ A witness may testify to its taste and effect upon him.⁷⁸ And he may testify that other liquor drawn

⁷³ *State v. Colvin*, 127 Iowa, 632; 103 N. W. 968; *People v. Kinney*, 124 Mich. 486; 83 N. W. 147; *State v. Costa*, 78 Vt. 198; 62 Atl. 38; *Commonwealth v. Brelsford*, 161 Mass. 61; 36 N. E. 677; *People v. Adams*, 95 Mich. 541; 55 N. W. 461; *State v. Witmar*, 12 Mo. 407.

⁷⁴ *Christian v. State* (Tex. Cr. App.), 39 S. W. 682; *Mayne v. State* (Tex. Cr. App.), 86 S. W. 329; *Lunenberger v. State*, 74 Miss. 379; 21 So. 134; *State v. Crawford*, 9 Kan. App. 886; 61 Pac. 316; *Brighton v. Miles*, 153 Ala. 653; 44 So. 390; *Markinson v. State* (Okla.), 101 Pac. 353; *Cockerell v. Commonwealth*, 115 Ky. 296; 73 S. W. 760; 24 Ky. L. Rep. 2149.

⁷⁵ *Wequinton v. State*, 51 Tex. Cr. App. 492; 102 S. W. 1124; *Feddern v. State* (Neb.), 113 N. W. 81; *Drye v. State* (Tex. Cr. App.), 55 S. W. 65; *Territory v. Pratt*, 6 Dak. 483; 43 N. W. 711.

⁷⁶ *Taylor v. State*, 44 Tex. Cr. App. 437; 72 S. W. 181; *State v. Marchbanks*, 61 S. C. 17; 39 S. E. 187; *Hinton v. State*, 132 Ala. 29; 31 So. 563; *Costello v. State*, 130 Ala. 143; 30 So. 376; *Stewart v. State* (Tex. Cr. App.), 38 S. W. 1143; *Schmidt v. State*, 53 Tex. Cr. App. 465; 110 S. W. 897; *Hartgraves v. State* (Tex. Cr. App.), 43 S. W. 331; *People v. Seeley*, 105 N. Y. App. Div. 149; 93 N. Y. Supp. 982; *State v. Adams*, 44 Kan. 135; 24 Pac. 71; *Parrott v. Commonwealth*, 6 Ky. L. Rep. 221; *Langel v. Bushnell*, 197 Ill. 20; 63 N. E. 1086; affirming 96 Ill. App. 618 (need not intoxicate every person who drinks it); *Kerr v. State*, 63 Neb. 115; 88 N. W. 240.

⁷⁷ *State v. Robinson*, 61 S. C. 106; 39 S. E. 247.

⁷⁸ *Edwards v. State*, 124 Ga. 100; 52 S. E. 319; *State v. Miller*, 53 Iowa, 84; 4 N. W. 838; *Parker v. State* (Tex. Cr. App.), 75 S. W.

from the same cask at the same time, or a bottle of liquor purchased under the same order, only one liquor being ordered, was intoxicating, but not if he did not know whether it was the same kind or had the same properties.⁷⁹ So where whisky was sold as cider, he may testify that at the same time he ordered cider, like the first purchaser had done, and that his cider tasted like whisky and was intoxicating.⁸⁰ But where the charge was a sale of "hop ale," and a witness said he drank some so-called "hop ale" which had an intoxicating effect upon him, it was held error unless it was shown that the liquor he drank had the same intoxicating properties as that described in the indictment.⁸¹ Yet where a witness testified that he bought "hop ale" of the accused, another witness was permitted to testify that he had bought and drank hop ale at other places than the accused's, and that it was intoxicating, although he did not see the prosecuting witness buy his hop ale nor see him drink it. This was to show hop ale was intoxicating.⁸² And where witnesses testified that the beverage in question was like beer in taste and smell, and that large quantities of the beverage was shipped to the defendant from a brewery under the name of "hop

30; *Commonwealth v. Reyburg*, 122 Pa. St. 299; 16 Atl. 351; *Costello v. State*, 130 Ala. 143; 30 So. 376; *Stewart v. State* (Tex. Cr. App.), 38 S. W. 1143; *Schmidt v. State*, 53 Tex. Cr. App. 465; 110 S. W. 897; *State v. Good*, 56 W. Va. 215; 49 S. E. 121; *Carl v. State*, 87 Ala. 17; 6 So. 118; 4 L. R. A. 380; *Brantley v. State*, 97 Ala. 47; 8 So. 816; *Brighton v. Miles*, 151 Ala. 479; 44 So. 394; *Wiginton v. State*, 51 Tex. Cr. App. 492; 102 S. W. 1124; *Commonwealth v. White*, 15 Gray, 407; *Commonwealth v. Peto*, 136 Mass. 135; *Savage v. Commonwealth*, 84 Va. 582; 5 S. E. 563; *Parrott v. Commonwealth*, 6 Ky. L. Rep. 221.

⁷⁹ *Terry v. State*, 44 Tex. Cr. App. 411; 71 S. W. 968.

⁸⁰ *Matkins v. State* (Tex. Cr. App.), 58 S. W. 108; *Wiginton v. State*, 51 Tex. Cr. App. 492; 102 S. W. 1124.

⁸¹ *Taylor v. State* (Tex. Cr. App.), 50 S. W. 343; *Davis v. State* (Tex. Cr. App.), 37 S. W. 435; *Satterfield v. State* (Tex. Cr. App.), 44 S. W. 291; *Petteway v. State*, 36 Tex. Cr. Rep. 97; 35 S. W. 646 (brandied cherries).

⁸² *West v. State*, 32 Ind. App. 161; 69 N. E. 465; *Cockerell v. Commonwealth*, 115 Ky. 296; 73 S. W. 760; 24 Ky. L. Rep. 2149; *Peoples v. State* (Tex. Cr. App.), 99 S. W. 1102.

ale," a witness who said he knew what beer was, was permitted to testify that "hop ale" of the kind accused sold was intoxicating.⁸³ So where it was shown that a third person had bought "hop ale" from the same brewery from which the accused had bought his "hop ale," put up in bottles labeled identically with his, about the same time, it was held that a chemist who had analyzed the "hop ale" so bought by such third person might testify that it was an intoxicating liquor.⁸⁴ But, of course, in such an instance the evidence must be sufficient to show that the liquors were of the same variety or sort, especially if they are designated as "bitters."⁸⁵ Such was said to be shown where the testimony was that the liquor sold was "Frosty" or "Ino," and there was evidence that the accused did not keep beer but kept "Frosty" and "Ino." In such an instance it was held error to exclude evidence that these two liquors did not taste like beer, the prosecution claiming that the liquor sold was beer.⁸⁶ The circumstance of sale may itself be sufficient evidence that the liquid sold was intoxicating. Thus, where the witness called for half a pint of "whisky," and the accused gave him a half pint of liquor and received pay for it as whisky, this was held to justify the conclusion that the liquor sold was in fact whisky.⁸⁷ And

⁸³ *Glasscock v. State* (Tex. Cr. App.), 43 S. W. 989; *State v. Good*, 56 W. Va. 215; 49 S. E. 121 (labeled bottles); *People v. Kestner*, 101 N. Y. App. Div. 265; 91 N. Y. Supp. 1004. (Defendant permitted to show analysis of other bottles than the one sold. This decision rests upon the theory that liquor systematically bottled and labeled by a brewery with the same label is all of the same kind and contains the same amount of alcohol.) *State v. Gillespie*, 63 W. Va. 152; 59 S. E. 957 ("senoj" cider); *Commonwealth v. Goodman*, 97 Mass. 117; *State v. Cool* (W. Va.), 66 S. E. 740 (labeled bottles); *State v.*

Clark (La.), 50 So. 811 ("Leroy," a trade name).

⁸⁴ *State v. Witts*, 106 Mo. App. 196; 80 S. W. 311; *McRoberts v. State*, 49 Tex. Cr. App. 288; 92 S. W. 804.

⁸⁵ *McRoberts v. State*, 49 Tex. Cr. App. 288; 92 S. W. 804.

⁸⁶ *Porter v. State* (Tex. Cr. App.), 86 S. W. 1014.

⁸⁷ *State v. Marks*, 65 N. J. L. 84; 46 Atl. 757; *Dant v. State*, 83 Ind. 60; *Thompkins v. State*, 65 S. E. 842; *People v. Marx*, 128 N. Y. App. Div. 828; 112 N. Y. Supp. 1011; *Thompkins v. State*, 2 Ga. App. 639; 58 S. E. 1111; *Barlow v. State*, 5 Ga. App. 21; 62 S. E. 574; *Brown v. State*, 4 Ga.

it has even been held in New Zealand that proof of a purchase of liquors in a saloon was sufficient evidence to show they were intoxicating.⁸⁸ Where the charge is a sale of bitters that were intoxicating or used as an intoxicating beverage, it is admissible to show that the same bitters were bought and used by many persons in the community as a beverage.⁸⁹ And if the accused claim the liquor was not intoxicating, other sales may be shown, not laid in the indictment, in order to show the purposes for which the liquor was sold as well as purchased, even sales upon which the accused had been acquitted.⁹⁰ A witness may testify that he heard in the saloon the liquor sold called "ale."⁹¹ He may testify that he had bought beer of other persons, to show his qualifications to judge of the beer he testifies he bought of the accused.⁹² Evidence is admissible to show that the liquor sold looked like whisky.⁹³ For the purpose of identifying liquor as being a certain kind, labels on the barrel from which it is drawn are admissible.⁹⁴ To show that the liquor is intoxicating, the

App. 73; 60 S. E. 805; Thompson v. State, 109 Ga. 272; 34 S. E. 579; State v. Peak, 9 Kan. App. 436; 58 Pac. 1034; State v. Harrington, 69 N. H. 496; Loveless v. State, 40 Tex. Cr. App. 131; 49 S. W. 98; Rice v. State, 52 Tex. Cr. App. 359; 107 S. W. 833; State v. Cloughly, 73 Iowa, 626; 35 N. W. 652.

⁸⁸ Cotter v. Cooper, 15 N. Z. L. R. 186. See also Dant v. State, 83 Ind. 60.

Where the accused claimed the beverage was a non-intoxicating liquor called "frosty," it was held proper for the State to put in evidence the freight bills paid by the defendant for the liquor, and that the liquor described in them was "beer," and not "frosty." Thompson v. State (Tex. Cr. App.), 97 S. W. 316; State v. Dahlquist (N. D.), 115 N. W. 81; Bronner v. State, 2 Ga. App. 711;

58 S. E. 1123; State v. Ford, 76 Kan. 424; 91 Pac. 1066; Gorman v. State, 52 Tex. Cr. App. 24; 105 S. W. 200.

⁸⁹ Carl v. State, 87 Ala. 17; 6 So. 118; 4 L. R. A. 380.

⁹⁰ State v. Coulter, 40 Kan. 87; 19 Pac. 368.

⁹¹ Commonwealth v. Gourdier, 14 Gray, 390; Lambie v. State (Ala.), 44 So. 51.

⁹² Commonwealth v. White, 5 Gray, 407.

⁹³ Commonwealth v. Dowdican, 114 Mass. 257; Dant v. State, 83 Ind. 60; Finch v. State, 120 Ga. 174; 47 S. E. 504; Commonwealth v. Dobbyn, 14 Gray, 44. The bottle containing it may be shown to the jury. Drye v. State (Tex. Cr. App.), 55 S. W. 65.

⁹⁴ Commonwealth v. Collier, 134 Mass. 203; State v. Wright, 68 N. H. 351; 44 Atl. 519.

State may show by chemical analysis that it contains sufficient alcohol for that purpose.⁹⁵ But the reputation of a liquor for being intoxicating cannot be shown.⁹⁶ It is admissible to submit to a witness samples of the alleged liquor in question and ask him what it is called.⁹⁷ And so it may be shown that persons, coming from the defendant's place of business, gathered in front of it in the street and were loud and profane in their language. On the theory of proving the intoxicating effect of liquor, the conduct of those who have drunk it may be shown.⁹⁸ Yet it is not admissible to show that other persons, present at the times it is claimed intoxicating liquor was sold to the witness, were intoxicated, unless it be shown they drank of the liquor or drank liquor sold or given them by the accused, upon a charge of selling intoxicating liquor in violation of the local option law.⁹⁹ Where the evidence showed that the accused had been selling cider generally for two years, making a sale of some of it to the person named in the indictment, and he claimed it was non-intoxicating, it was held not error to show a sale of the same cider by the accused to another, and that it had an intoxicating effect upon him, though it was said it would have been better to have eliminated evidence of the sale and confined the testimony to the effect the liquor had.¹ It is permissible to show that the accused kept liquor in stock at his place of business, and that persons who had purchased and drank it became intoxicated.² And it has been held no error to permit the jury to take to their room a bottle of liquor called "ale,"

⁹⁵ *State v. McKenna*, 16 R. I. 398; 17 Atl. 51; *Mayne v. State* (Tex. Cr. App.), 86 S. W. 329; *State v. Hughes*, 16 R. I. 403; 17 Atl. 911; *Commonwealth v. Pease*, 110 Mass. 412; *Smith v. State* (Mich.), 120 N. W. 881; *Poston v. State* (Neb.), 119 N. W. 520; *State v. Wright*, 68 N. H. 351; 44 Atl. 519; *Stoner v. State*, 5 Ga. App. 416; 63 S. E. 602; *Commonwealth v. Bentley*, 97 Mass. 551.

⁹⁶ *State v. Peterson*, 41 Vt. 504.

⁹⁷ *State v. Peterson*, 41 Vt. 504.

⁹⁸ *Houtz v. People*, 123 Ill. App. 445; *Commonwealth v. O'Donnell*, 143 Mass. 178; 9 N. E. 509.

⁹⁹ *Isom v. State*, 52 Tex. Cr. App. 438; 107 S. W. 350.

¹ *Devine v. Commonwealth*, 107 Va. 860; 60 S. E. 37.

² *State v. Adams*, 44 Kan. 135; 24 Pac. 71; *State v. Pferfferle*, 36 Kan. 90; 12 Pac. 406. See also *People v. Beller*, 73 Mich. 640; 41 N. W. 827.

though not a part of the liquor seized, yet manufactured and sold by the same person under the name of "ale."³ So the jury may look at, inspect and smell liquor in a bottle which has been put in evidence;⁴ and they may taste it to determine whether it be intoxicating.⁵ The name on the bottle containing the liquor alleged to be intoxicating may be shown.⁶ Of course the accused may furnish evidence to show that the liquor was not intoxicating, where evidence has been introduced that it was such.⁷ Thus where the court took judicial notice that beer was a malt liquor and intoxicating, it was held that the accused might show that the beer in question was not intoxicating, and that he had the burden to show such was the case.⁸ But if the accused seeks to give evidence that others drank the same kind of liquor in excessive quantities to raise a presumption that it was not intoxicating, he must go farther and show it did not intoxicate the person drinking

³ *State v. McCafferty*, 63 Me. 223; *State v. Lindquist* (Minn.), 124 N. W. 215.

⁴ *Reed v. Territory*, 1 Okla. Cr. App. 481; 98 Pac. 583.

⁵ *Schulenberg v. State*, 79 Neb. 65; 112 N. W. 304; *Weinandt v. State*, 80 Neb. 161; 113 N. W. 1040. *Contra*, *State v. Lindgrove*, 1 Kan. App. 51; 41 Pac. 688; *Wadsworth v. Dunnam*, 117 Ala. 661; 23 So. 699.

Where the accused claimed the liquor was not intoxicating, it was held error for the prosecuting attorney, in the absence of the accused, but in the presence of the jury, to pour some of the liquor in a chair bottom and set it afire. *Hendrick v. State*, 47 Tex. Cr. App. 371; 83 S. W. 711.

⁶ *Coleman v. State*, 54 Tex. Cr. App. 234; 112 S. W. 769; *Racer v. State* (Tex. Cr. App.), 73 S. W. 807.

⁷ *Taylor v. State*, 44 Tex. Cr.

App. 437; 72 S. W. 181. (In this case the purchaser testified the liquor intoxicated him; but the accused testified that it was cider made from non-intoxicants. It was held that the evidence supported the finding). *Nelson v. State*, 53 Neb. 790; 74 N. W. 279; *Hinton v. State*, 132 Ala. 29; 31 So. 563. Evidence that the liquor sold was of red coffee color, labeled "Dr. Anderson's Bitters," which the witness thought "tasted or smelt like whisky," though he did not think it spirituous, as the indictment charged, was held sufficient to sustain a conviction. *Bush v. Commonwealth* (Ky.), 47 S. W. 585; *Patrick v. State*, 45 Tex. Cr. App. 587; 78 S. W. 947; *People v. Anderson* (Mich.), 123 N. W. 605; *State v. Gibbs* (Minn.), 123 N. W. 810.

⁸ *State v. Currie*, 8 N. D. 545; 80 N. W. 475.

it.⁹ If the prosecuting witness claims the "bitters" he drank made him drunk, the defendant may show by him he had consumed the bitters in considerable quantities and they did not make him drunk, and that on the occasion he said they made him drunk, he may show that such witness at the time he drank the bitters also had in his possession alcohol or whisky which he drank.¹⁰ Where a witness testified that on two occasions he bought beer of the accused in his place of business, it was held that the accused could show that on one of the dates he sold a non-intoxicating liquor to the witness and on the other instances he claimed to have purchased liquor of him he did not sell him any liquor whatever.¹¹ The accused may show that by other witnesses who had drunk of the same liquor that they were not intoxicated.¹² He may show the liquor sold was a medicine and not a liquor.¹³ Whether or not the particular liquor was intoxicating is a question of fact for the jury.¹⁴ If the court judicially knows the liquor is intoxicating, it may, of course, charge the jury that it is; but if there is a dispute on that point, then the question must be submitted to the jury.¹⁵ In determining whether or not the particular liquor is to be classed as an intoxicating liquor, the quantity necessary to be taken to produce intoxication must be con-

⁹ Henderson v. State, 49 Tex. Cr. App. 269; 91 S. W. 569.

¹⁰ McRoberts v. State, 45 Tex. Cr. App. 288; 92 S. W. 804.

¹¹ Porter v. State (Tex. Cr. App.), 86 S. W. 1014.

¹² Knowles v. State, 80 Ala. 9.

¹³ Prather v. State, 12 Tex. App. 401.

¹⁴ State v. Williams, 14 N. D. 411; 104 N. W. 546; Bach v. State, 8 Mo. 497; State v. Skillicorn, 104 Iowa, 97; 73 N. W. 503; Commonwealth v. Bloss, 116 Mass. 56.

¹⁵ Daniel v. State, 149 Ala. 44; 43 So. 22; Thompson v. State (Tex. Cr. App.), 97 S. W. 316. *Contra*, by statute in Alabama.

Lambie v. State, 151 Ala. 86; 44 So. 51.

It is error for the court to say that the finding of a United States revenue stamp in the room where the liquor stamped was found is *prima facie* evidence that it was intoxicating. Thompson v. State (Tex. Cr. App.), 97 S. W. 316. See Barnes v. State (Tex. Cr. App.), 44 S. W. 491.

Testimony of a witness that he bought a bottle of "Wakeshaw" of accused; that he had drunk "Wakeshaw," and that he *thinks* it is intoxicating, is not enough to show the Wakeshaw in question was intoxicating. Racer v. State (Tex. Cr. App.), 73 S. W. 807.

sidered, for if it must be taken in excessive quantities in order to produce such a state upon the person drinking it, then it is not an intoxicating liquor within the meaning of the statute using that term, although it may be if the statute especially declares that such a liquor shall be so classed. And if there be a conflict in the evidence whether the liquor in question is intoxicating, it is error to so define intoxicating liquor that the jury might infer any mixture of liquor, having in it some alcohol, is an intoxicating liquor.¹⁶ But a liquor not containing alcohol is not to be classed as an intoxicating liquor, though it will produce intoxication.¹⁷

¹⁶ *Decker v. State*, 39 Tex. Cr. App. 20; 44 S. W. 845; *Pike v. State*, 40 Tex. Cr. App. 668; 51 S. W. 395; *State v. Henderson*, 52 S. C. 470; 30 S. E. 477; *State v. White*, 70 Vt. 225; 39 Atl. 1085; *Taylor v. State* (Tex. Cr. App.), 49 S. W. 589; *Robinson v. State* (Tex. Cr. App.), 49 S. W. 386.

¹⁷ *Thompson v. State* (Tex. Cr. App.), 97 S. W. 316.

Instructing the jury that any liquor that will make a person "drunk" is an "intoxicating liquor" is erroneous. *Taylor v. State* (Tex. Cr. App.), 49 S. W. 589.

Where there was a dispute between two prosecuting witnesses and the accused as to whether they bought beer in white bottles, as they claimed, or whether they bought "frosty," a non-intoxicant, in black bottles, as he claimed, evidence of a conversation between the two witnesses, though the accused was not present, concerning the purchase of beer from the accused in white bottles, was admitted, on the ground that it bore on the intoxicating properties of the liquor sold, and that it was

beer, as they claimed, and not "frosty." *Thompson v. State* (Tex. Cr. App.), 97 S. W. 316.

Of course a witness may testify that the liquor he received from the accused he delivered to the person producing it in court. *Harris v. State* (Tex. Cr. App.), 98 S. W. 842.

Sales made by the accused subsequent to the time it is charged he sold the particular intoxicating liquor cannot be shown by him in defense, on the ground that it shows his belief in their non-intoxicating qualities. *Henderson v. State* (Tex. Cr. App.), 93 S. W. 551; *Commonwealth v. Hallet*, 103 Mass. 452.

An interesting phase of what is and what is not an intoxicating beverage is the different effects the same amount of liquor will have upon different individuals; and the effect it will have upon the same individual at different times. As is well known, a man under great excitement will drink intoxicating liquor without feeling any effect whatever; and if he were to drink the same amount when not excited, he would quite per-

Sec. 962. Chemical analysis of liquor—Expert testimony.

Whether or not a liquor is intoxicating may be shown by a chemist who has analyzed it, and who is able thereby to tell

ceptibly feel the effect; indeed, it might seriously intoxicate him. So that, if he was without any knowledge of the liquor, he might testify very differently concerning its effect upon him in the one instance from that of the other. His physical condition, at other times, might affect his judgment of the intoxicating effects of a liquor. So what might perceptibly affect a man who had never used or drunk intoxicating liquor would not affect the other. These men, if they were to draw an opinion from their own experiences, would testify to very different results; and the question arises which effect are we to accept as the criterion whether or not the liquor is intoxicating? Are we to accept as the standard the effect that half a teaspoonful of liquor will have upon an individual very susceptible to its influence, or the fact that ten times that amount will produce in another individual no appreciable or perceptible effects beyond what an ordinary cup of tea or coffee will produce? So far as we know, this question has never been judicially determined. See *State v. Linden*, 87 Iowa, 702; 54 N. W. 1075; *Haines v. Hanrahan*, 105 Mass. 480; *O'Donnell v. Commonwealth*, 108 Va. 882; 62 S. E. 373; *State v. Costa*, 78 Vt. 198; 62 Atl. 38; and *Askew v. State*, 4 Ga. App. 446; 61 S. E. 737, where it took two quarts of grape juice to make a minor drunk.

Where an ordinance required liquors to be sold in certain quantities, evidence was held inadmissible that they were non-intoxicating, and if sold only in such quantities the defendant's business would be ruined. *Lincoln Center v. Linker*, 7 Kan. App. 282; 53 Pac. 787.

Accused sold a certain liquor called Phoenix which intoxicated. It was held competent to prove he had a barrel of whisky on his premises. *State v. Pfefferle*, 36 Kan. 90; 12 Pac. 406.

Where accused testifies he did not know the liquor was intoxicating (Mexican hot cider sold at a cold drink stand), and the prosecuting witness testifies it is, the court must instruct the jury on intent and mistake of fact. *Covington v. State*, 51 Tex. Cr. App. 48; 100 S. W. 370. But see *Penn v. State* (Tex. Cr. App.), 68 S. W. 170.

If the evidence shows the liquor was malt and non-intoxicating, it is error to charge the jury they could convict if they found the liquor was malt or any other compound containing alcohol and it could be reasonably used as an intoxicant. *State v. Seelig*, 16 N. D. 177; 112 N. W. 140.

If there be evidence *pro* and *con* as to whether the liquor was intoxicating, the question must be submitted to the jury. *State v. Krinski*, 78 Vt. 162; 62 Atl. 37; *Luther v. State*, 80 Neb. 432; 114 N. W. 411.

whether it does or does not contain alcohol and what per cent. of alcohol it contains. Such was said to be the case where a

But not where the court takes judicial notice or the statute declares the liquor sold was intoxicating, for then the court may tell the jury it is intoxicating. *Donaldson v. State*, 3 Ga. App. 451; 60 S. E. 115. See *Devine v. Commonwealth*, 107 Va. 860; 60 S. E. 37; *Feddern v. State*, 79 Neb. 651; 113 N. W. 127.

As tending to show alleged "cider" was intoxicating, where the evidence showed the accused sold a pint for fifty cents, it was held permissible to show that the usual price for such liquor in the community was fifty cents a gallon, and not fifty cents a pint. *Sparks v. State* (Tex. Cr. App.), 45 S. W. 493.

Where a witness testified that the liquor he drank made him drunk, and the accused claims it was not, it is error to refuse to grant a continuance in order to secure the testimony of an absent witness that on the day in question he and the prosecuting witness several times drank whisky out of a jug. *Wingo v. State*, 53 Tex. Cr. App. 16; 108 S. W. 372.

Where a statute provided that all preparations, except pure apple cider, should be deemed ardent spirits, and a subsequent statute provided that apple cider should be construed pure juice of the apple, not containing over a certain percentage of alcohol, the prosecution, on a charge of selling ardent spirits, it was held, need not prove the liquor sold was not pure cider, the accused having the

burden to show that. *Devine v. Commonwealth*, 107 Va. 860; 60 S. E. 37.

A witness cannot testify to the probable effect of a drink of liquor consumed by a purchaser of it. *Young v. Beveridge*, 81 Neb. 180; 115 N. W. 766.

Where accused testified he never kept but one kind of liquor, which was the kind sold the prosecuting witness, it was held error not to permit him to testify that the same liquor he had sold other witnesses at the trial was not intoxicating. *Taylor v. State* (Tex. Cr. App.), 49 S. W. 589.

The jury need not find in their verdict, however, that the liquor sold was spirituous, vinous, malt or fermented, if they find it was intoxicating. *State v. Piner*, 141 N. C. 760; 53 S. E. 305.

On a charge of selling "American Hop Ale," there can be no conviction where the proof shows a sale of a different, though similar, beverage. *Lincoln Center v. Linker*, 5 Kan. App. 242; 47 Pac. 174.

The accused cannot show by a given formula a non-intoxicating liquor may be made which is sometimes called "beer" and is not intoxicating, unless the evidence shows that the liquor sold was made from such formula. *State v. Jenkins*, 32 Kan. 477; 4 Pac. 809.

On a charge of selling "a quantity of intoxicating liquors, mixed liquors, a part of which is intoxicating," the State's evidence showed

chemist testified that one ounce in four of wine was alcohol.¹⁸ A like ruling was made where the evidence showed that the liquor contained three and a half to four per cent. of alcohol, accompanied by evidence that it would intoxicate.¹⁹ If a statute declares that a liquor containing a certain percentage of alcohol shall be deemed an "intoxicating liquor," the proper way to determine the percentage is by chemical analysis, though not the exclusive one; and if a chemist be employed to analyze

the liquor sold was whisky, and the defendant's that it was a mixture containing whisky and other ingredients, and was used as a liniment or wash, and was not an intoxicating drink. It was held not error to refuse to rule that the State must prove a sale of an intoxicating mixture; that there was a variance between the State's evidence and the charge, and that there was no evidence to support it. *Commonwealth v. Morgan*, 149 Mass. 314; 21 N. E. 369.

Where a witness hostile to the prosecution said he did not know whether or not the liquor he purchased was lager beer, it was held not error for the State to ask him, "Don't you think it was lager beer?" where the answer was, "I couldn't say whether it was lager beer." *Commonwealth v. Moinehan*, 140 Mass. 463; 5 N. E. 259.

Whether the beer kept and the beer analyzed was the same beer is a question for the jury where the evidence does not show they are different beers, and there are inferences to be drawn that they are one and the same beer. *State v. Wright*, 68 N. H. 351; 44 Atl. 519.

The court may say malt liquor is intoxicating. *State v. Ball* (S. D.), 123 N. W. 826.

Proof that accused sold "liquor" is *prima facie* proof he sold "intoxicating liquor," especially if it be shown it looked like rye whisky. *Carswell v. State* (Ga. App.), 66 S. E. 488.

A liquor which is alcohol 1.75 per cent. per volume, and 1.40 per cent. weight, is intoxicating under the North Dakota statute. *State v. Fargo Bottling Works Co.*, 124 N. W. 387.

¹⁸ *Harris v. Jenms*, 9 C. B. (N. S.) 152; 30 L. J. M. C. 183; 3 L. T. 408; 9 W. R. 36; *Bailey v. State* (Tex. Cr. App.), 66 S. W. 780; *State v. Schaefer*, 44 Kan. 90; 24 Pac. 92; *Haworth v. Minnus*, 56 L. T. 316; 51 J. P. 7; *Terry v. State*, 46 Tex. Cr. App. 75; 79 S. W. 317; *State v. Piche*, 98 Me. 348; 56 Atl. 1052; *State v. McKenna*, 16 R. I. 398; 17 Atl. 51; *Maguire v. State* (Tex. Cr. App.), 86 S. W. 329; *State v. Hughes*, 16 R. I. 403; 17 Atl. 911; *Commonwealth v. Pease*, 110 Mass. 412; *Smith v. State*, 120 N. W. 881; *Paston v. State* (Neb.), 119 N. W. 520; *State v. Wright*, 68 N. H. 351; 44 Atl. 519; *Stoner v. State*, 5 Ga. App. 716; 63 S. E. 602.

¹⁹ *Johnson v. State* (Tex. Cr. App.), 66 S. W. 552.

a particular liquor to be used as evidence, it will be presumed he did so in pursuance of such statute.²⁰ All the circumstances connected with the analysis should go to the jury.²¹ Wherever it is claimed that the particular liquor was intoxicating, evidence should be introduced tracing the liquor in question into the chemist's hands—each step must be proven, especially if it passes through different persons' hands. But the fact that it is sent in corked, sealed and labeled bottles to the chemist by express will not render his testimony of the analysis incompetent.²² And where the liquor analyzed is not identical with that in question, but it is shown that both came from a common source, then the testimony of the chemist analyzing it is admissible to show the amount of alcohol in it.²³ And if the liquor in question sold to a vendee has been put up in corked or sealed or labeled bottles, an analysis of like bottles of liquor put up at the same brewery and sold to a third person by the same vendor at another time are admissible to show the first liquor was intoxicating.²⁴ In a prosecution for selling an intoxicating liquor called "Malt Rose," the State showed an analysis of liquor called "Malt Rose," and a witness claimed he had obtained it from the accused. The defendant admitted he had sold "Malt Rose" as an article of commerce, but claimed it was not intoxicating. It was held that he was entitled to put in the testimony of another chemist who had analyzed "Malt Rose" to show its ingredients.²⁵ But where a chemist testified to the ingredients of the liquor in question and explained the processes of manufacture, it was held that he might not, the several ingredients being present in the court room, "mix them to show the jury its composition," because that would not enlighten the jury

²⁰ Commonwealth v. Magee, 114 Mass. 111; 4 N. E. 819.

²¹ State v. Schaefer, 44 Kan. 90; 24 Pac. 92.

²² Commonwealth v. Bently, 97 Mass. 551.

²³ Commonwealth v. Brelsford, 161 Mass. 61; 36 N. E. 677; State v. McKenna, 16 R. I. 398; 17 Atl.

51; State v. Hughes, 16 R. I. 403; 17 Atl. 911; People v. Kastner, 101 N. Y. App. Div. 265; 91 N. Y. Supp. 1004.

²⁴ State v. Wills, 106 Mo. App. 196; 80 S. W. 311.

²⁵ People v. Kastner, 101 N. Y. App. Div. 265; 91 N. Y. Supp. 1004.

as to the effect the liquor would produce on one drinking it.²⁶ The fact that a witness cannot name the component parts of whisky, nor even state whether it was a "distilled or rectified spirit," will not disqualify him to testify as an expert that the liquor he purchased was whisky. Nor does the additional fact disqualify him that he could not say that there are medicines which smell like that liquid.²⁷ But where the liquor was called "Hop Jack," and a person testified that his firm sold the liquor to the defendant, and said that "Hop Jack" did not contain a sufficient quantity of alcohol to intoxicate, although he had never drunk any of it and did not know what effect it would have on him, it was held incompetent to ask him, although he claimed to be an expert, whether "the usual and ordinary use of 'Hop Jack' as a drink would make one drunk."²⁸

Sec. 963. Proof as to kind of liquor.

Where the statute defines what is intoxicating liquors, under an allegation of a sale or gift of "intoxicating" liquors, proof of a sale or gift of any kind of liquor thus defined will support the allegation. So where there is no statutory definition in force, proof of a sale or gift of a liquor

²⁶ State v. Linden, 87 Iowa, 702; 54 N. W. 1075.

²⁷ People v. Marx, 128 N. Y. App. Div. 828; 112 N. Y. Supp. 1011.

²⁸ Doner v. People, 92 Ill. App. 43. If a witness be not cross-examined to test the value of his testimony, it will be presumed that he recognized the beverage he described. Cullinan v. McGovern, 94 N. Y. Supp. 525.

Where it is claimed that certain bitters are intoxicating, the fact that the United States Internal Revenue Department classed them as a proprietary medicine is irrelevant; but it does not show that they did not contain a suffi-

cient amount of alcohol to produce intoxication.

The accused may call the manufacturers to prove the amount of alcohol in the liquor; but he may not prove by him the amount of alcohol in other liquors he manufactures. State v. Costa, 78 Vt. 198; 62 Atl. 38.

A physician may testify that the liquor in question is legitimate medicine and used as such. State v. Costa, *supra*.

An analysis of liquor not shown to have any connection with the defendant is not admissible. Magill v. State, 51 Tex. Cr. App. 357; 103 S. W. 397. See also State v. Jenkins, 32 Kan. 477; 4 Pac. 809.

of which the court will take judicial notice it is intoxicating will be sufficient. Thus proof of a sale of brandy peaches or brandy cherries preserved in intoxicating liquors is sufficient to support the allegation.²⁹ So on a charge of selling "spirituous" liquor proof of a sale of gin or brandy mixed with sugar and water is sufficient.³⁰ So on a charge of a sale of "bitters," proof of a sale of whisky compounded in quantities sufficient to intoxicate with bitter herbs, but which is used as a beverage, is sufficient.³¹ An indictment charging a sale of "intoxicating liquors and mixed liquors, part of which was intoxicating" is supported by proof of a sale of whisky alone.³² But where the court does not take notice that "beer" is intoxicating, under a statute forbidding the sale of spirituous, vinous or malt liquor, without a license, proof of a sale of "beer" is not sufficient to show it was a "malt" liquor.³³ Under a statute forbidding a sale of "spirituous, vinous or malt liquors" where the sale charged is of "spirituous and intoxicating" liquors, it must be shown that the liquor sold was either a spirituous, vinous or malt liquor, and proof of a sale of intoxicating liquor is not enough.³⁴ Proof of a sale of "pop," if shown to be such, will support a charge of a sale of intoxicating liquors.³⁵ So where the evidence showed that the purchaser called for "whisky" and the accused set before him a bottle with liquor in it, from which the purchaser poured out some in a glass and drank it, and then gave the accused a flask and said "fill it," this was held sufficient to show the liquor sold was whisky.³⁶ It is no

²⁹ Ryall v. State, 78 Ala. 410;
Myers v. State, 93 Ind. 251.

³⁰ Commonwealth v. White, 10
Met. 14.

³¹ Wall v. State, 78 Ala. 417;
State v. Williams, 14 N. D. 411;
104 N. W. 546; Chapman v. State,
100 Ga. 311; 27 S. E. 789; State
v. Skillicorn, 109 Iowa 97; 73 N.
W. 503.

³² Commonwealth v. Leonard, 11
Gray, 458; Commonwealth v. Giles
1 Gray 466; Commonwealth v
Burns, 9 Gray, 287.

³³ Netson v. State, 24 Fla. 363;
5 So. 8; 1 L. R. A. 825; Connolly
v. Atlanta, 79 Ga. 664; 4 S. E.
263.

³⁴ Blankenship v. State, 93 Ga.
814; 21 S. E. 130.

³⁵ Godfreidsen v. People, 88 Ill.
284.

³⁶ Kammann v. People, 26 Ill.
App. 48; affirmed, 124 Ill. 181; 16
N. E. 661; Barrose v. State, 1
Clarke (Iowa), 374; Taylor v.

objection that evidence showing the liquor was intoxicating is wholly circumstantial.³⁷ It may be shown that "hop tea" is intoxicating upon a charge of selling intoxicating liquor.³⁸ So evidence of a witness that he sold intoxicating liquor, and that it was beer, justifies the jury in finding that it was intoxicating.³⁹ As has elsewhere been stated, mere proof of a sale of "beer" in some jurisdictions is not enough to show a sale of intoxicating liquor;⁴⁰ while in others it is, especially if sold under such circumstances as ordinary malt beer is usually sold.⁴¹ This is true of "lager" beer, though called "pop beer."⁴² Testimony that the liquid sold was "reddish," in a half-pint bottle, accompanied by the testimony of two witnesses who saw it that in their opinion it was whisky was held sufficient evidence that it was an intoxicating liquor.⁴³ Where the evidence showed that the witnesses called for "whisky," and the accused's clerk told him they had none, but did have "ginger," and he then produced a bottle in shape like a whisky bottle, out of which the witness poured some liquor into a whisky glass and drank it, and it looked and tasted like whisky, but did not make him intoxicated, though he said he believed it would do so if he drank enough of it, this was

State, 113 Ind. 471; 16 N. E. 183; State v. Cloughlay, 72 Iowa 626; 35 N. W. 652.

³⁷ Dant v. State, 83 Ind. 60.

³⁸ State v. Hickman, 54 Kan. 225; 38 Pac. 256; State v. Beasley, 21 W. Va. 777.

But on a charge of selling "hop tea" it was held that the State could not convict on proof of a sale of a different, though similar, beverage. Lincoln Center v. Linkes, 5 Kan. App. 242; 47 Pac. 174.

³⁹ Commonwealth v. Gavin, 160 Mass. 523; 36 N. E. 484.

See also Commonwealth v. Leo, 110 Mass. 414; Commonwealth v. Peto, 136 Mass. 155; Commonwealth v. Taylor, 14 Gray 26;

State v. Dick, 47 Minn. 475; 50 N. W. 362.

⁴⁰ State v. Sioux Falls Brewing Co., 5 S. D. 39; 58 N. W. 1; 26 L. R. A. 138.

⁴¹ Myers v. State, 93 Ind. 251; State v. Dick, 47 Minn. 475; 50 N. W. 362; State v. Barron, 37 Vt. 57; Levering v. State (Tex. Cr. App.), 33 S. W. 976.

⁴² State v. Kibling, 63 Vt. 636; 22 Atl. 613; Commonwealth v. Leo, 110 Mass. 414; People v. Henschel, 58 Hun, 607; 12 N. Y. Supp. 46; Commonwealth v. Reyburg, 122 Pa. 299; 16 Atl. 351; 23 Wkly. N. C. 151; 2 L. R. A. 415.

⁴³ Burrell v. State, 25 Neb. 581; 41 N. W. 399; State v. Twenty-five Packages, 38 Vt. 387.

held not to sustain the charge that the accused sold intoxicating liquor.⁴⁴ But where the sale was of "essence of cinnamon" under similar circumstances, which so affected the witness he "could not see after night," the evidence was held to show it was intoxicating.⁴⁵ So proof of a sale of liquors universally conceded and known to be intoxicating is sufficient proof that they were such.⁴⁶ Alleging under a *videlicet* the particular liquor sold will not necessarily require the State to prove that particular kind of liquor, unless it was especially descriptive of the offense.⁴⁷ But a charge of a sale of "whisky" must be supported by evidence of a sale of "whisky;"⁴⁸ and proof of a sale of "Home Bitters" cannot be shown unless made of whisky.⁴⁹ Anyone who knows the taste of different liquors, though not a chemist, may testify whether a particular liquor he has tasted is or is not a malt or fermented or a spirituous liquor.⁵⁰ Any person who knows whisky by the taste, whose knowledge is derived from drinking whisky, may testify whether liquor he has tasted is or is not whisky.⁵¹ Where the proof showed the liquor was called "Phoenix," yet it intoxicated those who drank it, and that accused had a barrel of whisky on tap at the place, it was held to support the charge that the liquor sold was intoxicating.⁵² Statements made by the accused at the time of the sale that the liquor was a medicine cannot be put in evidence, because self-serving.⁵³

⁴⁴ *Savage v. Commonwealth*, 84 Va. 582; 5 S. E. 563.

⁴⁵ *State v. Muncey*, 28 W. Va. 494.

⁴⁶ *State v. Barron*, 37 Vt. 57.

⁴⁷ *Frisbie v. State*, 1 Ore. 248.

It has been held that a charge of a sale of intoxicating liquor, "to-wit: whisky, brandy, rum and gin," proof of a sale of "alcohol" would not support the indictment; but the decision cannot be regarded as sound. *State v. Smith*, 38 Mo. App. 618.

⁴⁸ *State v. Hesner*, 55 Iowa 594; 8 N. W. 329.

⁴⁹ *Williams v. State*, 35 Ark. 430.

Where an intent must be shown proof of sales of other liquors that are intoxicating are admissible. *Dobson v. State*, 5 Lea 271.

⁵⁰ *Merkle v. State*, 37 Ala. 139.

⁵¹ *Territory v. Pratt*, 6 Dak. 483; 43 N. W. 711; *Burrell v. State*, 25 Neb. 581; 41 N. W. 399.

⁵² *State v. Pfefferle*, 36 Kan. 90; 12 Pac. 406.

⁵³ *Sills v. State*, 76 Ala. 92.

On a charge of a sale of "alcoholic, spirituous and intoxicating liquors, to-wit: whisky, brandy,

Sec. 964. Place of offense.

As it is necessary to aver facts sufficient to show that the offense was committed within the jurisdiction of the court—usually in the county where the prosecution is begun—it is necessary to prove that allegation; and if it is not proven, there can be no conviction.⁵⁴ But it is sufficient to prove the county in which it was committed without proving the State,⁵⁵ but not enough to prove the city or town, though incorporated.⁵⁶ In some States not only the county in which the sale took place must be shown, but even that political division of it in which the offense is charged to have been committed.⁵⁷

rum, gin, ale, lager beer and wine and other drinks which if drunk to excess will produce intoxication," proof of a sale of blackberry wine, made by the accused on his own premises, does not support the charge. *Loid v. State*, 104 Ga. 726; 30 S. E. 961.

An indictment charging a sale of three kinds of liquor is sustained on proof of any one of them. *Southern Express Co. v. State*, 1 Ga. App. 700; 58 S. E. 67.

Upon a charge of selling "medicated bitters," it is error to admit evidence of a sale of another kind of intoxicating liquor. *Cousins v. State*, 46 Tex. Cr. App. 87; 79 S. W. 549.

Where accused sold straight whisky and a doctor thereafter put medicine in it for the purchaser, it was held not error to refuse to charge that if accused believed the liquor was not intoxicating, but a medical compound, to be used under the prescription of a physician, he was not guilty. *Cotton v. State*, (Tex.), 120 S. W. 432.

⁵⁴ *Mullinix v. State*, 43 Ind. 511; *Jackson v. State*, 19 Ind. 312; *Baker v. State*, 34 Ind. 104;

Savage v. Commonwealth, 84 Va. 582; 5 S. E. 563; *Garst v. State*, 68 Ind. 37; *Sohn v. State*, 18 Ind. 389; *Deck v. State*, 47 Ind. 245; *Long v. State*, 56 Ind. 206; *State v. Ham*, 64 N. J. L. 49; 44 Atl. 845.

⁵⁵ *Wiles v. State*, 33 Ind. 207, disapproving *Jackson v. State*, 19 Ind. 312 on this point.

⁵⁶ *Garst v. State*, 68 Ind. 37. As the courts in this State take judicial notice of all incorporated towns or cities, though not of the extent of their boundaries (*Gruenmeyer v. Logansport*, 76 Ind. 549), this case cannot be regarded as very sound. See *Stultz v. State*, 65 Ind. 492. The rule stated in the text has been followed in Mississippi. *Botts v. State*, 26 Miss. 108. If the town be unincorporated, it is not sufficient to prove merely that the sale occurred in it. *State v. Busb (Mo.)*, 118 S. W. 670.

⁵⁷ *Moore v. State*, 12 Ohio St. 387.

In one case it was held that the jury could infer the place of sale from their own knowledge, where it was shown the sale took place at accused's store. *State v. Williams*, 3 Hill (S. C.), 91.

This case may be sustained on the ground that the place designated was by way of local description, and not a question of venue, in which event the proof must correspond with the averment. Where it was charged that the sale was within two miles of the limits of a certain city, it was held that the legal establishment of such limits could not be inquired into, and the *defacto* limits could be proven by parol.⁵⁸ Of course, in a case of a charge of the maintenance of a liquor nuisance, it must be proven not only that it was maintained in the county (and the town when that is) alleged, but also the exact place described in the indictment.⁵⁹

Sec. 965. Persons jointly indicted.

In an instance of an indictment against two for having jointly committed the same offense, the evidence must show

⁵⁸ *Albia v. O'Hara*, 64 Iowa 297; 20 N. W. 444.

Recitals in a special statute as to the center of a district in which the sale of liquor is prohibited are *prima facie* proof of the location of the center, and proof of a sale on the "outskirts" of such district is proof that it was made within ten miles of a college in such district or town. *Henry v. State*, 71 Ark. 574; 76 S. W. 1071.

⁵⁹ *Commonwealth v. Heffron*, 102 Mass. 148; *State v. Gurlagh*, 76 Iowa 141; 40 N. W. 141; *Commonwealth v. Boyden*, 14 Gray 101.

Upon a charge of a violation of a screen law, describing the premises as in a certain room, it was held there was no variance where the license (which had to be shown) described the licensed premises as covering not only the room, but also the cellar under it. *Commonwealth v. Keefe*, 140 Mass. 301; 4 N. E. 576.

Evidence conclusively showed a sale in the town of H. It was held not error to refuse to instruct that if the State had not proven the sale occurred within the corporate limits of the town of H there could be no conviction. *Leftwich v. State* (Tex. Cr. App.), 55 S. W. 571.

Where the defendant claims the witness is mistaken in the place where he obtained the liquor, he may show the furnishings of two saloons near and similar to his own, after the witness has described the place where he purchased the liquor. *Benson v. State* (Tex. Cr. App.), 44 S. W. 163.

A statement of a witness that he bought the liquor after the defendant moved to a designated town authorizes the inference that he bought it at that place. *Hendrickson v. Commonwealth*, 15 Ky. L. Rep. (abstract) 542.

a joint commission of the offense or there will be an acquittal. Evidence that they both separately at different times committed the offense is not sufficient.⁶⁰ But where husband and wife were jointly indicted, and the evidence showed the witness applied to the husband for liquor, and he said he had none, but his wife had for her private use, and he got liquor of her and handed it to the witness over the counter, it was held that the complaint as to the wife should be dismissed.⁶¹ And where the offense is such that one of the defendants could commit it, proof of a sale by one will be sufficient to authorize his conviction.⁶² To convict an accused it is not necessary to prove that he actually delivered the liquors; it is enough to show that he and another acted together at the same time and place, and each knew of the unlawful act in making the sale.⁶³

Sec. 966. Prior conviction or acquittal—Two offenses in one transaction.

If the defendant has been once tried and convicted or acquitted of the same offense as the one on trial, then he has the burden of showing that fact.⁶⁴ It does not follow that the test is a question of mere evidence; that is, that if the same evidence supports both charges; the real test is whether the two offenses charged are essentially independent, and, of course, distinct offenses.⁶⁵ And even if no evidence was given on a former trial, because of a plea of guilty, yet that will not prevent a showing that the offenses are distinct and differ-

⁶⁰ *Farrell v. State*, 3 Ind. 573; *Hall v. State*, 8 Ind. 439; *Bloomhoff v. State*, 8 Blackf. 205.

⁶¹ *State v. Matherson*, 77 Iowa 485; 42 N. W. 377.

⁶² *State v. Prater*, 59 S. C. 271; 37 S. E. 933; *Reed v. State*, 53 Tex. Cr. App. 4; 108 S. W. 368.

⁶³ *Reed v. State*, 53 Tex. Cr. App. 4; 108 S. W. 368.

⁶⁴ *State v. Ainsworth*, 11 Vt. 91; *Rex v. Kay*, 38 N. B. 325; *Regina*

v. Marsh, 25 N. B. 371; *Regina v. McGarry*, 31 Ont. 486.

⁶⁵ *State v. Blaunt*, 48 Ark. 34; 2 S. W. 190; *State v. Andrews*, 27 Mo. 267.

But see *State v. Gapen*, 19 Ind. App. 524; 45 N. E. 678; 47 N. E. 25, and *State v. Elder*, 65 Ind. 282; 32 Am. Rep. 32; *Freeman v. State*, 119 Ind. 501; 21 N. E. 1101; *Miller v. State*, 33 Ind. App. 509; 71 N. E. 248.

ent transactions.⁶⁶ The accused has the burden to show the offenses are the same in both prosecutions—that he is the same defendant in both prosecutions, and the transactions are the same.⁶⁷ Proof that he is the same person is not enough; identity of offense must be shown.⁶⁸ Whether or not the defendant in the one prosecution is the same as in the other is a question for the jury; and the court may not assume in its charge that proof of identity of names is proof of identity of persons.⁶⁹ The accused must come prepared to answer all the violations he has committed during the period over which the proof may range and answer any one the prosecution may bring forward.⁷⁰ A certificate of conviction in New Brunswick is held competent evidence.⁷¹ If an extended record has not been made up, docket entries are competent to show a conviction or acquittal.⁷² Usually proof of a verdict of acquittal or conviction is not sufficient to show either an acquittal or conviction, but it must be followed by a formal judgment, and a mere recital in the record of such a verdict is not such a judgment.⁷³ But there is no reason why, when the plea is former jeopardy, that the verdict and formal en-

⁶⁶ *State v. Shafer*, 20 Kan. 226.

⁶⁷ *Ex parte Flannagan*, 34 N. B. 577; *Robinson v. State*, 53 Tex. Cr. App. 565; 110 S. W. 908; *Regina v. Marsh*, 25 N. B. 371.

⁶⁸ *State v. Pianfetti*, 79 Vt. 236; 65 Atl. 84.

Where the penalty for a sale to a minor is recoverable in a civil action, its recovery is no bar to a criminal prosecution for the same sale. *Mitchell v. State*, 12 Neb. 538; 11 N. W. 848.

⁶⁹ *State v. Lashus*, 79 Me. 504; 11 Atl. 180.

⁷⁰ *Ex parte Whalen*, 32 N. B. 274; *Ex parte McManus*, 32 N. B. 481.

⁷¹ *Ex parte*, 26 N. B. 397.

⁷² *State v. O'Connell* (Me.), 14 Atl. 291; *State v. Neagle*, 65 Me. 468; *State v. Lashus*, 79 Me. 504;

11 Atl. 180; *State v. Robbins* (Me.), 13 Atl. 584.

⁷³ *Caskey v. State* (Tex. Cr. App.), 108 S. W. 665. In this case the recital was on return of the verdict, "Wherefore it is ordered, adjudged and decreed by the court the defendant be find \$50 and costs." The Code required that the judgment should be that the State recover of the defendant the fine and costs, and that he, if present, be imprisoned until the fine and costs were paid; and that execution might issue against his property for the fine and costs. The entry was held not to be a judgment. And see *Commonwealth v. Fraher*, 126 Mass. 265; *Commonwealth v. Lahy*, 8 Gray 459.

tries with the indictment may not be put in evidence, to be accompanied by proper parol proof of identification, to show a former jeopardy, and possibly to show an acquittal or conviction, for the accused is not bound by the failure or refusal of the State to have the court make proper entries showing his acquittal or conviction. On a trial for maintaining a liquor nuisance the accused cannot put in evidence the records of a lower court showing his discharge in that court on the search and seizure cases disclosed in the evidence in the case on trial.⁷⁴ Where an accused was convicted of keeping liquors illegally on May 16th, and in a subsequent case he was charged with selling illegally between January 21st and April 18th of the same year, and convicted of keeping for sale between February 14th and March 24th, it was held that the plea of former conviction of the offense charged was not made out, no evidence being put in by accused to show identity of transactions.⁷⁵ But when several sales were shown to have been made within a year upon a charge of having made one illegal sale, and there was a conviction, and upon a trial upon another indictment for an illegal sale during the same year, it was held that no evidence of the same sales could be introduced, although there had been a conviction of making only one illegal sale, that sale not having been identified by the verdict of the jury.⁷⁶ When the defendant has shown he had been convicted of an offense similar to one for which he is being prosecuted and has put in evidence to identify the two alleged offenses as covering one and the same transaction, the State may show that they were separate and distinct transactions.⁷⁷ If the accused be convicted of a single sale upon an indictment charging several, but the particular sale is not identified, nor the count shown upon which the verdict is based, and he appeal and the case be reversed, he may again be put upon trial for all the counts in the indictment, and cannot claim he was acquitted upon all of them except

⁷⁴ *State v. Wold*, 96 Me. 401; 52 Atl. 909.

⁷⁵ *Regina v. Marsh*, 25 N. B. 371.

⁷⁶ *State v. Stephens*, 70 Mo. App. 554.

⁷⁷ *Robinson v. State*, 53 Tex. Cr. App. 565; 110 S. W. 908.

one.⁷⁸ The plea of former acquittal or conviction must be interposed before verdict returned to be available.⁷⁹ There are some few instances where the prosecution may avail itself of a former conviction. Such an instance is where the charge is the possession of intoxicating liquors with intent to sell them unlawfully. In a case of that kind a previous conviction for a similar or another offense of the same kind may be put in evidence to show the intent.⁸⁰ And so upon a charge of keeping a nuisance, the record of having been convicted of being a common seller at the same place, but not at another place, is admissible;⁸¹ and to secure the introduction of the record, evidence outside the record is admissible to show that the description of the place in the indictment on the former occasion and in the indictment in the case on trial are the same, although less complete in the one than in the other, but not inconsistent.⁸² So where it is desired to increase the penalty on a second prosecution for a like offense a record of a former conviction is admissible, and such prior conviction cannot be disputed.⁸³ Where the charge is a sale to one B, the record of a conviction on a sale to C is not admissible, even though both sales

⁷⁸ *State v. Pianfetti*, 79 Vt. 236; 65 Atl. 84.

⁷⁹ *State v. Haynes*, 35 Vt. 570; *State v. Spaulding*, 61 Vt. 550; 17 Atl. 844.

⁸⁰ *State v. Neagle*, 65 Me. 468.

⁸¹ *State v. Hall*, 79 Me. 501; 11 Atl. 181; *Commonwealth v. Austin*, 97 Mass. 595.

⁸² *State v. Hall*, 79 Me. 501; 11 Atl. 181.

⁸³ *State v. Fagan*, 64 N. H. 431; 4 Atl. 727.

An order of a justice of the peace that certain liquors seized be returned to the accused, made several days before the date the indictment was found charging the keeping of the same liquors, is not admissible on the trial had on such indictment. *State v. Zim-*

merman, 78 Iowa 614; 43 N. W. 458. Nor is a dismissal of a prosecution under an agreement not to prosecute the offense charged in the indictment admissible, although no sales had been made after such dismissal. *Commonwealth v. Cutler*, 9 Allen 486.

Where an indictment does not charge any offense, a judgment thereon for the accused is not admissible for any purpose whatever. *Shafter v. State*, 114 Ind. 194; 16 N. E. 521.

For the purpose of increasing the punishment, the defendant cannot be compelled to testify that he had been previously convicted of a similar offense. *Queen v. Nurse*, 2 Can. Cr. Cas. 57.

took place on the same day.⁸⁴ And where the defendant showed a former conviction for selling liquors to divers unknown persons, and that prior to such conviction he had sold liquor to the same person alleged to be the purchaser in the indictment in the case on trial, but he did not show that he had sold to no one else, it was held that a former conviction of the particular offense on trial was not shown.⁸⁵ Where the charge was of a sale in general terms and there was a conviction, and at a subsequent term the same year the defendant was indicted in another general indictment of the same kind, the commission of the offense being charged to have been made prior to the time of the finding of the first indictment, it was held that the defendant should have been acquitted on the second indictment, on the ground that he had formerly been convicted for the same offense.⁸⁶ There are many instances where the same act constitutes two offenses, as a sale on a Sunday without a license, or a sale on a week day to a minor, or drunkard, or intoxicated person, without a license. In all such instances a conviction of one of these offenses is no bar to a conviction of the other offense involved in the same act.⁸⁷ A person thus tried a second time is not put twice in jeopardy "for the same offense."⁸⁸ In discussing an instance of a sale to a minor without a license the Appellate Court of Indiana used this language: "A sale of intoxicating liquors is not *per se* an unlawful act. It can only be made a crime by force of a statute. A sale to a minor and a sale without a license although the same sale, are, so far as constituting two offenses, entirely distinct. A simple sale without more is not a viola-

⁸⁴ *Levi v. Rex*, [1906] East. Dist. Ct. Rep. 272 (distinguishing *Queen v. Brooks*, 6 Sup. Ct. 319); *Ballowe v. Commonwealth* (Ky.), 44 S. W. 646; *Benson v. State* (Ky.), 44 S. W. 168; *State v. Gapen*, 17 Ind. App. 524; 45 N. E. 678; 47 N. E. 25; *Morton v. State*, 37 Tex. Cr. Rep. 131; 38 S. W. 1019; *State v. Heard*, 107 La. 60; 31 So. 384.

See *State v. Broeder*, 90 Mo. App. 169.

⁸⁵ *Ballowe v. Commonwealth* (Ky.), 44 S. W. 646.

⁸⁶ *McWilliams v. State* (Ga.), 34 S. E. 1016.

⁸⁷ *Arrington v. Commonwealth*, 87 Va. 96; 12 S. E. 224; *Ruble v. State*, 51 Ark. 170; 10 S. W. 262; *Montross v. Commonwealth*, 8 Pa. Super. Ct. 237.

⁸⁸ *State v. Gapen*, 17 Ind. App. 524; 45 N. E. 678; 47 N. E. 25.

tion of law. To make it unlawful it must be accompanied by the conditions which the statute requires to constitute the offense. Let it be admitted that the defendant made the sale to William Corberly. These facts standing alone do not constitute a crime. Something more must be charged as well as proved before he can be convicted of a criminal offense. It is not the sale alone that constitutes the offense, but it is the sale, coupled with other facts. In the one, it is the sale coupled with the fact that the vendor had no license. In the other, it is the sale coupled with the fact that it was made to a minor. The sale standing alone is an innocent act. It does not touch the sphere of culpability unless accompanied by other forbidden facts. It is the accompanying facts that make it unlawful. The accompanying fact in each instance is entirely distinct. There is no connection between the fact that the vendor had no license and the fact that the purchaser was a minor. Whilst it is true that there is an identity in the charges and the evidence up to a certain point, yet up to that point the sale is an innocent transaction. It is only when the criminal character of the transaction is sought to be made that the two offenses diverge, in the charge and in the evidence necessary to a conviction. The purposes of the two statutes are entirely dissimilar. The one is to raise revenue and protect those who have obtained license. The other is to guard the young against intemperance. The appellee is in error in assuming that the sale alone constitutes the criminal offense. In so far as the charges and the evidence are identical, the transaction is entirely innocent. The appellee might have been convicted or acquitted of the charge of selling to a minor, and the fact he had no license be not even alluded to. The fact he had no license was not an element in that offense. So, on the other hand, he might have been convicted or acquitted of the charge of selling without a license, and the age of the purchaser not have even been referred to; for his age is not an element of that offense.”⁸⁹ So the act of keeping open a tippling house or

⁸⁹ State v. Gopen, 17 Ind. App. v. Commonwealth, 87 Va. 96; 12 524; 45 N. E. 678; 47 N. E. 25. S. E. 224.

See also reasoning in Arrington According to the reasoning of

saloon on Sunday is a distinct offense from a sale of intoxicating liquor on that day, though the evidence be the same in both cases, and a conviction for one of the offenses is no bar to a prosecution for the commission of the other.⁹⁰ So the offense of keeping liquor for sale is distinct from the offense of a sale of the same liquor;⁹¹ and the same is true of the offense of keeping liquors for sale without a license with intent to sell and the offense of selling them;⁹² or of keeping a liquor nuisance and a sale of the liquor kept;⁹³ of a sale in violation of the local option law by a sale and a distinct sale on the same day to the same person;⁹⁴ or of keeping a tenement for the illegal sale of liquor and a sale of liquor therein;⁹⁵ or of keeping a tippling house and presuming to be a common seller;⁹⁶ or of a conviction of the husband for maintaining a liquor nuisance and a prosecution of his wife for being a common seller (the evidence in both cases being the same);⁹⁷ or of presuming to be a common seller and selling liquor;⁹⁸ or of keeping a liquor nuisance by keeping a tenement for the illegal sale of liquors and keeping liquors with intent to sell them illegally.⁹⁹ As each sale

this Indiana case a conviction for a sale on Sunday would be a bar to a prosecution if the sale was to a minor; and while a sale to a minor on Sunday without a license would constitute three offenses there could not be three convictions. See *State v. Elder*, 65 Ind. 282; 32 Am. Rep. 69.

Where a statute makes it an offense to sell, barter or give away liquor, a conviction of a sale is a bar to a prosecution for giving away or bartering the same liquor. *State v. Reed*, 168 Ind. 588; 81 N. E. 71.

⁹⁰ *Smith v. State*, 105 Ga. 724; 32 S. E. 127.

⁹¹ *Taylor v. State*, 5 Ga. App. 237; 62 S. E. 1048; *Sutton v. Washington*, 4 Ga. App. 30; 60 S. E. 811.

⁹² *State v. Ryan*, 68 Conn. 512; 37 Atl. 377; *Commonwealth v. Hanley*, 140 Mass. 457; 5 N. E. 468.

⁹³ *State v. Miller*, 63 Kan. 62; 64 Pac. 1033.

⁹⁴ *Robinson v. State*, 53 Tex. Cr. App. 565; 110 S. W. 908; *Harris v. State*, 50 Tex. Cr. App. 411; 97 S. W. 704.

⁹⁵ *Commonwealth v. Hogan*, 97 Mass. 122; *State v. Lincoln*, 50 Vt. 644; *Commonwealth v. Sullivan*, 150 Mass. 315; 23 N. E. 47.

⁹⁶ *State v. Innes*, 53 Me. 536.

⁹⁷ *Commonwealth v. Welch*, 97 Mass. 593.

⁹⁸ *State v. Combs*, 32 Me. 529; *State v. Maher*, 35 Me. 225.

⁹⁹ *Commonwealth v. McCauley*, 105 Mass. 69; *State v. Wheeler*, 62 Vt. 439; 20 Atl. 601; *State v.*

is a distinct offense, and there may be as many convictions as there are offenses, a seller of liquors may be convicted of two or more sales to the same person on the same day.¹ And where the accused had a purchaser make an order on a wholesaler for a gallon of liquor, which he, the accused, received and retailed out—this method being pursued to cover up an illegal sale—it was held that a conviction for making one sale to a purchaser was not a bar for a prosecution for another sale.² But if two persons be charged jointly with the commission of the same offense, the acquittal of one is available as a defense for the other.³

Sec. 967. Second offense.

Where the indictment charges that the accused has been formerly convicted of a violation of the liquor laws, the record of his prior conviction, or a certified copy of it, is admissible to prove that fact.⁴ Docket entries of a prior con-

Jangraw, 61 Vt. 39; 17 Atl. 733; see also *State v. Brown*, 75 Iowa 768; 39 N. W. 829; *State v. Graham*, 73 Iowa 553; 35 N. W. 628.

¹ *Robinson v. State*, 53 Tex. Cr. App. 565; 110 S. W. 908; *State v. Pianfetti*, 79 Vt. 236; 65 Atl. 84; *State v. Heard*, 107 La. 60; 31 So. 384; *Robinson v. State* (Tex. Cr. App.), 110 S. W. 905; *Harris v. State*, 50 Tex. Cr. App. 411; 97 S. W. 704; *Alexander v. State*, 53 Tex. Cr. App. 553; 110 S. W. 918; *Ex parte Perkins*, 30 N. B. 15; *Ex parte Hoffer*, 27 N. B. 496.

Under a statute forbidding a sale of uninspected liquors, every sale of a package not having on it the inspector's certificate, is a separate offense. *State v. Broeder*, 90 Mo. App. 169.

² *Armstrong v. State* (Tex. Cr. App.), 47 S. W. 1006.

³ *State v. Brown*, 49 Vt. 437.

A compromise of a prosecution cannot be used as a former conviction. The State is not bound by it. *Regina v. Mabey*, 37 Up. Can. 248; *In re Fraser*, 1 Can. Law Jour. 324.

Judicial notice, *Dupree v. State* (Tex.), 120 S. W. 871, 875.

A conviction for a violation of a city ordinance is no bar to a prosecution for violation of a statute based upon the same facts. *Mayhew v. Eugene* (Ore.), 104 Pac. 727.

⁴ *King v. Bigelow*, 7 Can. Cr. Cas. 132; *Regina v. Yeoveley*, 8 A. & E. 806; *Regina v. Word*, C. & P. 366; *Regina v. Bigelow*, 36 Nov. Sco. 554; *Commonwealth v. Line*, 149 Mass. 65; 20 N. E. 697.

Judicial notice, *Dupree v. State* (Tex.), 120 S. W. 871, 875.

viction have been held sufficient if no question of identity be raised.⁵ In Canada a certificate of conviction, issued by the clerk of the court, under its seal, is sufficient.⁶ The record of conviction is conclusive upon the accused.⁷ Identity of names has been held sufficient as to identity of persons.⁸ But similarity of names is not always enough, especially if there be some attendant circumstances throwing some doubt on the question.⁹ Identity of the accused with the person formerly convicted must be made to appear in some way,¹⁰ and usually the identity of persons is a question for the jury and not the court.¹¹ Unless a former conviction be proven, the court has no power to add the additional punishment inflicted for a second conviction.¹² And this must be made before verdict.^{12*}

Sec. 968. Permitting females in saloon—Keeping a wine room.

Upon a charge of permitting a female to remain in a saloon, evidence is admissible to show that while she was there the accused in person or by his barkeeper sold or gave intoxicating liquor to her, to show not only that the accused was conducting a saloon but also that he permitted her to remain in his saloon.¹³ The accused may show that a room

⁵ *State v. O'Connell* (Me.), 14 Atl. 291; *State v. Neagle*, 65 Me. 468; *State v. Lashus*, 79 Me. 504; 11 Atl. 180; *State v. Robbins* (Me.), 14 Atl. 584.

⁶ *Regina v. Clark*, 15 Ont. 49; *Regina v. Edgar*, 15 Ont. 142; *Regina v. Kennedy*, 10 Ont. 396; *Regina v. Kennedy*, 17 Ont. 159; *Regina v. Brown*, 10 Ont. 41; *Ex parte Dryden*, 32 N. B. 98; *Rex v. Byron*, 37 N. B. 383.

⁷ *State v. Fagan*, 64 N. A. 431; 14 Atl. 727.

⁸ *Regina v. Clark*, 15 Ont. 49; *Regina v. Edgar*, 15 Ont. 142; *Regina v. Kennedy*, 17 Ont. 159; *Ex*

parte Dugan, 13 C. L. T. 249; *King v. Batson*, 12 Can. Cr. Cas. 62.

⁹ *Queen v. Lloyd*, 1 Cox C. C. 51.

¹⁰ *Queen v. Harrell*, 1 Can. Cr. Cas. 511.

¹¹ *Lashus v. State*, 79 Me. 504; 11 Atl. 180.

¹² *Regina v. Clark*, 15 Ont. 49; *Regina v. Brown*, 16 Ont. R. (Q. B. D.), 41; *Rex v. Brien*, 38 N. B. 381.

^{12*} *State v. Spaulding*, 61 Vt. 550; 17 Atl. 844.

¹³ *State v. Baker*, 50 Ore. 381; 92 Pac. 1076; 13 L. R. A. (N. S.) 1040. See also *State v. Conway*, 38 Mont. 42; 98 Pac. 654.

charged to be a wine room was a restaurant, and he is entitled to show that it had all the paraphernalia of a restaurant.¹⁴

Sec. 969. Illegal transportation of liquor.

Upon a charge of illegal transportation of liquors from one place to another, with knowledge that they are intended for illegal sale, or having reasonable cause to believe that they are intended for such a sale, it may be shown that on several occasions near the time of the alleged transportation the accused had received other considerable quantities of liquors, at the same railroad station, for transportation by him.¹⁵ So where the accused was in a grocery connected by a door with a barroom in which liquor had been seized, and his wagon, containing liquor was then standing before the door of the store, and when arrested he said he knew it was illegal to carry the kind of liquor he had in his wagon and that he expected to get caught, it was held that proof of these facts was sufficient to warrant his conviction.¹⁶ So proof that the accused had carried liquors in the State to another, having reasonable belief he intended to sell them illegally to a third person, warrants a conviction.¹⁷ So where it is an offense to bring liquors into a "dry district," to be sold in violation of law, it is only necessary to show that the accused aided and assisted in bringing the liquor into the district, and the beginning and ending of the journey need not be shown.¹⁸ In order to show that the accused knew he was carrying intoxicating liquors, it was held proper to show that four months before the place was used for selling intoxicating liquors.¹⁹ The fact that the person to whom the same liquors had been sent, had been acquitted of a charge of keeping them,

¹⁴ *Ellis v. People*, 38 Colo. 516; 88 Pac. 461.

¹⁵ *Commonwealth v. Commeskey*, 13 Allen 585; *Commonwealth v. Currier*, 164 Mass. 544; 42 N. E. 96.

See *Commonwealth v. Locke*, 114 Mass. 288; *Commonwealth v. McConnell*, 11 Gray, 204.

¹⁶ *Commonwealth v. Locke*, 114 Mass. 288.

¹⁷ *Commonwealth v. McClusky*, 116 Mass. 64.

¹⁸ *Commonwealth v. Currier*, 164 Mass. 544; 42 N. E. 96.

¹⁹ *Commonwealth v. Kenney*, 115 Mass. 149.

with intent to sell them, is not available as a defense for the accused.²⁰ In an action against a railroad company for permitting an express company, having an office in its building, to sell liquor there, the State may show how the business of the office was conducted as bearing upon the question of intent or good faith involved.²¹ In a prosecution for carrying or assisting in carrying liquors into a local option district, it was held, where it appeared accused acted as the agent of an express company and was not aware that the shipment was in pursuance of a contract, that the presumption was the transaction was legitimate in the absence of evidence to show it was unlawful.²²

Sec. 970. "C. O. D."—Express agent's liability.

The letters "C. O. D." are by no means cabalistic. They have no occult or mysterious meaning. In ordinary commerce of the country, these letters have acquired such a fixed and determinate meaning that courts and juries from their

²⁰ Commonwealth v. Walters, 11 Gray 81.

²¹ Louisville, etc., R. Co. v. Commonwealth, 126 Ky. 279; 103 S. W. 349; 31 Ky. L. R. 683; Adams Express Co. v. Commonwealth (Ky.), 103 S. W. 353; 31 Ky. L. Rep. 81.

²² Ellington v. State (Tex. Cr. App.), 86 S. W. 330; Webb v. State (Tex. Cr. App.), 86 S. W. 331.

Where a statute requires a railroad company to keep a record of all liquor packages delivered in local option districts, instructions to its agent given by it concerning the keeping of such a record are admissible in evidence upon a charge of illegally carrying liquors into such districts. Commonwealth v. Riley, 196 Mass. 60; 81 N. E. 881; 10 L. R. A. (N. S.) 1122.

On a prosecution of an express company in Kentucky for transporting liquors into a local option district, evidence is not admissible to show that the company knew that a C. O. D. shipment of liquors was not ordered by the consignee. Adams Express Co. v. Commonwealth, 206 U. S. 129; 27 Sup. Ct. 606; 51 L. Ed. 987 (Ky.); 103 S. W. 353; 31 Ky. L. Rep. 811-813, reversing (Ky.) 87 S. W. 1111; 27 Ky. L. Rep. 1096; Adams Express Co. v. Commonwealth, 206 U. S. 138; 27 Sup. Ct. 608; 51 L. Ed. 992, reversing (Ky.) 92 S. W. 932; 29 Ky. L. Rep. 224; 5 L. R. A. (N. S.) 630; American Express Co. v. Commonwealth, 206 U. S. 139; 27 Sup. Ct. 609; 51 L. Ed. 993 (Ky.); 92 S. W. 807; 30 Ky. L. Rep. 207.

general information readily understand what is meant thereby. That is, where goods are shipped, marked "C. O. D.," the contract of the common carrier is not only to safely carry and deliver the goods to the consignee but also to "collect on delivery" and return to the consignor the charges, price, or value due the consignor on the goods. An express agent, acting in that capacity, receiving at his office a package containing intoxicating liquor and knowing or having reason to believe or suspicion what it contains, delivering the same to the consignee, collecting the pay therefor and transmitting it to the consignee is liable to conviction under an indictment charging him with illegal sale of liquor. It is essential to such liability that the agent have knowledge of or reason to suspect the contents of the package. His knowledge may be inferred from circumstances as well as proof of direct evidence; good reason to know is equivalent to knowledge; willful ignorance will not avail.²³

Sec. 971. Keeping saloon open.

Upon a charge of unlawfully keeping a saloon open on a prohibited day, proof of sales to a particular person on that day is sufficient evidence to establish the charge without showing a particular or specific sale,²⁴ and such evidence is competent.²⁵ So evidence that, after the accused had given a drink of whisky to one person and refused to give or sell to another, the accused pointed to the bar and said to the latter, "There is some," was held admissible.²⁶ So evidence is admissible to show accused was in his saloon engaged in the

²³ Newark on Sales 375; United States v. Shriner, 23 Fed. Rep. 134; United States v. Cline, 26 Fed. Rep. 515; Wagner v. Hallack, 3 Colo. 184; Crab v. State, 88 Ga. 584; 15 S. E. 455; Knight v. State, 88 Ga. 590; 15 S. E. 457; American Express Co. v. Schier, 55 Ill. 140; United States Express Co. v. Keefer, 59 Ind. 263; State v. Cicault, 1 Daily (N. Y.) 23;

Collender v. Densmore, 55 N. Y. 206 State v. O'Neil, 58 Vt. 140; 2 Atl. 586; Knight v. Goss, 59 Vt. 266.

²⁴ Colter v. Cooper, 15 N. Z. L. R. 186; see State v. Grant, 20 S. D. 164; 105 N. W. 97.

²⁵ Herod v. State, 41 Tex. Cr. App. 597; 56 S. W. 59.

²⁶ Knox v. State (Tex. Cr. App.), 77 S. W. 13.

business, and was only prevented from making a sale by the appearance of an officer.²⁷ So the statements of the accused's wife made in his presence in the saloon when the officers entered are admissible to show that it was being kept open.²⁸ It may be shown that the accused and people were seen going in and out of the saloon.²⁹ It is not necessary to sustain the charge to prove the liquor sold was to be drunk on the premises, it being sufficient to show it was drawn out of the cask and delivered in open vessels.³⁰ Proof that the door was open and the accused's clerk and another were seen in the saloon was held sufficient evidence that it was unlawfully open.³¹

Sec. 972. United States license—Probative effect as evidence.

Presumably no one would take out a liquor license from the United States Government authorizing him to sell intoxicating liquors unless he intended to sell liquors under the

²⁷ Ramey v. State (Tex. Cr. App.), 61 S. W. 126.

²⁸ State v. Hogan, 67 Conn. 581; 35 Atl. 508.

²⁹ Warrick v. State, 48 Ark. 27; 2 S. W. 253; Commonwealth v. Leighton, 140 Mass. 705; 6 N. E. 221.

³⁰ Harris v. People, 1 Colo. App. 289; 28 Pac. 1133.

³¹ Klug v. State, 77 Ga. 734; Warrick v. State, 48 Ark. 27; 2 S. W. 253; Commonwealth v. Leighton, 140 Mass. 305; 6 N. E. 221; Commonwealth v. Stevens, 153 Mass. 4; 26 N. E. 96; Commonwealth v. McNeese, 156 Mass. 231; 30 N. E. 1021; McKinney v. Nashville, 96 Tenn. 79; 33 S. W. 724; Kolman v. State, 2 Ga. App. 648; 58 S. E. 1070.

Perhaps a city may provide by ordinance that the fact the saloon was lighted by night should be

prima facie evidence that it was open. Piqua v. Zimmerlan, 35 Ohio St. 507.

Statutes make proof of the fact that persons were in a saloon on Sunday *prima facie* evidence of the accused's having made an unlawful sale. State v. Gerhardt, 145 Ind. 439; 44 N. E. 469; 33 L. R. A. 313.

Upon a charge of illegally keeping liquor, it is no defense for the accused that his barkeeper has been convicted of keeping the same liquors. People v. Mullins, 5 N. Y. App. Div. 172; 39 N. Y. Supp. 361.

If the accused defends on the ground that his clerk had without authority kept the saloon open, he must show both lack of knowledge and consent as to the fact. Kolman v. State, 2 Ga. App. 648; 58 S. E. 1070.

right given by it. Men are not wont to voluntarily do a useless thing at an expenditure of money. Ordinary experience teaches us that when a person takes out a Government license, at considerable expenditure, he intends to avail himself of the privilege granted him by its terms, and usually that is the privilege to sell intoxicating liquors. But this license will not excuse him from complying with the State or local regulations. He cannot sell liquor without a local license, nor, as a rule, maintain a place for their sale. Two licenses at least are essential to enable him to make a valid sale: one from the Federal Government, the other from the State. It is, therefore, held upon a charge of maintaining a liquor nuisance, or of maintaining a place for illegal sale of liquors, or of keeping liquors for unlawful sale, or of being a "common seller" of liquors, or of engaging in and carrying on the liquor business, that proof of the accused having a United States license to sell intoxicating liquors at retail has some probative force, and such proof is admissible without the aid of a statute authorizing it.³² In fact, some of the cases go so far as to hold that upon the ordinary charge of a sale the license is admissible in evidence,³³ while others hold

³² Commonwealth v. Uhrig, 146 Mass. 132; 15 N. E. 156; State v. Mellor, 13 R. I. 666; State v. Munch, 15 Mo. App. 207; State v. Spaulding, 60 Vt. 228; 14 Atl. 769; Burnett v. State, 72 Miss. 994; 18 So. 432; Commonwealth v. Brown, 124 Mass. 318; State v. Intoxicating Liquors, 44 Vt. 208; State v. Teahan, 50 Conn. 92; Commonwealth v. Keenan, 11 Allen 262; Commonwealth v. Anderson, 10 Ky. L. Rep. 307; State v. Wiggins, 72 Me. 425; State v. O'Connell, 82 Me. 30; 19 Atl. 36; Snider v. State, 78 Miss. 366; 29 So. 78; Walker v. State, 49 Tex. Cr. App. 345; 94 S. W. 230; State v. Frudie (Neb.), 92 N. W. 320; Coleman v. State, 53 Tex. Cr. App. 578; 111 S. W. 1011; Martin v.

State (Tex. Cr. App.), 61 S. W. 486; Park v. State (Tex. Cr. App.), 98 S. W. 243; State v. Pigg, 78 Kan. 618; 97 Pac. 859; Guy v. State, 90 Md. 29; 44 Atl. 997.

The Legislature may prescribe it as a rule of evidence that the possession of a Federal license shall *prima facie* establish that the licensee is engaged in the liquor business. Reed v. State (Tex. Cr. App.), 109 S. W. 182; Magee v. State, 50 Tex. Cr. App. 444; 98 S. W. 245; Denton v. State, 52 Tex. Cr. App. 58; 105 S. W. 199.

³³ Burnett v. State, 72 Miss. 994; 18 So. 432; State v. Mellor, 13 R. I. 666; State v. Spaulding, 60 Vt. 228; 14 Atl. 769.

that it is not.³⁴ The license, however, must cover the period during which the evidence shows the illegal act was committed.³⁵ In several States such a license is made admissible by statute, and certain probative force is attached to it when put in evidence.³⁶ These statutes are usually in force in local option or prohibition States, and the license may be proven to show the accused's occupation.³⁷ In his defense, however, an accused cannot show that he had no Federal license.³⁸ The accused has the right to prove what passed between him and the officer issuing the license, to show the purpose of taking it out.³⁹ The probative force of these licenses when put in evidence depends upon statutes, as a rule, authorizing their admission. Thus, in one State a statute provided that upon the charge of keeping a tippling house proof of a Federal license held by the defendant and that he held no State license should be evidence that he sold liquor without a license. Another statute provided that proof of possession of an internal tax receipt for the sale of liquors should be *prima facie* evidence of a sale. It was held that proof that the accused held a Federal license as a retail dealer raised a presumption that the accused was guilty of keeping a tippling house, which, however, he could overcome by evidence showing he did not keep such a house.⁴⁰ In another State it was held error to instruct the jury that on proof that the accused held such a license, they must find the accused

³⁴ State v. Stultz, 20 Iowa 488; Frudie v. State, 66 Neb. 244; 92 N. W. 320.

³⁵ Snyder v. State, 78 Miss. 366; 29 So. 78.

³⁶ Pitner v. State, 37 Tex. Cr. App. 268; 39 S. W. 662; Runde v. Commonwealth, 108 Va. 873; 61 S. E. 792; White v. Commonwealth, 107 Va. 901; 59 S. E. 1101 (said to be a question for the jury); Winton v. State, 77 Ark. 143; 91 S. W. 7.

³⁷ Henderson v. State (Tex. Cr. App.), 39 S. W. 116; Anderson v.

State (Tex. Cr. App.), 37 S. W. 859.

³⁸ Anderson v. State (Tex. Cr. App.), 37 S. W. 859.

On cross-examination the accused may be required to testify whether he had paid for his license. Henderson v. State (Tex. Cr. App.), 39 S. W. 116.

³⁹ Commonwealth v. Austin, 97 Mass. 595; State v. Morin, 102 Me. 290; 66 Atl. 650.

But see Barnes v. State (Tex. Cr. App.), 44 S. W. 491.

⁴⁰ Runde v. Commonwealth, 108 Va. 873; 61 S. E. 792.

guilty, for they could not do so unless they were satisfied of the accused's guilt beyond a reasonable doubt.⁴¹ In the absence of a statute proof of a license is received as a circumstance tending to show that the accused is engaged in the sale of liquors and for no other purpose.⁴² A statute making the license apply to the keeping of liquor in a house will not be so extended as to apply to a boat,⁴³ nor does it apply to a proof of illegally selling liquor on a prescription.⁴⁴ Usually by statute proof of the license makes a *prima facie* case that the accused was at the time engaged in selling intoxicating liquors.⁴⁵ And although no statute exists upon the subject, yet proof of the license on a charge of a sale where that may be done is admissible to show the intent in selling such liquors, and also to both show the accused kept liquors and what business he was engaged in.⁴⁶ In one case the State claimed the liquor sold in a local option district was beer, but the accused claimed it was "frosty" and non-intoxicating. The court told the jury that under the statute proof of the license was *prima facie* evidence that the liquor was intoxicating; but this was held error, that being a question for the jury.⁴⁷ The

⁴¹ State v. Liquors and Vessels, 80 Me. 57; 12 Atl. 794; State v. O'Connell, 82 Me. 30; 19 Atl. 86; State v. Momberg (N. D.), 103 N. W. 566.

⁴² Frudie v. State, 66 Neb. 244; 92 N. W. 320; Uloth v. State, Tex. Cr. App. 295; 87 S. W. 822, 823.

⁴³ Winton v. State, 77 Ark. 143; 91 S. W. 7.

Nor does it apply to a case of keeping a drug store. People v. Remus, 135 Mich. 629; 98 N. W. 397; 100 N. W. 403; 11 Detroit L. N. 237.

⁴⁴ Williamson v. State, 41 Tex. Cr. App. 461; 55 S. W. 568.

⁴⁵ Fox v. State, 53 Tex. Cr. App. 150; 109 S. W. 370; People v. Bacon, 117 Mich. 187; 75 N. W.

438; State v. Momberg (N. D.), 103 N. W. 566; Colby v. State (Iowa), 94 N. W. 491; Guy v. State, 96 Md. 692; 54 Atl. 879.

⁴⁶ Appling v. State (Ark.), 114 S. W. 927.

⁴⁷ Thompson v. State (Tex. Cr. App.), 97 S. W. 316; State v. Momberg (N. D.), 103 N. W. 566.

It was held proper to show that a license in another person's name was posted in a house where accused worked as tending to show accused was working for the person named in the license as licensee. Biddy v. State (Tex. Cr. App.), 108 S. W. 689.

So a statement by the accused to the officer arresting him that he had a Federal license for the current year, showing it to him, was

probative value of such a license as evidence is to be construed in connection with all the other evidence.⁴⁸ A certified copy from the record of the office of internal revenue showing that the defendant held a Federal license for the period during which it is claimed the illegal transaction was performed is admissible in evidence.⁴⁹ So a copy of the record, sustained by the oath of the person who had compared it with the original, is admissible.⁵⁰ So a witness may testify he saw such a license on exhibition in the defendant's place of business, without the production of the original.⁵¹ So it may be shown that the accused applied for and received a Federal license.⁵² The original record showing to whom licenses have been issued may be put in evidence without putting in the license.⁵³ But the contents of the record cannot be testified to from memory or a memorandum,⁵⁴ nor can the custodian

held competent to show not only that he had the license, but also conducted the business carried on at that place. *People v. Moore*, 155 Mich. 107; 118 N. W. 742; 15 Det. L. N. 920. See *State v. Martel*, 103 Me. 63; 68 Atl. 454.

⁴⁸ *White v. Commonwealth*, 107 Va. 901; 59 S. E. 1101.

⁴⁹ *Runde v. Commonwealth*, 108 Va. 873; 61 S. E. 792; *State v. Wiggin*, 72 Me. 425; *Gersteman v. State*, 35 Tex. Cr. App. 318; 33 S. W. 357; *State v. Pigg*, 78 Kan. 618; 97 Pac. 859; *Reed v. State*, 53 Tex. Cr. App. 4; 108 S. W. 368; *Gerstenkorn v. State*, 38 Tex. Cr. App. 621; 44 S. W. 501; *State v. Dowdy*, 145 N. C. 432; 58 N. E. 1002; *State v. Toler*, 145 N. C. 440; 58 S. E. 1005.

⁵⁰ *State v. O'Connell*, 82 Me. 30; 19 Atl. 86.

In this case occurred the letters "R. D. L." and evidence was admitted to show they meant "Retail Delivery License." *State v.*

Spaulding, 60 Vt. 228; 14 Atl. 769; *Biddy v. State* (Tex. Cr. App.), 108 S. W. 689; *State v. Nippert*, 74 Kan. 371; 86 Pac. 478; *State v. Howard*, 40 Atl. 65. Also so that "R. M. L. D." means "retail malt liquor dealer." *Topeka v. Stevenson*, 79 Kan. 394; 99 Pac. 598.

⁵¹ *Commonwealth v. Brown*, 124 Mass. 318; *Commonwealth v. Uhrig*, 146 Mass. 132; 15 N. E. 156; *Burnett v. State*, 72 Miss. 994; 18 So. 432; *People v. Moore*, 155 Mich. 107; 118 N. W. 742; 15 Det. L. N. 920; *Clark v. State* (Tex. Cr. App.), 49 S. W. 85.

Contra, *Snyder v. State*, 78 Miss. 366; 29 So. 78.

⁵² *State v. Munch*, 57 Mo. App. 207.

⁵³ *State v. Gorham*, 65 Me. 170.

⁵⁴ *Biddy v. State* (Tex. Cr. App.), 108 S. W. 689; *Biddy v. State*, 52 Tex. Cr. App. 412; 107 S. W. 814.

certify that a license was issued to the accused⁵⁵ unless he sets out a copy of it. But a witness who had examined the original register of licenses may testify that the accused's license has expired⁵⁶ or that he had one.⁵⁷

Sec. 972a. Proof of intoxication—Opinion of witness.

The opinion of a witness, when it is claimed that a particular person was drunk at a certain time, who then saw him, is admissible to show whether he was or was not then intoxicated. In fact, his statement, although called an "opinion" is not such, but it is a statement of a fact. Such a statement is much more satisfactory than to require the witness to describe the person alleged to have been intoxicated, his manner and his conduct, and then let the jury draw their conclusion whether or not he was drunk. "The effects of drink differ so widely in degree and visible manifestations that mere descriptive language is inadequate to convey to others

⁵⁵ Bayless v. State (Tenn.), 113 S. W. 1039; Peyton v. State (Ark.), 102 S. W. 1110; Reed v. State, 53 Tex. Cr. App. 4; 108 S. W. 368.

Contra, White v. Commonwealth, 107 Va. 901; 59 S. E. 1101.

An accused testified he never sold liquor, although he admitted he held a license. It was held that the Government might put in evidence showing he held a Federal license without producing the license itself. Clark v. State, 40 Tex. Cr. App. 127; 49 S. W. 85.

⁵⁶ Walker v. State, 49 Tex. Cr. App. 345; 94 S. W. 230.

⁵⁷ Gorman v. State (Tex. Cr. App.), 106 S. W. 384; Suggs v. State (Tex. Cr. App.), 101 S. W. 999.

Accused cannot be compelled to produce his license by a subpoena *duces tecum*. Bidley v. State, 52 Tex. Cr. Rep. 412; 107 S. W. 814.

Proof of an exhibition of a license in defendant's place will not render him liable for a sale in a local option district where one is unauthorizedly made on his premises by some one else. Rawls v. State, 48 Tex. Cr. App. 622; 89 S. W. 1071.

A statute making a Federal license *prima facie* evidence that the person to whom it was issued was engaged in the liquor business has no application where it is deposited in a bank, the mere possession of such a license not making out a *prima facie* case of an unlawful sale of liquor. Appling v. State (Ark.), 114 S. W. 927.

Where the accused had taken out a license to sell "malt" liquors it was held error to charge the jury he had a license to sell "intoxicating" liquors. Barnes v. State (Tex. Cr. App.), 44 S. W. 491.

the subtle gradations of evidence on which the observer's judgment is really formed. A man may be quiet and inert under circumstances that usually produce activity, and it may be because he is overcome with fatigue, or sleep, or is sodden with liquor. The outward conduct, and, therefore, the verbal description, will be closely similar in either case. So, on the other hand, his manifestations of excessive or noisy activity may be because he is excited, or angry, or fighting drunk. Without the observer's opinion as to the producing cause, a mere description, which would almost always, from the inadequacy of language, lack some of the subtler details, would afford a very uncertain basis for judgment of the actual condition. Hence, it is proper in such cases that a witness who has actual knowledge and observation of an occurrence should be allowed to supplement his description by his opinion. Of course, actual knowledge and observation on the part of the witness are the essential basis of the reception of his opinion, and, in the usual and regular course, such facts must be first proved as a foundation."¹ "A child," said the Court of Appeals of New York, "may answer whether a man (whom he has seen) was drunk or sober. It does not require science or opinion to answer the question, but observation merely. But the child could not probably describe the conduct of the man so that, from its description, others could decide the question. Whether a person is drunk or sober, or how far he was affected by intoxication, is better determined by the direct answers of those who have seen him than by their description of his conduct." "A witness was allowed to state that the * * * the plaintiff was intoxicated. This was objected to as being the expression of the opinion of a witness. * * * In a certain sense, a vast deal of testimony is but statements of opinion. But it is not opinion in an objectionable sense. It is every day practice for witnesses to swear to such facts as the quantity, weight, size and dimensions of a thing, to heat and cold, age, sickness, and health, and many other matters of that kind. In such cases witnesses do not express an opinion founded on hearsay or the judg-

¹ Commonwealth v. Eyler, 217 Pa. 512; 66 Atl. 746; 11 L. R. A. (N. S.) 639.

ment of other men. It is not an opinion based upon facts recited and sworn to by other witnesses. It is their own judgment, based upon facts within their own observation. It is, so far as such a thing can be, knowledge of their own. It is an opinion which combines many facts without specifying them. It has been described as 'an abbreviation of facts,' or 'shorthand rendering of facts.' It is an inference equivalent to a specification of the facts. * * * The witness in effect describes the facts when he gives his opinion. It is his way of stating them. Such testimony is admitted from necessity. A witness can seldom give in detail all the points and particles which go to make up his belief, but he can characterize them."² Thus, where a witness testifying in a

² *People v. Eastwood*, 14 N. Y. 62. This New York case is followed in that State in the following cases: *McCarty v. Wells*, 51 Hun, 171; 4 N. Y. Supp. 672; *People v. MacLean*, 59 Hun, 626; 13 N. Y. Supp. 677; *People v. Martin*, 15 N. Y. Misc. Rep. 6; 36 N. Y. Supp. 437; affirmed without an opinion, 149 N. Y. 621; 44 N. E. 1127; *Quinn v. O'Keefe*, 9 N. Y. App. Div. 68; 41 N. Y. Supp. 116; appeal dismissed, 151 N. Y. 633; 45 N. E. 1134; *People v. Gaynor*, 33 N. Y. App. 98; 53 N. Y. Supp. 86; *Donoho v. Metropolitan St. R. Co.*, 30 N. Y. Misc. Rep. 433; 62 N. Y. Supp. 523; *Marshall v. Riley*, 38 N. Y. Misc. Rep. 770; 78 N. Y. Supp. 827.

"Whether a person is drunk is a question which a person not an expert is competent to answer, as this is something which may fairly be considered to be a matter of common knowledge." *Burt v. Burt*, 168 Mass. 204; 46 N. E. 622.

"Under proper circumstances, a common witness may testify directly as to sanity, * * * and * * * whether a person was

drunk or sober." *Gallagher v. People*, 120 Ill. 179; 11 N. E. 335.

"The witness was rightly allowed to testify whether the plaintiff was intoxicated. It was not a matter of opinion, any more than questions of distance, size, color, weight, identity, age and many other similar matters are." *Edwards v. Worcester*, 172 Mass. 104; 51 N. E. 447.

Other cases support the rule laid down in these quotations: *Dozier v. State*, 130 Ala. 57; 30 So. 396; *Henderson v. State*, 49 Tex. Cr. App. 269; 91 S. W. 569; *St. Louis S. W. R. Co. v. Wright* (Tex. Civ. App.), 84 S. W. 270; *Pase v. State* (Tex. Cr. App.), 79 S. W. 531; *Stewart v. State*, 38 Tex. Cr. Rep. 627; 44 S. W. 505; *People v. Monteith*, 73 Cal. 7; 14 Pac. 373; *State v. Pike*, 49 N. H. 399; 6 Am. Rep. 533; *People v. Sehorn*, 116 Cal. 503; 48 Pac. 495; *Commonwealth v. Dowdican*, 114 Mass. 257; *Choice v. State*, 31 Ga. 424; *Stacy v. Portland Pub. Co.*, 68 Me. 279; *Aurora v. Hillman*, 90 Ill. 61; *Kuhlman v. Wieben*, 129 Iowa, 188; 105 N. W. 445; 2

murder case had seen and stated the appearances, condition and actions of the accused, it was held that he had sufficiently shown his qualification to state whether he appeared so intoxicated he did not know what he was doing.³ So he may be asked if a particular person on a certain occasion appeared to be drunk or sober; ⁴ or if, in his opinion, such person was under the influence of liquor.⁵ Thus, where a defendant was on trial for attempting to bribe the witness testifying, and the witness testified that he had intimately known him for fifteen or eighteen years, it was held that he might testify that at the time of the alleged offer of a bribe he thought he talked with his usual intelligence when he was sober.⁶ But the witness must have had sufficient opportunity for observation of the facts upon which he bases his opinion.⁷ Thus, where the plaintiff fell through an unguarded hole in a sidewalk, into the basement below, where the defendant's servant picked him up and helped him to a chair, and thence out of the basement, it was held no error was committed in refusing to allow the servant to testify the plaintiff was intoxicated or to give an opinion on that question.⁸ But it is manifest, from

L. R. A. (N. S.) 555; *Parker v. Parker*, 52 Ill. App. 333; *State v. Cather*, 121 Iowa, 106; 96 N. W. 722; *State v. Huxford*, 47 Iowa, 16; *Chicago City R. Co. v. Wall*, 93 Ill. App. 441. See *Hardy v. Merrill*, 56 N. H. 227; 22 Am. Rep. 441; *Sydlman v. Beckwith*, 43 Conn. 9; *Elam v. State*, 25 Ala. 53; *People v. Packerham*, 115 N. Y. 200; 21 N. E. 1035; *Bagley v. Mason*, 69 Vt. 179; 37 Atl. 287; *Chicago, etc., R. Co. v. Randolph*, 199 Ill. 126; 65 N. E. 142; *Gallagher v. People*, 120 Ill. 179; 11 N. E. 335; *In re Miller*, 179 Pa. 651; 36 Atl. 139; 39 L. R. A. 220; 1 Wigmore Ev. 571.

³ *State v. Dolan*, 17 Wash. 499; 50 Pac. 472; *State v. Cather*, 121 Iowa, 106; 96 N. W. 722; *League*

v. Ekine, 120 Iowa, 464; 94 N. W. 938.

⁴ *Castner v. Sliker*, 33 N. J. L. 95.

⁵ *Burt v. Burt*, 168 Mass. 204; 26 N. E. 622; *McKillopp v. Duluth St. R. Co.*, 53 Minn. 532; 55 N. W. 739.

⁶ *White v. State*, 103 Ala. 72; 16 So. 63.

⁷ *Campbell v. Fidelity & C. Co.*, 109 Ky. 661; 60 S. W. 492; *Felska v. New York, etc., R. Co.*, 152 N. Y. 339; 46 N. E. 613.

⁸ *Clarke v. Philadelphia, etc., Co.*, 92 Minn. 418; 100 N. W. 231. In this case *McKillopp v. Duluth St. R. Co.*, 53 Minn. 532; 55 N. W. 739, was distinguished. In this latter case the plaintiff brought an action to recover dam-

our daily observation of the conduct of men, that a moment's observation of a person may be amply sufficient to enable a witness to testify with accuracy whether or not he was then drunk, especially so where the drunkenness is extreme, and a witness' testimony on that question ought not to be excluded because of the shortness of the period of his observation or the possibility of error on his part.

Sec. 973. Miscellaneous.

Upon a charge of a sale without a license, evidence that the accused kept a bawdy house is not admissible.⁹ On a charge of giving away liquors on an election day when a general election was held, of which the court takes judicial notice when it is held, error in the admission of the minutes of the election officers is immaterial.¹⁰ Upon a charge of not having paid the occupation tax for selling liquors there must be proof a levy was imposed upon the occupation.¹¹ Where the charge was that the accused unlawfully maintained "upon his premises used by him" certain blinds which shut out the view of the interior of his saloon, proof showing that the blinds were on the outside of the windows of the saloon room was held to be no variance.¹²

ages from a street railway company because it had cut off his foot by running its car over him; and it was held that a witness who had seen him, before the accident, lying on the track, picked him up, and offered to take him home, was sufficiently qualified by his observations of him, to express an opinion whether or not he was then drunk.

⁹ *Ballowe v. Commonwealth* (Ky.), 44 S. W. 646; 19 Ky. L. Rep. 1867.

¹⁰ *Borcher v. State*, 33 Tex. Cr. Rep. 96; 25 S. W. 423.

¹¹ *Scott v. State*, 117 Tex. Cr. App. 176; 82 S. W. 656.

¹² *Commonwealth v. Costello*, 133 Mass. 192.

Accused sought to prove an alibi, and to that end claimed he was sick at home, and put in charges against him by the physician he claimed visited him, bearing the date of the time it was claimed he violated the statute, as shown on the physician's books. It was held proper for the State to then put in evidence charges made by the physician in the same book, both before and after the entries already in it, which bore different dates, to show that the charges against accused were not made at the time nor in the usual course of business and on the *bona fides* of the entry in question. *Morrow v. State* (Tex.), 120 S. W. 491.

CHAPTER XXX.

TRIAL AND JUDGMENT.

SECTION.

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Sec. 974. Jurisdiction.

What courts have and what have not jurisdiction of offenses against the liquor statutes is of so local a character and so purely statutory that no discussion of the question in a general work of this character can be of much benefit to the practitioner. We, therefore, do nothing more than cite those cases in which the particular court has been held to have had jurisdiction of the prosecution¹

¹ State v. Nolan, 15 R. I. 529; 10 Atl. 481; Commonwealth v. Carr, 11 Gray 463; *In re Buddington*, 29 Mich. 472; Commonwealth v. Hessey (Mass.), 9 N. E. 837; State v. Rockwell, 82 Iowa 429; 48 N. W. 721; State v. Kriechbaum, 81 Iowa 633; 47 N. W. 872; Marianner v. Vincent, 68 Ark. 244; 58 S. W. 25; Miller v. Camden, 63 N. J. 501; 43 Atl.

1069; Dominick v. State, 27 Ohio Cir. Ct. Rep. 305; Langan v. People, 32 Colo. 414; 76 Pac. 1048; Kappes v. State, 55 Ohio Cir. Ct. Rep. 723; People v. Bagley, 41 N. Y. Misc. Rep. 97; 83 N. Y. Supp. 766; Gaod v. State, 73 Ark. 625; 83 S. W. 935; State v. O'Brien, 35 Mont. 482; 90 Pac. 514; Regina v. Klemp, 10 Ont. 143; Sadler v. Sheahan, 92 Mich.

and in which particular court it has been held not to have had.²

Sec. 975. Statute of limitations.

The general statute of limitations applicable to prosecutions for criminal offenses applies to prosecutions for offenses

630; 52 N. W. 1030; *State v. Brooks*, 33 Kan. 708; 7 Pac. 591; *Eckhart v. State*, 5 W. Va. 515; *Morgan v. Tighe*, 12 Ohio Cir. Ct. Rep. 719; 4 Ohio C. D. 470; *State v. Williams*, 68 N. H. 449; 42 Atl. 898; *State v. Saxaner*, 48 Mo. 454; *Commonwealth v. Intoxicating Liquors*, 103 Mass. 448; *Commonwealth v. Intoxicating Liquors*, 105 Mass. 175; *Commonwealth v. Intoxicating Liquors*, 97 Mass. 63; *Mundy v. State*, 74 Pac. 378; *State v. Collins* (Minn.), 120 N. W. 1081; *State v. Werner* (Kan.), 101 Pac. 1004; *People v. Colleton*, 59 Mich. 573; 26 N. W. 771.

²*State v. Patterson*, 98 N. C. 666; 4 S. E. 540; *Commonwealth v. Murphy*, 11 Gray 53; *In re Chenoweth*, 56 Neb. 688; 77 N. W. 63; *Gassenheimer v. District of Columbia*, 6 App. D. C. 108; *Williams v. Augusta*, 111 Ga. 849; 36 S. E. 607; *People v. Tuthill*, 79 N. Y. App. Div. 24; 79 N. Y. Supp. 905; *People v. Chase*, 41 N. Y. App. Div. 12; 58 N. Y. Supp. 292; *State v. Haines*, 35 Ore. 379; 58 Pac. 39; *Regina v. Ramsay*, 11 Ont. 210; *Regina v. Durnion*, 14 Ont. 172; *Regina v. Sproule*, 14 Ont. 375; *Regina v. Collins*, 14 Ont. 613; *Harring v. State* (Ala.), 48 So. 576; *Gafford v. Busch*, 60 Cal. 149.

See *generally also, *State v.*

Bach, 36 Minn. 234; 30 N. W. 764; *Osborn v. Sargent*, 23 Me. 527; *Boldt v. State*, 72 Wis. 7; 38 N. W. 177; *State v. Stinson*, 17 Me. 154; *People v. Haas*, 79 Mich. 449; 44 N. W. 928; *Morrill v. Thurston*, 46 Vt. 732; *People v. Schottey*, 66 Mich. 708; 33 N. W. 810; *Hale v. State*, 15 Conn. 242; *State v. Arien*, 71 Iowa, 216; 32 N. W. 267; *Commonwealth v. Murray*, 144 Mass. 170; 10 N. E. 802; *Hamilton v. Carthage*, 24 Ill. 22; *Commonwealth v. Carney*, 153 Mass. 444; 27 N. E. 9; *State v. Hollingsworth*, 100 N. C. 535; 6 S. E. 417; *Eckart v. State*, 5 W. Va. 515; *Durr v. Commonwealth* (Pa.), 12 Atl. 507; *People v. Bouduin*, 12 N. Y. Cr. Rep. 244; *McTigue v. Commonwealth*, 99 Ky. 66; 35 N. W. 121; *State v. Pickett*, 47 S. C. 101; 25 S. E. 46.

It has been held that if no offense had been committed, a writ of prohibition lies to prevent the court proceeding with the prosecution. *King v. Breen*, 7 Can. Cr. Cas. 146.

Injunction lies to restrain tax collectors from seizing and selling property by summary process to secure the payment of a liquor license, where the remedy to enforce payment is by an ordinary action. *Hall v. Bastrop*, 11 La. Ann. 603.

against the liquor statutes³ unless the liquor statute specifically provides a limitation of its own. Where the general limitation in cases of misdemeanor was two years, and another section provided that a prosecution for desecration of the Sabbath must be brought within six months, a prosecution for a sale made on Sunday was held to fall within the first statute and not the second.⁴ Unless the evidence shows that the offense was not barred by the statute there must be an acquittal.⁵

Sec. 976. Repeal of statute.

A repeal of a statute creating an offense renders it impossible to prosecute the person who has violated its provisions.⁶ But a saving clause may keep the statute alive for the prosecution of offenses committed while it was in force, in which event the offender may be prosecuted notwithstanding the repeal of the statute. So, too, in some States a general statute is in force wherein it is provided that an offender may be prosecuted for a violation of a statute committed when it was in force notwithstanding its repeal. In such an event the offender may be prosecuted if the action is brought within the statute of limitations.⁷ So where a repealing statute provides that it shall not take effect until a certain date; in the meantime the act repealed remains in force for prosecuting

³ Freese v. State, 23 Fla. 267; 2 So. 1; Patton v. State, 80 Ga. 714; 6 S. E. 273; State v. Pfefferle, 36 Kan. 90; 12 Pac. 406; State v. Rundlett, 33 N. H. 70; Monford v. State, 35 Tex. Cr. Rep. 237; 33 S. W. 351.

⁴ Shepler v. State, 114 Ind. 194; 16 N. E. 521; Gilbert v. State, 81 Ind. 565.

⁵ State v. Crimmins, 3 Kan. 576; 2 Pac. 574; State v. O'Connell, 31 Kan. 383; 2 Pac. 579.

⁶ Whitehurst v. State, 43 Ind. 473; State v. Reyelts, 74 Iowa, 499; 38 N. W. 377; Boone v. State,

12 Tex. App. 184; Mullinix v. People, 76 Ill. 211; Teague v. State, 39 Miss. 516. See Commonwealth v. Hitchins, 5 Gray, 482; Commonwealth v. Keefe, 7 Gray, 332; Draper v. State, 6 Ga. App. 12; 64 S. E. 117.

⁷ State v. Helms, 136 Ind. 122; 35 N. E. 893; State v. Buskirk, 20 Ind. App. 496; 48 N. E. 871; State v. Halter, 149 Ind. 292; 47 N. E. 665; Starr v. State, 149 Ind. 592; 49 N. E. 591; Loveless v. State (Tex. Cr. App.), 49 S. W. 601; State v. Patrick, 65 Mo. App. 653; State v. Winfield, 65 Mo. App.

those violating its terms.⁸ A repeal of the statute after judgment entered does not set aside such judgment, nor require its reversal on appeal because of that fact.⁹ A statute providing that the repeal of a statute shall not release the accused from a penalty he had incurred has no application to an instance of a repeal, as it were, of a local option statute by vote of the district.¹⁰

Sec. 977. Form of proceedings.

In nearly all the States violations of the liquor statutes are classed as crimes to be prosecuted under the general criminal procedure by indictment or information.¹¹ Such was held to be the case where a statute provided that the offender should "forfeit and pay for every such offense" a certain designated sum of money.¹² But where a municipality brings an action to recover a penalty for an infraction of its liquor ordinances, the action is a civil one and the pleading is an ordinary complaint, even though a warrant be issued thereon, the defendant be arrested, and no summons issued as notice to him.¹³ In some States, also, the action is made a civil action by the terms of the statute.¹⁴ Such is a suit on the

662; *State v. Walker* (Mo.), 120 S. W. 1198; affirming 129 Mo. 371; 108 S. W. 615.

⁸ *Leyner v. State*, 8 Ind. 490; *Commonwealth v. Bennett*, 108 Mass. 30; 11 Am. Rep. 304.

⁹ *Wichita v. Murphy*, 78 Kan. 859; 99 Pac. 272.

¹⁰ *State v. Patrick*, 65 Mo. App. 653; *State v. Winfield*, 65 Mo. App. 662.

¹¹ *State v. Hollin*, 12 La. Ann. 677; *People v. Hart*, 1 Mich. 467; *Tefft v. Commonwealth*, 8 Leigh, 721; *State v. Kobe*, 26 Minn. 148; 1 N. W. 1054; *Haines v. State*, 7 Tex. App. 30; *State v. Schilling*, 14 Iowa, 455; *Harper v. State*, 7 Ohio St. 73; *People v. Charbineau*, 115 N. Y. 433; 22 N. E. 271;

Glenn v. State, 1 Swan, 19; *McClellan v. State*, 117 Ala. 122; 23 S. E. 653; *People v. McBride*, 234 Ill. 146; 84 N. E. 865; *State v. Brown* (Iowa), 109 N. W. 1011; *Ball v. Commonwealth* (Ky.), 99 S. W. 326; 30 Ky. L. Rep. 600; *People v. Cornyn*, 36 N. Y. Misc. Rep. 135; 72 N. Y. Supp. 1088; *People v. Hoenig* (N. Y.), 86 N. Y. Supp. 673; *People v. Gantz*, 41 N. Y. Misc. Rep. 452; 85 N. Y. Supp. 79; *United States v. Powers*, 1 Alaska, 180 (information).

¹² *State v. Sinnott*, 15 Neb. 472; 19 N. W. 613.

¹³ *McIntosh v. Pueblo*, 9 Colo. App. 460; 48 Pac. 969.

¹⁴ *McCracken v. State*, 71 Md. 150; 17 Atl. 932; *Downs v. State*,

bond of a liquor dealer brought by the State to recover a penalty for a violation of the liquor statute; and an acquittal of the licensee in a criminal proceeding for the same act is no defense.¹⁵ If a liquor statute prescribes a particular form of action or procedure, that form must be used or procedure followed.¹⁶

Sec. 978. Preliminary proceedings.

An affidavit filed before a magistrate to secure a preliminary hearing should be sufficiently full and explicit to charge an offense against the liquors laws.¹⁷ The magistrate is not bound to notify the district or prosecuting attorney.¹⁸ If the warrant be not sufficient it may be amended on the evidence coming in.¹⁹ In binding the accused over the magistrate need not enter a finding that he finds the charge in the affidavit

19 Md. 571; *State v. Koehler*, 6 Iowa, 398; *State v. Shawbeck*, 7 Iowa, 322; *Lyman v. Granmercy Club*, 28 N. Y. App. Div. 30; 50 N. Y. Supp. 1004; *Carrier v. Bernstein*, 104 Iowa, 572; 73 N. W. 1076.

¹⁵ *State v. Carron*, 73 N. H. 434; 62 Atl. 1044.

¹⁶ *Commonwealth v. Thompson*, 2 Gray, 82.

¹⁷ *O'Connor v. State*, 45 Ind. 347; *Hosea v. State*, 47 Ind. 180; *Farrell v. State*, 45 Ind. 371; *Qualter v. State*, 120 Ind. 92; 22 N. E. 100; *People v. Haas*, 79 Mich. 449; 44 N. W. 928; *People v. Cramer*, 12 N. Y. Cr. Rep. 469; 47 N. Y. Supp. 1039; *State v. Rozum*, 8 N. D. 548; 80 N. W. 477; *People v. Tuthill*, 79 N. Y. App. Div. 24; 79 N. Y. Supp. 905; *State v. Stevens* (N. D.), 123 N. W. 888.

Usually preliminary proceedings are not necessary to a prosecution for a violation of the liquor laws.

State v. Scampini, 77 Vt. 92; 59 Atl. 201. See *Topeka v. Raynor*, 60 Kan. 860; 58 Pac. 557; 61 Kan. 10; 55 Pac. 509.

¹⁸ *People v. Schatz*, 50 N. Y. App. 544; 64 N. Y. Supp. 127; 15 N. Y. Cr. Rep. 38. See *State v. Bowden* (Kan.), 101 Pac. 654.

¹⁹ *McGuire v. Commonwealth* (Ky.), 99 S. W. 612; 30 Ky. L. Rep. 720.

As to sufficiency of warrant under Kentucky statute, see *Thompson v. Commonwealth* (Ky.), 45 S. W. 1039; *Thompson v. Commonwealth*, 103 Ky. 685; 46 S. W. 492; *McGuire v. Commonwealth* (Ky.), 99 S. W. 612; 30 Ky. L. Rep. 720; *Jett v. Commonwealth* (Ky.), 49 S. W. 786. Under Kansas statute. *Holton v. Haist*, 8 Kan. App. 856; 55 Pac. 468; *State v. Eldred*, 8 Kan. App. 625; 56 Pac. 153. Under Michigan statute. *Sparta v. Boorum*, 129 Mich. 555; 89 N. W. 435; 90 N. W. 681; 8 Det. L. N. 1100.

or information to be true.²⁰ The recognizance to appear in the upper court for trial should be taken in the name of the proper person or it will be void,²¹ unless some statute cures the defect; and it must be otherwise in proper form or no action can be maintained upon it.²² Where the court must find there is probable cause to believe the accused guilty, there need be no entry made of such finding, the issuance of the warrant taking its place.²³

Sec. 979. Who may institute proceedings.

The statutes almost universally point out or designate who shall institute proceedings for the punishment of those violating the liquor statutes. Usually, however, these statutes do not confer exclusive power upon the officer designated therein to prosecute, and any citizen may institute or begin such a proceeding, though not able to control it thereafter.²⁴ But in those States where an excise board has been created, the members of this board not infrequently are given the exclusive power to institute proceedings for the infraction of the liquor laws.²⁵ A duty imposed upon an officer to institute proceedings when furnished with proofs of a violation of the

²⁰ *Scovern v. State*, 6 Ohio St. 288.

²¹ *Chittenden Co. v. Mitchell*, 23 Vt. 131.

²² *Loveless v. State* (Tex. Cr. App.), 50 S. W. 361; *Fleming v. State* (Tex. Cr. App.), 22 S. W. 1038; *Jackson v. State* (Tex. Cr. App.), 24 S. W. 902; *Viser v. State*, 10 Tex. App. 86; *Munch v. State*, 3 Tex. App. 552; *Johnson v. State*, 34 Tex. Cr. App. 106; 29 S. W. 472; *Parish v. State*, 47 Tex. Cr. App. 148; 82 S. W. 517; *Youngman v. State*, 38 Tex. Cr. App. 459; 42 S. W. 988; 43 S. W. 519; *Harding v. Commonwealth*, 105 Va. 858; 52 S. E. 832; *Lewis v. State* (Tex. Cr. App.), 47 S. W. 988; 39 S. W. 570.

²³ *State v. Brooks*, 33 Kan. 708; 7 Pac. 591.

The defendant cannot raise the question of the constitutionality of the statute providing for a preliminary examination. *State v. Stevens* (N. D.), 123 N. W. 888.

²⁴ *Commonwealth v. Murphy*, 147 Mass. 577; 18 N. E. 418; *Commonwealth v. Guy*, 153 Mass. 211; 26 N. E. 571, 852; *Pattee v. Thompson* (N. H.), 41 Atl. 265. See *Harp v. Commonwealth* (Ky.), 61 S. W. 467; 22 Ky. L. Rep. 1792.

²⁵ *Board v. Sackrider*, 35 N. Y. 154; *Root v. Alexander*, 63 Hun, 557; 28 Abb. N. C. 390; 18 N. Y. Supp. 632; 142 N. Y. 663; 37 N. E. 570.

liquor laws does not limit his powers to those instances only where he has been furnished such proof, but he may proceed upon his own examination of a violation of the law.²⁶ The fact that an attorney has a strong prejudice against the liquor traffic does not disqualify him from acting as an assistant in prosecutions for violation of the liquor laws.²⁷

Sec. 980. Defendant's plea.

The plea of "not guilty" is the general issue and puts in issue all the material allegations of the indictment or information,²⁸ and under it the defendant may show a former conviction.²⁹ If a special answer be filed with the plea of not guilty it may be stricken out, if its subject matter may be shown under the plea of not guilty, which is usually the case.³⁰

Sec. 981. Election between offenses.

Elsewhere has been discussed the question of election between different sales under the section relating to proof of

²⁶ Portland v. Rolfe, 37 Me. 400.

²⁷ People v. O'Neill, 107 Mich. 556; 65 N. W. 540.

Assistants appointed by the attorney-general who are authorized to sign, verify and file all complaints for violations of the liquor laws, are not officers. State v. Becker, 3 S. D. 29; 51 N. W. 1018.

If the liquor statutes prescribe a solicitor's fee—even though it be a local prohibition statute—they will control, and not the general statutes. Bonds v. State, 130 Ala. 106; 30 So. 413.

A statute providing that a complaint in *quo warranto* might be prosecuted on the relation of a private person interested in the matter, does not authorize such a person to prosecute an information in the nature of a *quo warranto* against a hotel keeper to compel him to show by what authority he was exercising a license to sell

liquors. Brown v. Alderman, 74 Atl. 230.

Duty of prosecuting attorneys to enforce liquor laws. Tenant v. Kuhlemeier (Iowa), 120 N. W. 689; State v. Bowden (Kan.), 101 Pac. 654; State v. Butler (Me.), 73 Atl. 560.

²⁸ Plainfield v. Batchelder, 44 Vt. 9.

²⁹ State v. Conlin, 27 Vt. 318. But if a special plea of former conviction be filed, a reply that the conviction set up in special answer was for another offense, is sufficient. State v. Conlin, 27 Vt. 318.

³⁰ Trost v. State, 64 Miss. 188; 1 So. 49.

As to the plea of *nolo contendere* in the Massachusetts practice, see Commonwealth v. Adams, 6 Gray, 359, and Commonwealth v. Mead, 10 Allen, 396.

the time of the commission of an offense,³¹ and what was there said need not necessarily be repeated here. A defendant may be convicted upon as many counts as there are in the indictment, though each count charge a separate and distinct transaction.³² But where there is but one count in an indictment, in which a single sale is charged, and the proof shows two sales, even on the same day, to the same person on two distinct occasions, the State will be required to elect upon which of the two it will insist on a conviction.³² "When he is charged with a single offense," said the Supreme Court of Indiana, "he has a right to demand that the single question, as to whether or not he is guilty of that offense, shall be presented to the jury, so that, if convicted, he may know the whole jury agreed to his conviction of the offense charged. Where one offense is charged, and the State is allowed to rely upon two offenses, in support of which it adduced evidence, there is no knowing upon which he was really convicted, or whether the whole jury agreed upon his guilt as to either one. In a case like this, six of the jury might have thought that the accused was guilty of having sold intoxicating liquors in the morning, and not guilty of having sold in the afternoon. The other six might have thought he was guilty of having sold in the afternoon and not in the morning. The result would be that they would all agree that he was guilty, without agreeing that he was guilty of any particular offense. Or, suppose that instead of bringing forward evidence to establish the fact of two sales to the prosecuting witness, the State had brought forward evidence to show that appellant had made twelve sales to him upon the same day, and yet so separate in time as to constitute distinct and separate violations of the statute. In that case it is possible that one juror might be convinced that he was guilty of some one particular sale and of none other. And thus each juror might be convinced that he was guilty of some particular sale, and all agree to a conviction, and yet no two jurors be agreed upon

³¹ See title Election in Index.

³² *Murphy v. State*, 9 Lea, 373;

³² *Commonwealth v. Tuttle*, 12 Cush. 505.

Commonwealth v. O'Hanlon, 155 Mass. 198; 29 N. E. 518.

any one sale.”³⁴ And the rule is that if several distinct offenses be charged in as many counts in one indictment, the State may be compelled to elect upon which one it will proceed; as, where in several counts are charged separate and distinct illegal giving of a prescription for liquor by the defendant.³⁵ Nor can there be, as a rule, separate and distinct offenses of different kinds tied together in one indictment under different counts.³⁶ Of course, as has been elsewhere stated, the offense selected need not necessarily be the one which the grand jury investigated, nor the one for which the accused was indicted. Thus, if the accused was indicted for

³⁴ Lebkovitz v. State, 113 Ind. 26; 14 N. E. 363; Long v. State, 56 Ind. 182; 26 Am. Rep. 19; Kannon v. State, 10 Lea, 386; State v. Brown, 58 Iowa, 298; People v. Jenness, 5 Mich. 305; Sims v. State, 10 Tex. App. 131; State v. Crimmins, 31 Kan. 376; Commonwealth v. Elwell, 1 Gray, 463; Goodhue v. People, 94 Ill. 37; Hughes v. State, 35 Ala. 351; Commonwealth v. Dean, 109 Mass. 349.

“We are not dealing with a case where the offenses are so mingled that there can be no severance,” said Judge Elliott, in a separate opinion in the case just quoted from. “No such case is at bar. There were in this case two entirely distinct and disconnected offenses—distinct in themselves and separated by a clear and perceptible interval of time. Where the offenses are so blended that a separation is impracticable, a different rule obtains; but here the offenses are not blended, for a wide interval separates them, and there is not even a remote connection between them, save that they are members of the same general class

and were committed on the same day. But while members of one general class, they are independent and distinct.”

See also Squires v. State, 3 Ind. App. 114; 28 N. E. 708.

³⁵ State v. Farmer, 104 N. C. 887; 10 S. E. 563; DeGraff v. State (Okla.), 103 Pac. 538.

It has been held in Massachusetts that, after conviction on several counts, a *nolle prosequi* may be entered on all the counts except the first, upon which judgment may be entered. Commonwealth v. Jenks, 1 Gray, 490. But such a practice does not prevail in many of the States, except upon motion of the defendant.

Of course, the offense elected must be one covered by the indictment, so as there will be no variance between the proof and the charge. Robinson v. Commonwealth, 6 Dana, 287; State v. Whisner, 35 Kan. 271; 10 Pac. 852.

³⁶ Commonwealth v. Beckum, 153 Mass. 386; 26 N. E. 1003; DeGraff v. State (Okla.), 103 Pac. 538.

a sale, and the evidence discloses that three sales were made to the same prosecuting witness, and it was the third sale upon which the indictment was drawn, yet the prosecution may elect to take a conviction upon the first one.³⁷ Upon a charge of keeping a nuisance in a certain "tenement," the State is not required to elect which one of several rooms was the tenement.³⁸ The election must be definite so the accused will know with certainty which offense he is required to meet;³⁹ but he is entitled to have the prosecution proceed far enough with the evidence so that the particular transaction can be identified with certainty.⁴⁰ If a new trial be granted, upon a second trial the State may proceed upon an entirely different transaction, notwithstanding the election taken on the first trial; if the indictment is broad enough to cover it.⁴¹

Sec. 982. Jury trial.

Violations of liquor penal statutes are crimes, and the usual constitutional guaranty of a right to a trial by jury

³⁷ *State v. Gaffeny*, 66 Iowa, 262; 23 N. W. 659; *State v. Ensley*, 10 Iowa, 149.

³⁸ *Commonwealth v. Clymer*, 150 Mass. 71; 22 N. E. 436; *Elam v. State*, 26 Ala. 48.

³⁹ *State v. Guettler*, 34 Kan. 582; 9 Pac. 200.

⁴⁰ *Hughes v. State*, 35 Ala. 351.

⁴¹ *State v. Dow*, 74 Iowa, 141; 37 N. W. 114.

Where a statute made a specific sale presumptive evidence that the accused kept the place where it was sold, the State was held not bound to elect where it was charged the accused made a specific sale and also kept a place where liquors were sold, because the offenses were not separate and distinct. *People v. Shuler*, 136 Mich. 161; 98 N. W. 986; 10 Det. L. N. 1004.

As to what is practically a bill

of particulars in Vermont, see *State v. Wooley*, 59 Vt. 357; 10 Atl. 84; *State v. Bacon*, 41 Vt. 526; 98 Am. Dec. 616, and *State v. Smith*, 55 Vt. 57.

Of course, a new trial may be granted as to one count and a judgment of conviction be entered on another. *Commonwealth v. Remby*, 2 Gray, 508.

If evidence of two sales be given, and then a motion to elect be made, the prosecution must elect as between the two; and cannot elect to proceed upon a third. *Gelber v. State (Tex.)*, 120 S. W. 863.

In Massachusetts if there be an appeal from a conviction, in the court to which the appeal is taken, the trial must be upon the identical offense tried below. *Commonwealth v. McNeff*, 145 Mass. 406; 14 N. E. 616.

applies to them.⁴² But even though a constitutional provision secures the accused such a right of trial, yet a statute which confers power upon a magistrate or justice of the peace to try a case without a jury, and gives a right of appeal to the accused on conviction, where he is entitled to a trial *de novo* and by a jury, is constitutional.⁴³ The defendant in such an instance cannot successfully complain that he is required to pay the costs below and a fee for the prosecuting attorney before he can take an appeal.⁴⁴ Nor can he complain of such a statute where it provides that the liquors seized and decreed forfeited shall be "forthwith" destroyed, for the word "forthwith" does not mean that they shall be destroyed instantly upon the rendition of the decree, but means that a reasonable time shall be allowed for an appeal.⁴⁵ But where the right of appeal is clogged with a provision of the statute that the accused shall give a bond with good security that he will not violate any provision of the liquor statute, such provision is unconstitutional, because it is an improper obstacle in the way of an appeal.⁴⁶

⁴² *People v. Baird*, 11 Hun, 289; *Commonwealth v. Saal*, 10 Phila. 496; *Eilenbreker v. District Court*, 134 U. S. 31; 10 Sup. Ct. 424. When trial by jury may be taken away. *Commonwealth v. Rock*, 10 Gray, 4.

But in Vermont it has been universally held that the defendant in a liquor prosecution is not entitled to a jury trial as a matter of right; the constitutional guaranty of a trial by jury only applying to "high crimes," the punishment of which affects life, liberty or reputation. *State v. Conlin*, 27 Vt. 318; *In re Daugherty*, 27 Vt. 325; *State v. Freeman*, 27 Vt. 523; *State v. Comstock*, 27 Vt. 553; *State v. Intoxicating Liquors (Vt.)*, 73 Atl. 586. A similar holding has been made in Georgia. *Floyd v. Commissioners*, 14 Ga. 354.

⁴³ *State v. Brennan*, 25 Conn. 278; *Jones v. Robbins*, 8 Gray, 329; *State v. Fitzpatrick*, 16 R. I. 54; 11 Atl. 773; *Emporia v. Volmer*, 12 Kan. 622; *Beers v. Beers*, 4 Conn. 535.

⁴⁴ *Littlefield v. Peckham*, 1 R. I. 509.

⁴⁵ *In re McSoley*, 15 R. I. 608; 10 Atl. 659.

⁴⁶ *Saco v. Wentworth*, 37 Me. 165; *In re McSoley*, 15 R. I. 608; 10 Atl. 659; *Saco v. Woodsum*, 39 Me. 258.

An appeal from a finding by supervisors as to the sufficiency of an *ex parte* statement of consent to the sale of liquors is not triable in the court by a jury. *Porter v. Butterfield*, 116 Iowa, 725; 89 N. W. 199.

Although the proceedings for the seizure and confiscation of liquors to some extent involves property

Sec. 983. Juror's competency.

A person who is an agent of a voluntary league, formed for the enforcement of the law against the illegal sale of liquors and for the prosecution of liquor dealers, and is employed by it to carry out its purposes, is not a competent juror upon the trial of an accused with maintaining a liquor nuisance.⁴⁷ But an opinion held by a juror that the accused's business of selling liquors is an immoral one,⁴⁸ or that a man who engages in such a business must necessarily be an immoral man, does not disqualify him as a juror.⁴⁹ Yet where the moral character of a party to the proceedings—as in application for a license—is at issue, then a person who entertains such an opinion concerning the liquor business is not competent to serve as a juror.⁵⁰ But the mere fact that a person belongs to a temperance society, and he considers its object is merely to promote temperance amongst its own members and not for the enforcement of the liquor laws, does not disqualify him as a juror.⁵¹ Nor does the fact that the person offered as a juror is a constable charged with the enforcement of the liquor law disqualify him.⁵²

Sec. 984. Juror's qualifications in criminal prosecutions.

A juror is not disqualified to sit as a juror on the trial of a person indicted for violating a law against the sale of intoxicating liquors, where, on his *voire dire*, he states that he has a prejudice against the sale of such liquors, and believes

rights, yet it is not an action to recover money, nor of real or personal property, and hence the right of trial by jury cannot be demanded under a provision in a civil code giving the right of trial by jury in all actions for the recovery of money or of real or personal property. *Sothman v. State*, 66 Neb. 302; 92 N. W. 303.

A statute requiring the demand to be made in writing is valid. *State v. Semmes* (Ala.), 50 So. 120.

⁴⁷ *Commonwealth v. Moore*, 143 Mass. 136; 9 N. E. 25.

⁴⁸ *Smith v. State*, 24 Ind. App. 688; 57 N. E. 572.

⁴⁹ *Dolan v. State*, 122 Ind. 141; 23 N. E. 761; *Pemberton v. State*, 11 Ind. App. 297; 38 N. E. 1096.

⁵⁰ *Fletcher v. Crist*, 139 Ind. 121; 38 N. E. 472.

⁵¹ *State v. Estlinbaum* (Kan.), 27 Pac. 996.

⁵² *State v. Cosgrove* (R. I.), 16 Atl. 900.

such business, though legitimate, immoral and improper, but thinks that he can waive his prejudice so as to do the accused justice and try him as freely as he would a person for the violation of any other law. This is so because a juror's opinion of the morality of a particular transaction cannot be considered in determining his competency to try one accused thereof. If so, jurors could not be found to try those charged with murder, arson, rape, or any of the crimes which are *mala in se*. All good men, and most bad men, are prejudiced against such acts and deem them improper and immoral. But as to those things which are *mala prohibita*, offenses only because forbidden by statute and not generally deemed illegitimate unless so condemned, the opinions of men widely differ, some esteeming particular laws and the punishment prescribed for their violation proper and necessary to the public welfare, while others think them needless, unjust and improper invasions of private and individual liberty. A license law itself some think wrong because they deem the liquor traffic immoral and improper to be licensed, while others, perhaps, condemn such laws as an unwarrantable interference with individual enterprise and freedom of action. Others occupy various intermediate positions between them, but it is a needless refinement of argument to presume that the holder of any of these views would, on account of his conscientious scruples, be exposed to impalement "on one horn or other of the dilemma," if required to try the question of some one's guilt of an alleged infraction of the law. In fact, a juror's belief about the morality of the liquor traffic has no direct bearing upon, and is entirely collateral to, an inquiry into the fact of an alleged infraction of a law regulating the traffic; and, if he is able, on his oath, to say that he can do the defendant justice and satisfies the presiding judge of his competency, it is not for an appellate court to revise the ruling so made upon a speculative possibility that the conscientious scruples of a juror concerning a collateral question, entirely severable from the issue to be tried, may prove an embarrassment strong enough to affect his regard for his oath to try and determine that issue accord-

ing to the law and the evidence. The law will not presume such results. The competency of jurors must be determined by practical standards and not by speculative theories and conjectures. If those who believe in the immorality of any trade or pursuit are incompetent, as jurors, to try one charged with an infraction of a law concerning that business, then those who think that business should not be regulated or restricted by law, but should be left as free as other pursuits, should also be deemed incompetent. Such is not the law.⁵³ But if a juror admits that he would allow less weight and credit to the testimony of the defendant, if he should testify in his own behalf, than he would if such defendant were not engaged in the business of selling such liquors, then he is at least *prima facie* incompetent as a juror to try such a cause.⁵⁴ Nor will the fact that one, as a constable, is specially charged with enforcing a liquor law disqualify him from acting as a juror on a trial for maintaining a liquor nuisance in another precinct.⁵⁵

Sec. 985. Questions for the jury.

The question of whether or not the license offered in evidence is sufficient is one for the court and not for the jury.⁵⁶ Whether or not the purchaser was a minor is a question for the jury, but they cannot determine this from his personal appearance;⁵⁷ and so it is as to whether minors were permitted in the accused's saloon;⁵⁸ or what constitutes the

⁵³ Robinson v. Randall, 82 Ill. 521; Meanx v. Whitehall, 8 Brad. 173; Elliott v. State, 73 Ind. 10; Shields v. State, 95 Ind. 299; Dolan v. State, 122 Ind. 141; 23 N. E. 761; Pemberton v. State, 11 Ind. App. 297; 38 N. E. 1096; Smith v. State, 24 Ind. App. 688; 57 N. E. 572.

⁵⁴ Stoots v. State, 108 Ind. 415; 9 N. E. 380.

⁵⁵ State v. Cosgrove, 16 R. I. 411; 16 Atl. 900.

It is no cause for a new trial,

that many of the jurors were members of the local option league whose object was to enforce the laws and some of whom had voted for local option. Deadwheeler v. State (Tex.), 121 S. W. 864.

⁵⁶ Townsend v. State, 2 Blackf. 151.

⁵⁷ Ihinger v. State, 53 Ind. 251; Robinius v. State, 63 Ind. 235; Hale v. State, 36 Ark. 150.

⁵⁸ State v. Kinhead, 57 Conn. 173; 17 Atl. 855.

appurtenances of premises;⁵⁹ or whether the accused's servant was authorized to make the sale charged;⁶⁰ or whether a method of sales adopted by a club is an evasion of the law;⁶¹ or what weight shall be given to a failure of the accused to sell the persons to whom he claims to have given and not sold liquors;⁶² or whether the general use by all persons of a gate and passageway in the rear of a saloon made the premises on the same street as a schoolhouse less than four hundred feet away;⁶³ whether a room adjoining another building kept by a third person is a tenement in the building;⁶⁴ whether a sale by a servant on Sunday was a violation of the defendant's orders, or whether his orders were mere subterfuges;⁶⁵ or which of two rooms used for sale of liquor, card playing and the sale of tobacco is the saloon;⁶⁶ or whether a temperance camp meeting is a "public assembly convened for the purpose of religious worship;"⁶⁷ or whether the liquor sold was sold to be drunk upon the premises;⁶⁸ or whether the defendant used due care to ascertain the habits of an intemperate person to whom he is charged with making an unlawful sale;⁶⁹ or whether the local option law was in force at the place of sale;⁷⁰ or the good faith of the accused in making sales;⁷¹ or whether accused knew his barkeeper was selling

⁵⁹ *Stout v. State*, 93 Ind. 150.

⁶⁰ *State v. Tibbetts*, 35 Me. 81.

⁶¹ *Commonwealth v. Smith*, 102 Mass. 144; *State v. Clark*, 18 Mo. App. 531. See *Turner v. State*, 121 Ga. 154; 48 S. E. 906.

⁶² *Commonwealth v. Cummings*, 121 Mass. 63.

⁶³ *Commonwealth v. Everman*, 140 Mass. 434; 5 N. E. 155.

⁶⁴ *Commonwealth v. Lee*, 148 Mass. 8; 18 N. E. 586.

⁶⁵ *Commonwealth v. Riley*, 157 Mass. 89; 31 N. E. 708; *State v. Wentworth*, 65 Me. 234; 20 Am. Rep. 688.

⁶⁶ *People v. Scranton*, 61 Mich. 244; 28 N. W. 81.

⁶⁷ *State v. Norris*, 59 N. H. 536.

⁶⁸ *Jefferson v. People*, 101 N. Y. 19; 3 N. E. 797.

⁶⁹ *Crabtree v. State*, 30 Ohio St. 382; *Elam v. State*, 25 Ala. 53.

⁷⁰ *Ezzell v. State*, 29 Tex. App. 521; 16 S. W. 782. *Contra*, *State v. Searey*, 39 Mo. App. 393; *State v. Watts*, 39 Mo. App. 409.

⁷¹ *Owens v. People*, 56 Ill. App. 569; *Harris v. State*, 50 Ala. 127; *State v. Huff*, 76 Iowa, 200; 40 N. W. 720; *Brooks v. State*, 65 Me. 445; 4 So. 343; *State v. Wentworth*, 65 Me. 234; 20 Am. Rep. 688; *Commonwealth v. Bishman*, 138 Pa. 639; 12 Atl. 12; *State v. Aulman*, 76 Iowa, 624; 41 N. W. 379.

liquors illegally;⁷² or whether bitters contained intoxicating liquors in appreciable quantities;⁷³ or whether "ginseng cordial" is an "intoxicating bitters or beverage;"⁷⁴ or whether liquors compounded had lost their character as beverages;⁷⁵ or whether "peach cider" containing a certain percentage of alcohol is intoxicating;⁷⁶ or whether "hop tea" is intoxicating;⁷⁷ or wine is a spirituous liquor;⁷⁸ or whether a liquor is a spirituous liquor,⁷⁹ or a malt liquor,⁸⁰ or contains a certain percentage of alcohol;⁸¹ or cider after fermentation is intoxicating;⁸² or lager beer is intoxicating;⁸³ or the liquor on brandy peaches is intoxicating;⁸⁴ or cider a "vinous or spirituous" liquor;⁸⁵ or whether ale is intoxicating.⁸⁶ In those States, however, where the court takes judicial notice whether a liquor is intoxicating, as whisky or brandy, the court may so charge the jury, and if there is no dispute as to the kind of liquor sold, of which it takes judicial notice that it is intoxicating, then the question as to whether the liquor was intoxicating is one for the court.⁸⁷ So it is a question for the jury whether the liquor sold in a quart bottle

⁷² *Neideiser v. State*, 6 Baxt. 699.

⁷³ *Allred v. State*, 89 Ala. 112; 8 So. 56; *King v. State*, 58 Miss. 737; 38 Aa. Rep. 344; *Fairly v. State*, 63 Miss. 333.

⁷⁴ *Wadsworth v. Dunnam*, 98 Ala. 610; 13 So. 597.

⁷⁵ *State v. Laffer*, 38 Iowa, 422.

⁷⁶ *Topeka v. Zufall*, 40 Kan. 47; 19 Pac. 359; 1 L. R. A. 387.

⁷⁷ *State v. May*, 52 Kan. 53; 34 Pac. 407.

⁷⁸ *State v. Stewart*, 31 Me. 515; *State v. Lowry*, 74 N. C. 121.

⁷⁹ *State v. Wall*, 34 Me. 165.

⁸⁰ *State v. Starr*, 67 Me. 242.

⁸¹ *Commonwealth v. Magee*, 141 Mass. 111; 4 N. E. 819. See *Commonwealth v. Lowry*, 145 Mass. 212; 13 N. E. 611.

⁸² *State v. Biddle*, 54 N. H. 379.

⁸³ *People v. Schewe*, 29 Hun, 122; 1 N. Y. Cr. R. 360; *Blatz v. Rohrbach*, 116 N. Y. 450; 22 N. E. 1049; 6 L. R. A. 669; *State v. Gravelin*, 16 R. I. 407; 16 Atl. 914.

⁸⁴ *State v. Scott*, 116 N. C. 1012; 21 S. E. 194.

⁸⁵ *Commonwealth v. Reyburg*, 122 Pa. 299; 16 Atl. 351; 23 W. N. C. 151; 2 L. R. A. 415; *State v. Gravelin*, 16 R. I. 407; 16 Atl. 914.

⁸⁶ *State v. Barron*, 27 Vt. 57; *People v. Ingraham*, 100 Mich. 530; 59 N. W. 234; *State v. Witmare*, 12 Mo. 357; *State v. Gravelin*, 16 R. I. 407; 16 Atl. 914.

⁸⁷ *State v. Tisdale*, 54 Minn. 105; 55 N. W. 903; *King v. State*, 58 Miss. 737; 38 Am. Rep. 344.

was less than a quart;⁸⁸ or that the purchaser of liquor is a person of "intemperate habits;"⁸⁹ or whether a sale to an adult and minor entering a saloon was a sale to the adult or minor;⁹⁰ or to whom, of two persons together, the liquor was sold.⁹¹ So it is a question for the jury for what purpose liquors were kept.⁹² So it is a question for them whether or not a transaction of doubtful character is a sale or barter or loan,⁹³ or a gift;⁹⁴ or whether a sale was intended;⁹⁵ or whether giving away liquor with a sale of goods, with a view to increase sales, is a mere device to evade the liquor law.⁹⁶ So it is a question for the jury whether a sale of liquor was for the purpose that sales are permitted within an exception of the statute allowing them for purposes therein stated;⁹⁷ and so whether made for medicinal purposes;⁹⁸ or for the use of a guest in a hotel;⁹⁹ or if the sale was made upon a prescription, where there is a dispute on that point;¹ or whether the defendant was a manufacturer of liquor;² or the trans-

⁸⁸ *Scott v. State*, 25 Tex. Supp. 168.

⁸⁹ *Smith v. State*, 55 Ala. 1; *Gallagher v. People*, 120 Ill. 179; 21 N. E. 335; affirming 29 Ill. App. 397, 401; *Kamman v. People*, 24 Ill. App. 388; affirmed, 124 Ill. 481; 16 N. E. 661; *State v. Pratt*, 34 Vt. 323; *Mullinix v. People*, 76 Ill. 211; *Commonwealth v. Trimble*, 150 Mass. 89; 22 N. E. 439.

⁹⁰ *Edgar v. State*, 45 Ark. 356.

⁹¹ *Commonwealth v. Woods*, 165 Mass. 145; 42 N. E. 565.

⁹² *Commonwealth v. Kennedy*, 108 Mass. 292; *Commonwealth v. Kane*, 150 Mass. 294; 22 N. E. 203; *Commonwealth v. McManus*, 161 Mass. 64; 36 N. E. 675; *State v. Shank*, 74 Iowa, 649; 38 N. W. 523; *State v. Hale*, 91 Iowa, 367; 59 N. W. 281; *Commonwealth v. Kenan*, 148 Mass. 470; 20 N. E.

101; *Commonwealth v. Canny*, 158 Mass. 210; 33 N. E. 340.

⁹³ *Coker v. State*, 91 Ala. 92; 8 So. 874.

⁹⁴ *Keiser v. State*, 82 Ind. 379; *Kober v. State*, 10 Ohio St. 44; *Turner v. State*, 121 Ga. 154; 48 S. E. 906.

⁹⁵ *State v. Greenleaf*, 31 Me. 517; *Archer v. State*, 45 Md. 33.

⁹⁶ *Kober v. State*, 10 Ohio St. 444; *Archer v. State*, 45 Md. 33.

⁹⁷ *Howard v. State*, 5 Ind. 516.

⁹⁸ *Mitchell v. State*, 63 Ind. 574; *State v. Aulman*, 76 Iowa, 624; 41 N. W. 379; *State v. Field*, 89 Iowa, 34; 56 N. W. 276; *State v. Young*, 36 Mo. App. 517.

⁹⁹ *Scott v. State*, 25 Tex. Supp. 168.

¹ *Cullinan v. Hosmer*, 100 N. Y. App. Div. 148; 91 N. Y. Supp. 607.

² *State v. Ross*, 58 S. C. 444; 36 S. E. 659.

action a sale at wholesale or a device to evade the law concerning retail of liquors.³

Sec. 986. Qualifications of judge.

The fact that the judge trying the case was an inspector at the election held to determine whether local option should be adopted does not disqualify him to try a case for a violation of the local option statute.⁴ So a judge who has held the office of liquor license inspector may try a case for a violation of the liquor statute,⁵ and so may a prohibitionist who takes an active part with his local council in enforcing the liquor laws.⁶ Signing a petition that no license be granted does not disqualify a judge from trying a violation of the liquor statute.⁷

Sec. 987. Verdict.

Where it is permissible to charge sales of liquors in the alternative, as a sale of "vinous or malt liquors," the verdict of the jury need not specify which kind of liquor was sold;⁸ so on a charge in one count of a sale and in another of a gift, a verdict of guilty is sufficient.⁹ Where the fine for an illegal sale had to be three times the amount of the statute license fee, a verdict of guilty and assessing the fine at \$375 was held sufficient, the State license fee for selling malt liquors being \$125 but for selling lager beer was only one-

³ *Adair v. Commonwealth* (Ky.), 56 S. W. 530. When a question for the court, see *Commonwealth v. Paulin*, 187 Mass. 568; 73 N. E. 655.

Distance from church where sale took place. *Gilmore v. State* (Ala.), 28 So. 382.

⁴ *Ex parte Michaud*, 4 Can. Cr. Cas. 569; *Ex parte Michaud*, 34 N. B. 123.

⁵ *Ex parte Michaud*, 32 Can. L. Jr. 779; *Ex parte Gorman*, 34 Can. L. Jr. 175; *Ex parte Driscoll*, 27 N. B. 216.

⁶ *Regina v. Klemp*, 10 Ont. 143; *Regina v. Eli*, 10 Ont. 727; *Regina v. Brown*, 16 Ont. 41; *Regina v. Sproule*, 14 Ont. 375.

⁷ *Rex v. Davis*, 38 N. B. 335. But see *Wathan, etc., Co. v. Commonwealth* (Ky.), 116 S. W. 336. See also *Ex parte Flannagan*, 34 N. B. 326; *Ex parte Herbert*, 34 N. B. 455.

⁸ *Adler v. State*, 55 Ala. 16; *In re Butman*, 8 Greenl. (Me.) 113.

⁹ *Brugier v. State*, 1 Dak. 5; 46 N. W. 502.

third that amount.¹⁰ If there be a verdict of guilty upon two counts, and the court grant a new trial as to one of them, the accused cannot then insist the verdict is broader than the charge.¹¹ It is not necessary that the jury find the liquor sold was intoxicating.¹² So a verdict finding the liquors were kept for the purpose of being sold in violation of law is sufficient, although it does not find that any sales were made as alleged, the indictment being a charge of keeping liquors for unlawful sales, even though the accused had a permit to keep liquors for certain specified purposes.¹³ If there be several counts, a verdict on each count is not necessary, it being sufficient to state in the one verdict the findings upon each count.¹⁴ Where the proof shows the sale was by accused's agent, a general verdict of guilty is sufficient, without a finding that the sale was by the accused's agent;¹⁵ and such a verdict is sufficient where it is alleged the sale was in a shop,¹⁶ as well as upon a charge of keeping liquor.¹⁷ And where the question was submitted to the jury whether the liquors seized were kept for sale "contrary to the provisions of" a specified statute, a verdict reciting "all kept for sale" was held to be a sufficient finding that they were kept for sale contrary to law.¹⁸ Where the charge was a sale within two miles of "Bethel Methodist Church in Macon County," a verdict describing the church as "Bethel Church in Macon County," was held sufficient.¹⁹ Likewise, where the indictment charged a sale of "less than five gallons, to-wit, by the quart," alleging that the liquors sold were neither the product of the accused's farm nor of his manufacture, nor

¹⁰ *Sampson v. State*, 107 Ala. 76; 18 So. 207.

¹¹ *Jones v. State*, 67 Miss. 11; 7 So. 220. See *People v. Gaul*, 233 Ill. 630; 84 N. E. 721; and also see *State v. Whisenant*, 149 N. C. 515; 63 S. E. 91.

¹² *State v. Wadsworth*, 30 Conn. 55.

¹³ *State v. Blair*, 72 Iowa, 591; 34 N. W. 432.

¹⁴ *State v. Nield*, 4 Kan. App.

626; 45 Pac. 623. See *State v. Jackson*, 72 Mo. App. 59.

¹⁵ *State v. Brown*, 31 Me. 520.

¹⁶ *State v. McCann*, 61 Me. 116.

¹⁷ *State v. Nowlan*, 64 Me. 531; *Riggs v. State* (Neb.), 121 N. W. 588.

¹⁸ *Commonwealth v. Intoxicating Liquors*, 148 Mass. 124; 19 N. E. 23.

¹⁹ *State v. Downs*, 116 N. C. 1064; 21 N. E. 689.

that the sale was made at his place of business, a special finding that the accused sold a quart of whisky of his own manufacture at a place two hundred yards from his place of manufacture, was held to sustain a judgment of guilty.²⁰ A defendant was alleged to be a druggist and charged "with keeping a tippling house without a license, and without a license selling intoxicating liquors to be used as a beverage, contrary to law." The verdict was "guilty of selling liquor without a license." This was held to be a finding that he was guilty as a druggist of selling liquor to be used as a beverage, and that the words "charging a sale without a license" were surplusage.²¹ And where a statute was amended, and the amended section required the jury to specify in their verdict what offenses charged were committed before and what after the act took effect, but the evidence was confined wholly to violations since the amendment took effect, a failure of the jury to specify that the offenses were before or after that time was held not fatal to it.²² If a special verdict be returned it must contain a finding of all the facts necessary to show the commission of the crime as charged in the indictment, and that the offense was committed before the prosecution was begun;²³ and a special verdict on an indictment charging a sale without a license, which merely finds "that the sale was made as set forth in the complaint" or "that defendant made the sale set forth in the complaint," is not sufficient, because it does not show the defendant had no license.²⁴ So where the defendant was charged in the first count with being a

²⁰ *State v. Whissenhunt*, 98 N. C. 682; 4 S. E. 533.

²¹ *Rhoads v. Commonwealth* (Pa.), 6 Atl. 245; reversing 1 Pa. Co. Ct. Rep. 639.

²² *State v. Kibling*, 63 Vt. 636; 22 Atl. 613.

On an indictment for selling liquors without a license, a verdict that defendant was "guilty of aiding selling whisky" was held sufficient. *Johns v. State*, '88 Miss. 663; 29 So. 401.

²³ *State v. Leap*, 1 Cranch C. C. 1; Fed. Cas. No. 16964; *Commonwealth v. Dooly*, 6 Gray, 360.

²⁴ *Commonwealth v. Dooly*, 6 Gray, 360; *State v. Kirkham*, 23 N. C. 384. See *Commonwealth v. Intoxicating Liquors*, 148 Mass. 124; 19 N. E. 23; *State v. Bradley*, 132 N. C. 1060; 44 S. E. 122; *People v. Cox*, 45 N. Y. Misc. Rep. 311; 92 N. Y. Supp. 125.

common seller of liquors, and in the second, third and fourth with single sales, and the verdict was that he was "not guilty as a common seller," but was "guilty on two single sales," and the court ordered it to be recorded as a verdict of not guilty on the first count, but guilty on the second and third counts, in which form it was affirmed by the jury, it was held that the verdict did not conform to the findings and must be set aside.²⁵ Where three of the jurymen answered "guilty of keeping a bar," it was held that the court could not record a verdict "guilty" of keeping a nuisance or a tippling shop.²⁶ So where the amount of the fine for non-payment of either State or county liquor tax was the amount of either tax, and there was no evidence that the county tax had been levied, though the amount of the county tax was shown, yet the jury fixed the fine at as much as both the State and county taxes were in amount, the verdict was set aside, because there was nothing in the record to show the jury did not in fact include the county tax as a part of the penalty assessed.²⁷ And where the charge was in separate counts the unlawful keeping of liquors in the accused's shop, "in the back room," and in the premises connected with the shop, a verdict of "guilty of having liquor in the back room" was held insufficient.²⁸

²⁵ Commonwealth v. Munn, 14 Gray, 364.

²⁶ State v. Wright, 5 R. I. 287.

²⁷ Allen v. State (Tex. Cr. App.), 13 S. W. 998.

In King v. State, 66 Miss. 502; 6 So. 188, it was held that if evidence of several sales on one count be shown, without an election, the verdict would be set aside, for the reason that if it stood there could be but one conviction.

²⁸ Weikman v. City Council, 2 Speers (S. C.), 371. See State v. Whissenhunt, 98 N. C. 682; 4 S. E. 533.

Of course, where it is not con-

sidered a variance, one defendant may be convicted and the other acquitted. Commonwealth v. Garvin, 148 Mass. 449; 19 N. E. 554; Commonwealth v. Cook, 12 Allen, 542.

Where the court required the jury to confine its consideration to a particular count, it was held that the other counts passed out of the case; and the jury were not required to specify what count they based their verdict upon. Smart v. State, 49 Tex. Cr. App. 373; 92 S. W. 810.

Where a druggist was indicted for keeping liquors for sale and

Sec. 988. Sentence and punishment.

Liquor statutes usually specify the amount of fine to be assessed and punishment inflicted for a violation of their provisions, and no discretion is left in that respect. The courts must obey the mandates of the statutes.²⁹ Thus, where the lowest fine for a sale of liquors without a license was \$100, and there were seven sales charged and finding of guilty on each charge, it was held that the fine could not be less than \$700.³⁰ In Texas, at least in the past, the amount of the fine had to be equal to the county occupation tax levied for the year, and the amount of the levy for that year had to be alleged and proven.³¹ Where a statute provides for the commitment of a person convicted when he has no real or personal property with which to pay the fine, it is error to commit him to jail until he pays his fine and costs. In such

with intent to unlawfully sell them, and the prosecution relied upon sales made to persons who signed false certificates, to the effect that they desired the liquor for medicinal purposes, when they in fact wanted it for a beverage, it was held it was not sufficient to find that accused had "reasonable cause to know" the liquor was really wanted as a beverage, in order to find the sales were unlawful—*Thornton Intoxicants* *Barney* 370 *ful*; but the verdict should have contained a finding that the accused did, in fact, have a guilty knowledge or belief. *Commonwealth v. Joslin*, 158 *Mass.* 482; 33 *N. E.* 653; 21 *L. R. A.* 449.

Sufficiency of verdict for destruction of liquors. *Commonwealth v. Intoxicating Liquors*, 113 *Mass.* 13.

Directing verdict for plaintiff in a civil case. *Fielding v. LaGrange*, 104 *Iowa*, 530; 73 *N. W.* 1038.

²⁹ *Johnson v. People*, *Breese* (Ill.), 276; *Morris v. People*, 2 *T. & C. (N. Y.)* 219; *Brown v. State*, 2 *Head*, 180; *People v. Brown*, 85 *Mich.* 119; 48 *N. W.* 158; *State v. Combs*, 19 *Ore.* 295; 24 *Pac.* 235; *Foote v. People*, 56 *N. Y.* 321; reversing 2 *T. & C.* 216; *Burgamy v. State*, 114 *Ga.* 852; 40 *S. E.* 991; *McCampbell v. State*, 116 *Tenn.* 98; 93 *S. W.* 100. The judgment must follow the indictment. *Thompson v. Durnford*, 12 *Low. Can. Jr.* 285; *Commonwealth v. Luken*, 7 *Lack. Leg. N.* 4; 10 *Pa. Dist. Rep.* 95; *Edmonson v. Commonwealth (Ky.)*, 62 *S. W.* 1018; 22 *Ky. L. Rep.* 1902.

³⁰ *State v. Faber*, 28 *Neb.* 803; 44 *N. W.* 1137; *Olson v. People*, 125 *Ill. App.* 460. See *Dalrymple v. State*, 26 *Ohio Cir. Ct. Rep.* 562.

³¹ *Spears v. State*, 8 *Tex. App.* 467; *White v. State*, 11 *Tex. App.* 476; *Allen v. State (Tex. App.)*, 13 *S. W.* 998; *Davidson v. State*, 27 *Tex. App.* 262; 11 *S. W.* 371.

an instance an execution must first be ordered issued to ascertain if he has any property out of which the fine can be satisfied.³² In Indiana, at an early day, it was said that an order for the removal of a liquor nuisance was not a necessary part of the judgment in an action for keeping it, but the court could issue it afterwards and it must be sufficiently explicit to guide the officer in the discharge of his duty.³³ As a rule, the accused stands committed until the fine and costs are paid³⁴ (or replevied), and the court cannot discharge him with orders that an execution issue to collect the amount of the fine and costs.³⁵ Unless the statute, however, provides for imprisonment, there can be none;³⁶ but where the court is empowered to render judgment, on conviction, "of fine or imprisonment, or both, as the case may require," there may be, of course, a judgment of imprisonment.³⁷ If the statute provides that any licensee be convicted of having made an illegal sale, his license shall thereby be revoked, it is proper to make the revocation a part of the judgment.³⁸ A conviction and a fine for retailing without a license does not operate as a license to retail for a year, where annual licenses are required.³⁹ Where a statute provided for

³² Deitz v. City of Central, 1 Colo. 323.

³³ Howard v. State, 6 Ind. 444.

³⁴ Harris v. Commonwealth, 23 Pick. 289; State v. Shaw, 23 Iowa, 316; State v. Winstrand, 37 Iowa, 110; *Ex parte* Tuichner, 69 Iowa, 393; 28 N. W. 655; Olson v. People, 125 Ill. App. 460. See People v. Stock, 26 N. Y. App. Div. 564; 50 N. Y. Supp. 483; affirmed, 157 N. Y. 691; 51 N. E. 1092; People v. Hazard, 23 N. Y. Misc. Rep. 477; 52 N. Y. Supp. 670, and People v. Shaver, 37 N. Y. App. Div. 21; 55 N. Y. Supp. 701.

³⁵ State v. Robinson, 17 N. H. 263.

³⁶ People v. Combs, 16 Hun, 577; affirmed, People v. Hislop, 77 N.

Y. 331; Van Noy v. State, 14 Tex. App. 69; Aikin v. State, 14 Tex. App. 142.

³⁷ People v. Henschel, 58 Hun, 607; 12 N. Y. Supp. 46; State v. Hicks, 101 N. C. 747; 7 S. E. 707.

³⁸ Commonwealth v. Watson, 2 Pa. Dist. Rep. 526.

But the fact of his having a license must have been alleged in the indictment. Newman v. State, 101 Ga. 534; 28 S. E. 1005.

See Conner v. Commonwealth, (Ky.), 16 S. W. 454; 13 Ky. L. Rep. 403.

See Lambert v. Rahway, 58 N. J. L. 578; 34 Atl. 5.

³⁹ State v. McBride, 4 McCord (S. C.), 332.

a lighter punishment for a licensee selling liquor to a person of known intemperate habits than a non-licensee, a licensee who sold such a person liquor as the agent of a non-licensee was held liable to the heavier punishment and could not successfully claim he was liable only to the lighter one.⁴⁰ A somewhat similar case was where there was one penalty for a sale by a dramshop keeper on Sunday and a smaller one for a non-dramshop keeper selling on that day. In order to inflict the greater penalty it was held necessary to prove the accused was a dramshop keeper.⁴¹ Where a statute provides that all persons confined in a work house shall be "kept at hard labor," a judgment sentencing a defendant to a work house for a term and adding "there to be kept at hard labor" is valid, and is not violated by the addition of the clause just quoted.⁴² A separate sentence may be imposed for each count of an indictment where the evidence shows each relates to a distinct offense.⁴³ Evidence of a lack of knowledge that the liquor sold was intoxicating may be received to mitigate the punishment.⁴⁴ A statute authorizing the imposition of a fine

⁴⁰ Commonwealth v. Zelt, 138 Pa. 615; 21 Atl. 7; 27 W. N. C. 131; 11 L. R. A. 602.

⁴¹ State v. Heckler, 81 Mo. 417.

Under Mississippi Code, 1892, § 1590, an attachment issues to collect the penalty. Clark v. Adams, 80 Miss. 219; 31 So. 746.

An erroneous judgment on one count must be reversed as to another count, though valid as to the latter. People v. Gaul, 233 Ill. 630; 84 N. E. 721.

⁴² Hampton v. State, 78 Ohio St. 76; 84 N. E. 601.

See State v. Farrington, 141 N. C. 844; 53 S. E. 954.

A city cannot pass an ordinance that the accused on being convicted of a violation of a liquor ordinance shall work on the chain gang, unless empowered by statute to do so. Littlejohn v. Stells, 123 Ga. 427; 51 S. E. 390.

Where a statute authorizes a court to require the defendant on conviction to enter into bond for good behavior, one convicted a third time may be required to give the bond. Caldwell v. State, 87 Miss. 420; 39 So. 896.

Where a court unauthorizably decreed "that on payment of \$250 and costs, sentence stands suspended as long as defendant keeps from dealing in intoxicating liquors or from doing business where such liquors are sold," this was held not to vitiate what was otherwise a valid judgment. Ragland v. State (Fla.), 46 So. 724.

⁴³ Nichols v. State, 49 Neb. 777; 69 N. W. 99; Kroer v. People, 78 Ill. 294.

⁴⁴ Scott v. State, 47 Tex. Cr. App. 176; 82 S. W. 656.

does not authorize the addition of imprisonment to the fine.⁴⁵ Unless especially empowered by statute, the court cannot, even on payment of the costs, suspend the judgment.⁴⁶

Sec. 989. Excessive punishment.

Perhaps in every State Constitution is a provision to the effect that "excessive fines shall not be imposed." It has been held that a fine for sales without a license greater than the amount of a license fee—double the amount in this case—which would have secured immunity against punishment, is not

⁴⁵ Pressly v. State, 114 Tenn. 534; 86 S. W. 378; 69 L. R. A. 291.

See People v. Rouse, 72 Mich. 59; 40 N. W. 57; State v. Hicks, 101 N. C. 747; 7 S. E. 707, and *Ex parte* Demarco, 77 Vt. 445; 61 Atl. 36.

⁴⁶ King v. Verdon, 8 Can. Cr. Cas. 352.

In Canada, unless the judgment conforms to the requirements of the statute, it will be quashed. Regina v. Brady, 12 Ont. 358; Regina v. Walsh, 2 Ont. 206; Regina v. Bennett, 1 Ont. 445; Regina v. Elliott, 12 Ont. 524; Regina v. Collins, 14 Ont. 613; Regina v. Edgar, 15 Ont. 142.

Where the offense is punishable by fine "or" imprisonment or both, it is error to charge the jury that if they find the accused guilty they may assess a fine "and" imprisonment. Ball v. Commonwealth (Ky.), 99 S. W. 326; 30 Ky. L. Rep. 600.

As to what is a sufficient form of a judgment for violation of a liquor ordinance, see *Ex parte* Mogensen (Cal. App.), 90 Pac. 1060, forfeiture of license, see State v. Gilbert, 21 S. D. 204; 111 N. W.

538; State v. McMillan, 21 S. D. 209; 111 N. W. 540.

Where a statute provided that offenders under a city ordinance for the suppression of liquor sales should be committed to the city jail, it was held void, because city jails throughout the State were not uniform in quality. Wichita v. Murphy, 78 Kan. 859; 99 Pac. 272.

In a trial before a justice of peace for several violations of the liquor law, charged in one proceeding, the recovery cannot exceed the jurisdiction of the justice. Hensoldt v. Petersburg, 63 Ill. 111.

Upon a judgment assessing a fine and also ordering the destruction of the liquors, an appeal, to prevent the destruction of the liquors, must be taken from that part of the judgment, and one taken from the assessment of the fine will not prevent their destruction. Riggs v. State (Tex.), 121 N. W. 588.

Practice under North Dakota statute. State v. Stevens (N. D.), 123 N. W. 888; State v. Wisniewski, 13 N. D. 649; 102 N. W. 883.

excessive,⁴⁷ even though the fine amounted to nine hundred and could have been made twelve hundred dollars.⁴⁸ A fine of three hundred dollars and one year's confinement for violation of a local option law has been held not excessive,⁴⁹ so a fine of five hundred dollars assessed upon a druggist where he had been violating the liquor statute for three years,⁵⁰ or for one merely maintaining a liquor nuisance, a fine of four hundred dollars,⁵¹ or three hundred dollars and costs on plea of guilty for keeping and owning liquors with intent to sell them, with an order for their destruction and the sale of the property used in the business;⁵² or one thousand dollars and costs, though the accused believed in good faith the law was unconstitutional, and discontinued his business when the Supreme Court of the United States declared it was a valid law.⁵³ A fine of three hundred dollars and imprisonment for 365 days for a violation of the local option law in Missouri was held not to be excessive,⁵⁴ and so a fine of five hundred dollars in Georgia for a single sale to a minor where it might have been double that amount;⁵⁵ or in Mississippi a fine of two hundred dollars and three months imprisonment for selling without a license;⁵⁶ or a fine of two hundred dollars upon each of sixteen counts in an indictment for selling without a license⁵⁷ or the full penalty upon each count,⁵⁸ even though the penalty imposed be imprisonment, fixed successively, to commence at the expiration of the next preceding sentence.⁵⁹ Requiring

⁴⁷ Frese v. State, 23 Fla. 267; 2 So. 1; White v. State, 11 Tex. App. 476.

See Rex v. Kay, 38 N. B. 3.

⁴⁸ Beaumel v. State, 26 Fla. 71; 7 So. 371.

⁴⁹ *Ex parte* Swann, 96 Mo. 44; 9 S. W. 10.

⁵⁰ State v. Little, 42 Iowa 51; State v. Huff, 76 Iowa 200; 40 N. W. 720 (50 or 60 sales).

⁵¹ State v. Fertig, 70 Iowa 272; 30 N. W. 633; State v. Price, 75 Iowa 243; 39 N. W. 291.

⁵² State v. Baker, 74 Iowa 760; 38 N. W. 380.

⁵³ State v. Maloney, 79 Iowa 413; 44 N. W. 693.

⁵⁴ *Ex parte* Swann, 96 Mo. 44; 9 S. W. 10.

⁵⁵ McCollum v. State, 119 Ga. 308; 46 S. W. 413.

⁵⁶ Haynes v. State (Miss.), 23 So. 182.

⁵⁷ Fletcher v. Commonwealth, 106 Va. 850; 56 S. E. 149; Rose v. Commonwealth, 106 Va. 850; 56 S. E. 151.

⁵⁸ State v. Carlyle, 33 Kan. 716; 7 Pac. 623.

⁵⁹ Bolun v. People, 73 Ill. 488; Mullinix v. People, 76 Ill. 211;

the convicted defendant to work out his fine at hard labor on the public streets is not excessive punishment.⁶⁰ Of course, the punishment cannot exceed that provided by statute.⁶¹ A court has no power to reduce the fine below the amount fixed by statute.⁶²

Sec. 990. Separate sentences—Separate counts.

If an indictment or information contain several counts, a fine may be assessed upon each count sustained by the proof.⁶³ And where the punishment was ten days' imprisonment for each unlawful sale, and there were charged and proven two sales, it was held error to assess an imprisonment of twenty days in gross; but the judgment should have assessed ten days upon each count, the time under the second one to commence when the first one had expired.⁶⁴ Yet where the judgment was as follows it was held sufficient, viz.: "Therefore it is considered that the State of Iowa recover of said defendant ten dollars for the first offense, ten dollars for the second, and ten dollars for the third offense named

Martin v. People, 76 Ill. 499; Johnson v. People, 83 Ill. 431; Loveless v. State (Tex. Cr. App.), 49 S. W. 601; Briffitt v. State, 58 Wis. 39; 16 N. W. 39; 46 Am. Rep. 621; Hepler v. State, 58 Wis. 46; 16 N. W. 42.

⁶⁰ *Ex parte* Bedell, 20 Mo. App. 125.

See Hubbard v. Commonwealth, 10 Ky. L. Rep. (abstract) 683; Evans v. Commonwealth, 10 Ky. L. Rep. (abstract) 681.

⁶¹ Pursifull v. Commonwealth, (Ky.), 47 S. W. 772; 20 Ky. L. Rep. 863; Johnson v. People, Breese (Ill.), 351; Walters v. State, 5 Iowa 507; Baer v. Commonwealth, 10 Bush 8; Bergmeyer v. Commonwealth, 3 Ky. L. Rep. 823. See also Jordan v. State, 40 Tex. Cr. App. 189; 49

S. W. 371; Miller v. Camden, 63 N. J. L. 501; 43 Atl. 1069.

⁶² State v. Faber, 28 Neb. 803; 44 N. W. 1137. As to excessive amount of fine for violating an ordinance, see Dinuzoo v. State (Neb.), 123 Pac. 310.

⁶³ Barnes v. State, 19 Conn. 398; State v. Leis, 11 Iowa 416; Fletcher v. People, 81 Ill. 116; Kroer v. People, 78 Ill. 294; Tuttle v. Commonwealth, 2 Gray 505; Burrell v. State, 25 Neb. 581; 41 N. W. 399; State v. Faber, 28 Neb. 803; 44 N. W. 1137; State v. Paddock, 24 Vt. 312.

⁶⁴ Mullinix v. People, 76 Ill. 211; Johnson v. People, 83 Ill. 431.

See Bolun v. People, 73 Ill. 488; Martin v. People, 76 Ill. 499; Loveless v. State (Tex. Cr. App.); 49 S. W. 601.

in the indictment, and that he stand committed until said fine and costs are paid.”⁶⁵ But if there be separate counts in the indictment, and yet the evidence shows but one transaction, there cannot be a judgment of guilty on each count.⁶⁶

Sec. 991. Joint defendants.

If two persons be jointly indicted, a joint fine may be assessed against them, if they acted jointly; for instance, as a firm or partners, or a separate fine if they acted individually;⁶⁷ but it is also held that there can be no joint fine, for they are individually liable,⁶⁸ and other cases hold that the fine may be assessed against each defendant, because the charge is several, and one may be convicted and the other acquitted.⁶⁹ In such an instance the entire penalty must be assessed against each defendant found guilty.⁷⁰

Sec. 992. Second offense—Excessive penalty.

Where an increased fine or penalty is inflicted by reason of the offense on trial being the second one the accused has been convicted of, it is usually necessary for the indictment to set out the fact of such prior conviction with such certainty that the accused may know where to find the record of conviction, and if it be not so set out, there can be no increased penalty, though the proof may incidentally disclose the fact of a prior conviction.⁷¹ Proof of former conviction

⁶⁵ Wrocklege v. State, 1 Iowa 167.

Of course, the judgment can be based only on the offense charged, though two be proven. *Bridgeford v. Lexington*, 7 B. Mon. 47.

⁶⁶ *Weaver v. State*, 74 Ohio St. 53; 77 N. E. 273; *Carey v. State*, 70 Ohio St. 121; 76 N. E. 955.

⁶⁷ *Lemons v. State*, 50 Ala. 130; *People v. Sweetser*, 1 Dak. 308; 46 N. W. 452.

⁶⁸ *Miller v. People*, 47 Ill. App. 472; *People v. Walbaum*, 1 Dak. 301; 46 N. W. 452.

⁶⁹ *Commonwealth v. Griffin*, 3 Cush. 523; *Commonwealth v. Harris*, 7 Gratt. 600.

⁷⁰ *People v. Sweetser*, 1 Dak. 308; 46 N. W. 452; *Commonwealth v. Brown*, 12 Gray 135; *Commonwealth v. Sloan*, 4 Cush. 52; *Commonwealth v. Tower*, 8 Met. 527.

⁷¹ *Garvey v. Commonwealth*, 8 Gray 382; *Norton v. State*, 65 Miss. 297; 3 So. 665; *State v. Zimmerman*, 83 Iowa 118; 49 N. W. 71.

must be made to enable the court to assess the heavier penalty.⁷² As a rule statutes allowing the assessment of a heavier penalty by reason of a prior conviction relate to a prior conviction for a violation of the statute under which the pending prosecution is brought, and not to a conviction under a similar statute enacted before the law allowing the increased penalty went into force.⁷³ But upon all questions of this kind the exact language of the statute must be examined, for it controls in each instance. As a rule the prior offense need not be exactly similar to the one for which the accused is on trial. Thus it has been held that a prior conviction of possessing liquor will warrant an increase of penalty for selling, where the statute made it an offense to sell, furnish, or give away, or own, keep or possess liquor with intent to sell, furnish or give it away.⁷⁴ Where a statute provided for an increased penalty on proof of the commission of a "third offense" against the prohibition law, that was held to mean upon proof of a "third conviction," or third offense which had been legally ascertained and determined.⁷⁵ It is not necessary for the State to aver and prove that the prior judgment of conviction has not been appealed from, nor to show it has not been reversed. If it has been reversed, that is a matter of defense.⁷⁶ A failure to prove the prior conviction is not such a variance as will prevent a conviction for the commission of the accused for the offense on which he is on trial.⁷⁷

Sec. 993. Informer—When entitled to part of penalty.

In a few States (perhaps in only one or two), an informer is entitled to a part of the penalty recovered, in payment for his services. Usually he is not deprived of his right to it, if he was actively instrumental in securing the conviction

⁷² State v. Haynes, 35 Vt. 570.

⁷⁵ *In re* Buddington, 29 Mich.

⁷³ State v. Sanford, 67 Conn.

472.

286; 34 Atl. 1045.

⁷⁶ State v. Zimmerman, 83 Iowa,

⁷⁴ State v. Sawyer, 67 Vt. 239;

118; 49 N. W. 71.

31 Atl. 285. See State v. Haynes,

⁷⁷ State v. LaRose, 71 N. H.

36 Vt. 667, and State v. Haynes,

435; 52 Atl. 943.

35 Vt. 570.

of the accused by reason of the fact that the Government used his witnesses before the grand jury to secure indictments, or that his witnesses were subpoenaed at the expense of the State.⁷³ An informer has such a vested interest in the penalty assessed that his portion of it cannot be remitted by the Government or the offender pardoned so as to enable him to escape paying such interest.⁷⁹

Sec. 994. Double liability.

In an action to recover damages in a civil case because of an unlawful sale made, it is no defense that the defendant is liable to a fine for having made the same unlawful sale, and much more so in a prosecution for an unlawful sale, it is no defense for the defendant that he has paid a civil liability because of such sale.⁸⁰ So an ordinance fixing a penalty for a violation of its terms, and in addition thereto requiring a bond of the licensee and making him liable thereon to another amount equal to the penalty is valid, and the recovery of one is no bar to a recovery of the other amount.⁸¹

Sec. 995. Lien of fine and costs on premises used.

Where a liquor statute makes a fine and costs incurred for a violation of its provisions a lien on the premises used or occupied for unlawful sale of liquors with the owner's consent or knowledge, no lien attaches until the judgment is rendered.⁸² In Iowa the fine and costs are liens on the homestead, the statute being construed as making a "special declaration" that they shall be a lien within the meaning of the code that "where there is no special declaration of the statute to the contrary" a judgment shall not be a lien on the

⁷⁸ *Pierce v. Hillsborough*, 57 N. H. 324.

⁷⁹ *State v. Williams*, 1 Nott. & M. 26; *United States v. Harris*, 1 Abb. (U. S.), 110; *Anglea v. Commonwealth*, 10 Gratt. 696.

But see *Rout v. Feemster*, 7 J. J. Marsh (Ky.), 131, and *Parrott v. Wilson*, 51 Ga. 255.

⁸⁰ *Mulcahy v. Givens*, 115 Ind. 286; 17 N. E. 598.

⁸¹ *Whalen v. Macomb*, 76 Ill. 49. See also *State v. Corron*, 73 N. H. 434; 62 Atl. 1044.

⁸² *Bonesteel v. Downs*, 73 Iowa 685; 35 N. W. 924.

homestead. Even as against the wife the judgment for a fine and costs is a lien on the homestead her husband uses for unlawful sale of liquors.⁸³ In Kansas a statute made the premises liable for the fine and costs assessed against the lessee, and it was not necessary to first exhaust the property of the lessee before resorting to the leased premises.⁸⁴ But to enforce this lien of such fine and cost against the premises it must be averred and proven that the lessor knowingly permitted the occupant to use them for unlawful sales, or that he rented them to him for that purpose.⁸⁵ And proof of knowledge sufficient to excite the suspicions of a prudent man and to put him on inquiry is sufficient to charge him with knowledge of the unlawful use to which they were put.⁸⁶ The fine and costs in the judgment are *prima facie* the amount of the lien.⁸⁷ The lien attaches to the leased premises from the date of the conviction of the tenant, and all subsequent conveyances are subject thereto.⁸⁸ Where the owner of the premises is not a party to the criminal action, the enforcement of the judgment against his property must be by an action and not by an execution issued on the judgment assessing the penalty.⁸⁹ To enforce the lien of the judgment upon the premises, the owner of them is the only necessary party, and the filing of the petition to enforce the lien is sufficient notice to third parties of the rights of the State to the relief demanded. But under a power in the governor of the State to suspend the execution of the judgment, the suspension so long as it is in force prohibits enforcement of its collection.

⁸³ McClure v. Braniff, 75 Iowa 38; 39 N. W. 171; Pfefferle, 39 Kan. 128; 17 Pac. 828.

⁸⁴ Hardten v. State, 32 Kan. 637; 5 Pac. 212.

See also State v. Somerville, 1 Ohio N. P. 422.

⁸⁵ Cordes v. State, 37 Kan. 48; 14 Pac. 493.

See also State v. Maloney, 6 Ohio Dec. 209; 4 Ohio N. P. 197.

⁸⁶ Cordes v. State, *supra*.

⁸⁷ Pfefferle v. State, 39 Kan. 128; 17 Pac. 828.

⁸⁸ Snyder v. State, 40 Kan. 543; 20 Pac. 122.

See also Financial Ass'n v. State, 6 Kan. App. 206; 49 Pac. 696.

⁸⁹ Larson v. Christensen, 14 N. D. 476; 106 N. W. 51. In this case it is held that if a landlord "permit" the leased premises to be used for the sale of liquor he renders his premises liable.

A purchaser of the property, pending an action to enforce the lien of the judgment, takes it subject to the rights of the State, and delay in pushing the action will not be a waiver of its rights.⁹⁰ If the agent in charge of the property, whose owner is a non-resident of the State, has knowledge of the illegal use to which the property is being put, his knowledge will be imputed to the owner.⁹¹

⁹⁰ *State v. Mateer*, 105 Iowa, 66; 74 N. W. 912. See *Leom Mercantile Co. v. Anderson* (Tex.), 121 S. W. 868.

⁹¹ *Financial Ass'n v. State*, 6 Kan. App. 206 49 Pac. 696.

If a tenant violate the liquor statutes, thereby rendering the premises of his landlord liable to the fine and costs, his landlord may at once terminate the lease and successfully institute an action of ouster. *Conforti v. Romano*, 50 N. Y. Misc. Rep. 148; 98 N. Y. Supp. 194.

The statute in Kansas making the fine and costs a lien on the

premises is constitutional. *State v. Snyder*, 34 Kan. 425; 8 Pac. 860.

If a wife make her husband her agent to lease her premises, she is responsible for his act the same as if he were not her husband. *Hardten v. State*, 32 Kan. 637; 5 Pac. 212.

When a pardon does not discharge the lien. *Karcher v. State* (Kan.), 104 Pac. 568.

A judgment of one of three of the defendants is a lien on the property of the one convicted. *Karcher v. State* (Kan.), 104 Pac. 568.

CHAPTER XXXI.

RIGHTS IN AND CONTRACTS CONCERNING INTOXICATING LIQUORS.

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SECTION.

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Sec. 996. At common law.

At common law intoxicating liquors are treated as any other personal property, and sales concerning them are valid.¹

Sec. 997. Property in intoxicating liquors.

Intoxicating liquors not owned and held under such conditions as to make their possession a nuisance or penal offense are lawful property, and are protected by the law.² Thus, liquor purchased in another State and brought into a prohibition State for the purchaser's own private use is lawful property, and is protected by the law so long as the purchaser retains possession of it, at least so long as he has not formed the intent to unlawfully dispose of it.³ So liquors manufactured in the State are subject to local taxation just as any other property.⁴ If one partner of a partnership engage in illegal sales of liquor as a business, and he converts the liquors to his own use, in an action by his fellow partners for their conversion, he cannot set up the fact that they were devoted to an illegal purpose.⁵ The purchase price of liquors not sold in violation of law may be recovered the same as the purchase price of any other property.⁶ So where a statute permits sales of intoxicating liquors under a license, or even in a more restricted way, they are still property and a lawful commodity.⁷ It has been held in several States that intoxicating liquors are not the subject of seizure and sale on an

¹ *State v. McMaster*, 13 N. D. 58; 99 N. W. 58; *Weitzel v. Slavin*, 13 Ohio Cir. Ct. Rep. 221; 7 Ohio Dec. 155; *Kreiter v. Nichols*, 28 Mich. 496; *Tucker v. Adams*, 63 N. H. 361; *Ely v. Webster*, 102 Mass. 304; *Adams v. Calliard*, 102 Mass. 167.

² *Brown v. Perkins*, 12 Gray 89; *Tucker v. Adams*, 63 N. H. 361; *Kreiter v. Nichols*, 28 Mich. 496.

³ *Bowen v. Hale*, 4 Iowa 430.

In Iowa it has been held that he has the burden to show he

owned or possessed the liquor with lawful intent (*Sommer v. Cate*, 22 Iowa, 585); but this is certainly not the law in many of the prohibition States.

⁴ *Dunbar v. Boston*, 101 Mass. 317.

⁵ *Howe v. Jolly*, 68 Miss. 323; 8 So. 513.

⁶ *Sis v. Boarman*, 11 App. D. C. 116.

⁷ *McCord v. State (Okla.)*, 101 Pac. 280.

execution, because their sale is restricted to certain persons; ⁸ while in others it has been held that they could be so seized and sold.⁹

Sec. 998. Attachment of liquors—When not maintainable.

In those States which have prohibitory laws, and for the better enforcement of such laws have statutes which provide for the recovery of possession of intoxicating liquors or the value thereof, such liquors cannot be attached on *mesne process* or seized on execution, nor can an attaching officer, though in actual possession of such liquors, but claiming no rights in them except under an attachment, maintain a suit for a forcible taking of them from his possession, even though such taking be by one having no right to or authority over them, and in such case the owner of the liquors may recover them from the officer, notwithstanding he owned and possessed them with the illegal intention of selling them. The object of attaching property on *mesne process* is, that it may be held to be seized and sold, after judgment, on execution. It is, therefore, very clear that chattels which cannot be lawfully seized on execution cannot be lawfully attached. After prohibiting citizens of the State not only from keeping "drinking houses and tippling shops" but from all general traffic in intoxicating liquors, it would be an absurdity to say that the officers of the law, under its forms and by its protection, may become the vendors of those inhibited articles, restrained only by the obligation to sell to the highest bidder. At common law such liquors are recognized as property and the owner of them

⁸ Kiff v. Old Colony, etc. R. Co., 117 Mass. 591; 19 Am. Rep. 429; Nipples v. Valentine, 36 Me. 322; Engles v. Baker, 13 Allen 449; Barron v. Arnold, 16 R. I. 22; 11 Atl. 298; Heinz v. Stahl (Kan.), 99 Pac. 273 Lake v. Stahl, 79 Kan. 854; 99 Pac. 275; Lanahan v. Bailey (S. C.), 31 S. E. 332; 42 L. R. A. 297.

⁹ Tucker v. Adams, 63 N. H. 361; Howe v. Stewart, 40 Vt. 145.

In Connecticut the act of 1895, ch. 128, authorizes the attachment and sale of liquor licenses "and all right and interest therein, in the same manner and for the same length of time as personal property," which includes both the certificate and franchise. Quinnpiaac Brewing Co. v. Hackborth, 74 Conn. 392; 50 Atl. 1023.

may protect them against the unjustifiable or inexcusable acts of third parties. Such right of protection can only be taken from such an owner by a direct statutory provision, and a statute which simply provides that no action of any kind shall be maintained for the recovery of such liquors does not accomplish that purpose. The intention on the part of such owner to sell such liquors in violation of the law of the State does not take from it the capacity of being property, nor divest the owner of it of the right to have it protected and taken away from him by due course of law. It does not become derelict so that anyone may seize it and destroy it or convey it away. The intention to sell such liquors in violation of law renders them liable to seizure, confiscation and destruction, but this must be done by the officers of the law, under legal process and procedure, after due notice and giving a right to any claimant to appear and claim the property. A seizure under a writ of attachment is not such legal process and procedure. Nor can an attaching officer defend his right to such liquors on the ground that liquor held with such illegal intent to sell becomes at once a nuisance. Liquor is not in itself a nuisance, and can only be made so by statute, and when so made it is a public and not a private nuisance. Such a statute deals with the subject as one of common and general concern and attempts to guard the whole people from the demoralizing and destructive effects of the liquor traffic, which can in no proper sense be regarded as a private injury so particularly affecting an individual member of the community as to enable him, of his own motion, to abate it as a nuisance.¹⁰

Sec. 999. Larceny of intoxicating liquors.

Intoxicating liquors are the subject of larceny, even though not the subject of sale, as in a prohibition State,¹¹ and even

¹⁰ *Nichols v. Valentine*, 36 Mo. 322; *Hamilton v. Goding*, 55 Me. 419.

The owner of the properties may recover them from the officer seizing them, for his possession is illegal, the levy being void. *Bar-*

ron v. Arnold, 16 R. I. 22; 11 Atl. 298.

See *Oviatt v. Pond*, 29 Conn. 479.

¹¹ *Monce v. State*, 5 Ga. App. 229; 62 S. E. 1053; *State v. Bailey*, 63 W. Va. 668; 60 S. E. 785.

though they are kept in violation of law.¹² "It is a principle or rule of property, as old as the common law itself," said the Supreme Court of Iowa, "that the possession of one is good against all others who cannot show a better right of possession. Hence, he who steals a stolen article of property from a thief may be himself convicted, notwithstanding the criminality of the possession by his immediate possessor in crime."¹³ Much more so are the proceeds of illegal sales of liquor the subject of theft.¹⁴

Sec. 1000. Mortgage or pledge of intoxicating liquors.

A moment's reflection will convince anyone that the question of mortgaging or pledging intoxicating liquors as a security for a debt is surrounded with difficulties. A chattel mortgage to secure a debt carries with it the right of the mortgagee to sell the property mortgaged to secure his debt. How, then, if he be not licensed to sell intoxicating liquors, can he sell the liquors mortgaged to pay his debt? Again, the very act of giving a chattel mortgage on liquors is a conditional sale of them, in many States, transferring the possession thereof to the mortgagee, the condition only to be defeated by a full performance of all its conditions. Reasoning along these lines some courts have held that a chattel mortgage of intoxicating liquors is absolutely void.¹⁵ In other States,

¹² Commonwealth v. Coffee, 9 Gray 139; State v. May, 20 Iowa 305.

¹³ State v. May, 20 Iowa 305.

¹⁴ Commonwealth v. Rourke, 10 Cush. 397.

An indictment for larceny of "four barrels of whisky" is a sufficient description of the property stolen. State v. Bailey, 63 W. Va. 668; 60 S. E. 785.

¹⁵ Hay v. Parker, 55 Me. 355; Flersheim v. Cary, 39 Kan. 178; 17 Pac. 825; Gerlach v. Skinner, 34 Kan. 86; 8 Pac. 257; Korman v. Henry, 32 Kan. 49; 3 Pac.

764; Arie v. Dixon (Iowa), 123 N. W. 173 (void by statute); C. D. Smith Drug Co. v. First Nat. Bank, 60 Kan. 184; 55 Pac. 851.

In Hawaii a mortgage of a cask does not cover the liquor in it. Hawaiian Trust Co. v. High Sheriff, 16 Hawaii 689.

It would seem that a mortgage of a stock of goods containing liquor, of which fact the mortgagee had no knowledge, is valid, and to sustain it he may testify as to his lack of knowledge. C. D. Smith Drug Co. v. First Nat. Bank, 60 Kan. 184; 55 Pac. 851.

however, while fully recognizing the status of personal property mortgaged and the effect of mortgaging it, yet the courts regard the transaction valid as between the parties, and at least, also, as to the creditors of the mortgagor. "Notwithstanding the statute," said the Supreme Court of Massachusetts, "spirituous liquors are still property in this Commonwealth. An action may be maintained against a wrongdoer who interferes with the possession or property of the owner. A sale, even made under such circumstances as the law forbids, yet passes the property to the purchaser. The seller commits an offense for which he is punishable, but he does not retain his property in the article sold. It has never been held, under any of the statutes regulating the sale of spirituous or intoxicating liquors in this Commonwealth, that the purchaser was guilty of any offense or was *particeps criminis*. A mortgage is a sale, defeasible upon condition, but it passes title, subject to the right of redemption. As it is criminal in the buyer to take an absolute title, we cannot see that it is criminal in him to take a defeasible title, or that he will fail to acquire all the rights of property which such a title usually gives."¹⁶

Sec. 1001. Mortgage of license to sell liquors.

A liquor license is a mere privilege to sell liquors—is not a property right—and is, therefore, incapable of being rendered subject to a chattel mortgage, even though with the consent of the licensing board it may be transferred from one person to another, or from one place to another place.¹⁷ Such a mortgage does not authorize the mortgagee to take possession of the license merely for the purpose of depriving the licensee from selling under his license. It will be presumed that it was the intention to mortgage the privilege given by the

¹⁶ Cobb v. Farr, 16 Gray, 597; Bogg v. Jerome, 7 Mich. 145; Trott v. Irish, 1 Allen 481.

See United States v. Distilled Spirits, 5 Sawy. 421.

The mortgage is not invalid because it contains a clause that the

proceeds of sale shall be applied to the purchase of liquors to be held subject to the mortgage. Cobb v. Farr, 16 Gray 597.

¹⁷ Feigenspan v. Mulligan, 63 N. J. Eq. 179; 51 Atl. 191; affirmed (N. J. L.) 53 Atl. 1124.

license and not the mere paper itself.¹⁸ But in New York, owing to their peculiar nature, liquor tax certificates may be mortgaged, and a chattel mortgage of the mortgagor's right, title and interest "to a license to sell beer or to a renewal thereof" covers his liquor tax certificate.¹⁹

Sec. 1002. Statutes forbidding recovery of possession or value of liquors.

The Legislature cannot enact a statute forbidding a recovery of possession or the value of intoxicating liquors not kept for an illegal purpose and under such circumstances as do not render them liable to seizure and forfeiture, or where not sold, or intended for sale, contrary to law; and a statute broad enough in its terms will not be so construed as to forbid a recovery, except in the instances and under the conditions just mentioned.²⁰ But if the liquors were intended for an illegal sale, there can be no recovery either of their possession or value,²¹ and this rule applies to an execution officer who has seized them and then been forcibly deprived of their possession, for when under the execution he has no lawful right to sell them.²² But the owner of the liquors may himself recover back the liquors, for the levy and seizure is void.²³

Sec. 1003. Wrongful conversion of intoxicating liquors.

Inasmuch as intoxicating liquor not kept illegally is property protected by the law, the owner deprived of its possession unlawfully may maintain an action against the wrongdoer

¹⁸ Feigenspan v. Mulligan (N. J.), 53 Atl. 1124, affirming 63 N. J. Eq. 179; 51 Atl. 191.

¹⁹ McNeely v. Welz, 20 N. Y. App. Div. 566; 47 N. Y. Supp. 310.

²⁰ Preston v. Drew, 33 Me. 558; 54 Am. Dec. 639; Jones v. Fletcher, 41 Me. 254; Robinson v. Barrows, 48 Me. 186; Lord v. Chadbourne, 42 Me. 429.

²¹ Dolan v. Buzzell, 41 Me. 473.

²² This is upon the theory that it is unlawful to sell liquors on an execution, just as it is for any private person to sell them without a license. Nichols v. Valentine, 36 Me. 322.

²³ Barron v. Arnold, 16 R. I. 22; 11 Atl. 298.

See Oviatt v. Pond, 29 Conn. 479.

either to recover its possession or its value.²⁴ Statutes prohibiting actions upon illegal contracts for sales of liquor have no application to such actions, and do not forbid a recovery of the property.²⁵ If the liquor was purchased for a lawful purpose, a creditor of the vendor cannot attach or levy upon it to secure the payment of his claim,²⁶ and perhaps not if the sale was illegal. But a vendor who has illegally sold liquor cannot maintain an action to replevy the liquor on the ground that the sale was illegal, for he cannot base an action or right to relief on his own illegal act.²⁷ Likewise liquors seized on a search warrant against him he cannot replevy from the officer seizing them, for they are in *custodia legis*.²⁸

Sec. 1004. Insurance of liquors.

The fact that intoxicating liquors are illegally kept is no defense to an action on an insurance policy placed thereon. They are property and can be insured.²⁹ The reason assigned for this ruling is that the contract of insurance "is collateral and independent, though in some measure connected with acts done in violation of law." Such a contract is not void.³⁰ "By insuring his property the insurance company have no concern with the use he may make of it, and, as it is susceptible of lawful uses, no one can be held to contract concerning it in an illegal manner unless the contract itself is for a directly illegal purpose. Collateral contracts, in which no illegal design enters, are not affected by an illegal trans-

²⁴ *Harrison v. Nichols*, 31 Vt. 709; *Monty v. Arneson*, 25 Iowa 383; *Hamilton v. Goding*, 55 Me. 419.

In Iowa the burden is on the owner to show he was not keeping the liquor for an unlawful purpose. *Walker v. Shook*, 49 Iowa 264.

²⁵ *Breck v. Adams*, 3 Gray 569; *Sullivan v. Park*, 33 Me. 438.

²⁶ *Niles v. Fries*, 35 Iowa, 41.

²⁷ *Marenthal v. Shafer*, 6 Iowa, 223; *Donohue v. Maloney*, 49 Conn.

163. Nor stop them in transit. *Howe v. Stewart*, 40 Vt. 145.

²⁸ *Musgrove v. Hall*, 40 Me. 298; *State v. Harris*, 38 Iowa 242; *Weir v. Allen*, 47 Iowa 482.

²⁹ *Niagara Ins. Co. v. De Graff*, 12 Mich. 124; *Kellogg v. German-American Ins. Co.*, 133 Mo. App. 391; 113 S. W. 663.

³⁰ This principle is discussed by Chief Justice Marshall, in *Armstrong v. Taylor*, 11 Wheat. 271; 6 L. ed. 472

action with which they may be remotely connected.”³¹ In another case it was said: “If the purpose of the contract in question had been to protect the assured in the sale of intoxicating liquors, it would have been null; but the greater part of the property insured consisted of goods, insurance upon which was subject to no objection. The contract was legal upon its face, nothing appearing to show that the wines and liquors were intended for illegal sale, and it is a fact, not needing proof, that in compounding medicines, liquors, especially wines and alcohol, are of daily use, and for that purpose their possession and use by druggists are legitimate. The assured was a dealer in drugs and medicines, and in that respect legitimately and presumably using liquors. There was evidence tending to show that he illegally sold them, including those not used in compounding medicines, and the fact may have been that the latter trade was the larger and main one. If such illegal trade was the business of the assured, and his legal traffic and transactions with other property a mere cover, ostensibly carried on for the purpose of enabling him to secrete and disguise his iniquity, the purpose of the contract would be to protect him in his illegal ventures, and it would therefore be void; but if he carried on business, using alcoholic liquors legitimately in his drug trade, and occasionally sold them in violation of law, we think that, if no illegal design entered into the making of the contract in its inception, that it would be so far collateral to the illegal acts that it would be inconsistent, and in accordance with no well adjudged case, to hold it null.”³² On the other hand; a policy of insurance on intoxicating liquors has been held void if they were kept by the assured for illegal purposes.³³ And if the policy is issued on a stock of liquors

³¹ *Niagara Ins. Co. v. Graff*, 12 Mich. 124.

³² *Carrigan v. Lycoming F. Ins. Co.*, 53 Vt. 418; 48 Am. Rep. 687; *Erb. v. German-American Ins. Co.*, 98 Iowa 606; 67 N. W. 583; 40 L. R. A. 845; *People's Ins. Co. v. Spencer*, 53 Pac. 353; 91 Am. Dec.

217; *Kellogg v. German-American Ins. Co.*, 133 Mo. App. 391; 113 S. W. 663; *Manchester, etc., Ins. Co. v. Feibelman*, 118 Ala. 308; 23 So. 759.

³³ *Kelley v. Home Ins. Co.*, 97 Mass. 288.

unlawfully kept for sale, it does not attach, though immediately thereafter the assured makes application for a license.³⁴ If the policy contain a clause that it shall be void if the building insured shall be occupied or used for unlawful purposes, then the storage in the building for two or three months before the fire of a number of barrels of intoxicating liquors will render it void if it be unlawful to keep liquors.³⁵ But where the insured had a license when the policy was issued, and it expired before the fire, when some time after its expiration and before the fire he ceased to do business, the policy was held valid.³⁶

Sec. 1005. Sales without license—Recovery of purchase price.

Where a license to sell liquors is required, a sale of liquors when the vendor did not possess such a license is void, and its purchase price cannot be recovered.³⁷ And any sale of

³⁴ *Johnson v. Union, etc., Ins. Co.*, 127 Mass. 555; *Lawrence v. National Ins. Co.*, 127 Mass. 557, *note*.

³⁵ *Kelly v. Worcester, etc., Ins. Co.*, 97 Mass. 285.

³⁶ *Hinckley v. German Fire Ins. Co.*, 140 Mass. 38; 54 Am. Rep. 445; 1 N. E. 737.

In Mississippi a statute makes policies of insurance issued on intoxicating liquors void. *Pollard v. Phenix Ins. Co.*, 63 Miss. 244; 56 Am. Rep. 805; *Sun Mutual Life Ins. Co. v. Searles*, 73 Miss. 62; 18 So. 544; *American Fire Ins. Co. v. First Nat. Bank*, 73 Miss. 469; 18 So. 931.

³⁷ *Moise v. Weymuller*, 78 Neb. 266; 110 N. W. 554; *Wertheimer & Sons v. Habinck*, 131 Iowa 643; 109 N. W. 189; *Brown v. Moore*, 32 S. C. Rep. (Can.) 93; *Giozza v. Tiernan*, 148 U. S. 657; 13 Sup. Ct. 721; 37 L. ed. 599; *Plisson*

v. Skinner, 4 Terr. L. R. 391; *Brown v. Moore*, 33 Nov. Sco. 381; 32 S. C. (Nov. Sco.) 93; *McGuinness v. Bligh*, 11 R. I. 94; *Monroe v. Thomas*, 61 Me. 581; *Huffstater v. Hayes*, 64 Barb. 573; *Smith v. Grable*, 14 Iowa, 429; *In re Daniels*, 8 Hawaii, 746; *Boucher v. Capital Brewing Co.* [1905], 9 Ont. L. Rep. 266.

Campbell v. Jones, 2 Tex. Civ. App. 263; 21 S. W. 723; *Stallings v. Lee*, 123 Ala. 464; 26 So. 211; *Heintz v. LePage*, 100 Me. 542; 62 Atl. 605; *Wempen v. Girard*, 84 Ill. App. 130; *Smith v. Benton*, 20 Ont. 344; *Dreyfuss v. Goss*, 67 Kan. 57; 72 Pac. 537; *Andrews v. Fry*, 104 Mass. 234; *Heintz v. LePage*, 100 Me. 542; 62 Atl. 605; *Sachs v. Garner*, 111 Iowa 424; 82 N. W. 1007; *Gross v. Feehan*, 110 Iowa 163; 81 N. W. 235.

A license held by the vendor's

liquor in contravention of law is so tainted with illegality that no action can be maintained to recover its purchase price. "It is everywhere held that where an indictment can be sustained for the illegal sale of liquors or other goods, there the price cannot be recovered."³⁸ Thus, if a saloon keeper sell liquor to a drunkard after receiving notice from the latter's wife, under the statute, not to sell to him, he cannot recover the purchase price.³⁹ Sales by an agent fall within the rule of illegal sales.⁴⁰ Contracts of the kind just discussed cannot be ratified,⁴¹ although it would seem that a sale on Sunday may be ratified on a week day.⁴² A statute providing that no action shall be maintainable in the State on a contract for the sale of liquors in another State in violation of the laws of that State, is valid.⁴³ Sales, as elsewhere discussed, in which the purchaser is actively assisted by the vendor to violate, by their resale therein, the laws of another State, are not enforceable, and the purchase price to be paid cannot be recovered.⁴⁴ A woman, who could not secure a license

agent who sells the liquors does not render the sale void. *Seollings v. Lee*, 123 Ala. 464; 26 So. 211.

³⁸ *Jones v. Surprise*, 64 N. H. 243; 9 Atl. 384; *Bach v. Smith*, 2 Wash. Ty. 145; 3 Pac. 831; *Melchoir v. McCarty*, 31 Wis. 252; *Solomon v. Dreschler*, 4 Minn. 278; *Alexander v. O'Donnell*, 12 Kan. 608; *Dolson v. Hope*, 7 Kan. 161; *Vannony v. Patton*, 5 B. Mon. 248; *Moog v. Hannon*, 93 Ala. 500; 9 So. 596; *Briggs v. Campbell*, 25 Vt. 704; *Boutwell v. Foster*, 24 Vt. 485; *Lewis v. Welch*, 14 N. H. 294; *Cobb v. Billings*, 23 Me. 470; *Grieff v. Wells*, 3 Denio 226; *Bluthenthal v. Headland*, 132 Ala. 249; 31 So. 87.

³⁹ *Laranger v. Jardine*, 56 Mich. 518; 23 N. W. 203.

⁴⁰ *Galligan v. Fannan*, 7 Allen, 255.

⁴¹ *Smith v. Grable*, 14 Iowa 429;

Shan v. Maxwell, 115 Cal. 208; 46 Pac. 1069.

⁴² *Melchoir v. McCarty*, 31 Wis. 252; 11 Am. Rep. 605.

⁴³ *Reynolds v. Deary*, 26 Conn. 179.

In an action to recover the price of liquors the plaintiff need not aver that he had a license to sell them. *Rohlf v. Bise* (Neb.), 120 N. W. 904.

⁴⁴ *Bollinger v. Wilson*, 76 Minn. 262; 79 N. W. 109.

The receipts of a railroad company for the liquors are admissible in evidence in an action to recover their purchase price, without showing that the defendant received the liquors at his place of business, when there is no dispute that he received them; so orders on which the plaintiff shipped the goods, though not signed by the defendant, are admissible, if the defendant authorized them and

under the law, but who was the owner of saloon fixtures and a stock of liquor, executed a written contract with a man, by the terms of which it was agreed that he should apply in his own name and procure a license from the licensing board to sell liquors, and use her fixtures, and when he secured the license he should retail the liquors for a salary of so much a month, which she agreed to pay, and that after the current expenses were paid from the receipts the overplus should go to her. The owner of liquors sold liquors to a saloon manager, which were charged to him. It was held that as the vendor knew how the saloon was run, the sale was illegal and he could not recover the purchase price of the liquors he had so sold.⁴⁵ So where it was made to appear that the plaintiff selling beer to the defendant held the license but the defendant retailed the beer as his own and had charge of the saloon, it was decided that there could be no recovery by the plaintiff for beer he had sold the defendant under such an arrangement.⁴⁶

Sec. 1006. Divisible and entire contract.

“The general rule is, that where you cannot sever the illegal from the legal part of a covenant, the contract is altogether void; but where you can sever them, whether the illegality be by statute or common law, you may reject the received the goods thereon. *Gross v. Feehan*, 110 Iowa 163; 81 N. W. 235.

Where the illegality consists in engaging in the occupation of selling liquor without a license, a retail liquor dealer can recover the price of liquor sold, though at the time he has not paid the occupation tax and procured the license; for it is the engaging in the occupation without a license, rather than the sale of liquor, that is forbidden. *Eberstadt v. Jones*, 19 Tex. Civ. App. 480; 48 S. W. 558.

The price of liquors sold in Canada to travelers could formerly be

recovered. *Mercier v. Brillan*, 5 L. C. J. 337; and so if they were constituted in the price of a meal. *Phillip v. Desmaeais*, 28 L. C. J. 291; but not if sold to others than travelers, to be drunk on the premises. *Bergeron v. Fleury*, 7 Rev. Leg. 183; *Lapierre v. Briere*, 10 Leg. News 387,

⁴⁵ *Woodford v. Hamilton*, 139 Ind. 481; 39 N. E. 47; *Moore v. Winstead*, 24 Ind. App. 56; 55 N. E. 777.

⁴⁶ *Storz v. Finkelstein*, 46 Neb. 577; 65 N. W. 195; 30 L. R. A. 644.

bad part and retain the good.”⁴⁷ So that “in cases where the consideration is tainted by no illegality, but some of the conditions or promises are illegal, the illegality of those which are bad does not communicate itself to or contaminate those which are good, except where, in consequence of some peculiarity in the contract, its parts are inseparable or dependent upon one another.”⁴⁸ It follows from this rule that if other property is sold with the liquors, and it can be separated from the latter, that is, if the price of such property has been agreed upon and also the price of the liquors, then there can be a recovery of the purchase price of such other property, and the fact that the sale of the liquors was illegal will not prevent a recovery.⁴⁹ But if a sale of a stock of goods be in bulk for a gross sum, and there be liquors in the stock, the whole sale will be void;⁵⁰ and this is true of a sale of liquors in casks with an agreement that they might be returned and the purchaser be credited with the price charged for them, in which event no action can be maintained for the price of the casks.⁵¹ In an action on a board bill where liquor had been illegally furnished the defendant, the plaintiff was permitted to withdraw the items concernig liquors and recover the balance.⁵² The burden is upon the plaintiff to show what items were valid where it appears that liquors were sold and charged in the general account sued upon.⁵³

⁴⁷ Pickering v. Railroad Co., L. R. 3 C. P. 250.

⁴⁸ Smith's Leading Cases (7th Am. Ed.) 681.

⁴⁹ Monroe v. Thomas, 61 Me. 581; Jacobs v. Stokes, 12 Mich. 381; Brown v. Burns, 67 Me. 535; Walker v. Lovell, 28 N. H. 138; Carleton v. Woods, 28 N. H. 290; Ladd v. Dillingham, 34 Me. 316.

⁵⁰ Ladd v. Dillingham, 34 Me. 316.

⁵¹ Holt v. O'Brien, 15 Gray 311. So this is true of bottles not to be returned. Wirth v. Roche, 92 Me. 383; 42 Atl. 794.

⁵² Close v. Burkholder, 18 Pa. St.

⁴⁸ See also Fowle v. Blake, 38 Me. 528; Cochrane v. Clough, 38 Me. 25.

⁵³ Graves v. Ranger, 52 Vt. 424.

In an action by a brewery corporation to recover for liquor sold at wholesale it is no defense that the corporation was conducting a retail saloon without a license. Orke v. McMannus (Iowa), 115 N. W. 580.

If the sale is illegal, the value of the casks containing the liquor is not recoverable. Gipps Brewing Co. v. Iler & Co., 91 Iowa, 108; 58 N. W. 1087; 28 L. R. A. 396.

Sec. 1007. Payments upon accounts partly illegal.

If a general payment be made upon an account containing items of illegal sales of intoxicating liquors, then upon the trial it will be applied upon the items of legal debts due,⁵⁴ and cannot be applied upon the items of the illegal debts and a recovery be had upon the first set of items.⁵⁵ But the parties may agree when a payment is made that it shall apply to the illegal items, and upon a suit brought upon the account the defendant cannot then insist that they shall be applied on the valid items, even though the agreement as to such payment be void; and he cannot recover back the amount paid, for to do that the court would in effect "make a new contract for the parties against their wishes and intentions."⁵⁶

Sec. 1008. Contracts violating policy of liquor laws.

A contract may be void because it violates the policy of the liquor law. Such would be a contract of assignment of a liquor license, although no statute expressly forbid the assignment. A sale of a stock of liquors and a lease of the premises where they are kept for retail sale, together with the license, is entirely void because of the illegality entering into the sale of the license.⁵⁷ So if a horse be purchased with intoxicating liquors, which the purchaser had no license to sell, he cannot sue upon a warranty given with the sale.⁵⁸ So where two persons were the owners of some intoxicating liquors which they, by agreement, placed in the hands of defendant to sell and divide the proceeds equally between them and he sold them in violation of the license law, it was

⁵⁴ *Dunbar v. Garrity*, 58 N. H. 575; *Solomon v. Deschler*, 4 Minn. 278.

⁵⁵ *Huffster v. Hayes*, 64 Barb. 573; *Shain v. Maxwell*, 115 Cal. 208; 46 Pac. 1069. After an award made, the defendant cannot object that he is therein charged with the price of liquors sold in violation of law. *Davis v. Wentworth*, 17 N. H. 567.

⁵⁶ *Tomlinson Carriage Co. v. Kinsella*, 31 Conn. 268; *Plummers v. Erskine*, 58 Me. 59.

⁵⁷ *Sanderson v. Goodrich*, 46 Barb. 616; *Commonwealth v. Bryan*, 9 Dana 310; *Strahn v. Hamilton*, 38 Ind. 57; *Semple v. Flynn* (N. J. Ch.), 10 Atl. 177.

⁵⁸ *Howard v. Harris*, 8 Allen 297.

held that one of the owners could not recover his share of the proceeds, for the reason that in doing so he would be compelled to show a violation of law by the defendant, his own agent.⁵⁹ The same rule prevailed where an assignment of rent was made in consideration of intoxicating liquors. In such an instance the assignee cannot maintain an action to recover it of the tenant.⁶⁰ If one enter into a contract to sell intoxicating liquors for another and knows at the time the sales will be illegal, he cannot recover for his services; but if he enters into a contract to perform services other than the sale of liquors, he will not lose his right of recovery merely because he gratuitously assisted his principal in making some illegal sales not embraced in the line of his employment.⁶¹ He may also recover for his services rendered after a time when a decision of the Supreme Court had held a statute under which his principal was operating unconstitutional, if the decision is reversed before he brings his action to recover what is due him because of having performed them.⁶² So one who performs labor and furnishes material for a barroom may recover for such services and material, although he may know it was to be used for unlawful purposes.⁶³ A person, who does not know otherwise, may deal with a person in charge of a saloon as if he was the owner thereof and duly licensed, and if he sells liquors to him he may recover their price, though such person have no license to sell.⁶⁴ A loan of money to enable the borrower to carry on the liquor business under a license is valid;⁶⁵ but a note given in consideration of the execution of a written statement of consent to the location of a saloon, as required by a statute, of adjoining property owners is void, because against public policy.⁶⁶ A

⁵⁹ *Buck v. Albee*, 27 Vt. 184.

⁶⁰ *Davis v. Slater*, 17 Iowa, 250.

⁶¹ *Goodwin v. Clark*, 65 Me. 280; *Tinson v. Moulton*, 3 Cush. 269.

⁶² *Krigler v. Shepler* (Kan.), 101 Pac. 619.

⁶³ *Bryson v. Haley*, 68 N. H. 337; 38 Atl. 1006.

⁶⁴ *Moise v. Weymuller*, 78 Neb.

266; 110 N. W. 554; *Tooth v. Laws*, 9 N. S. W. L. R. 154.

⁶⁵ *Germantown Brewing Co. v. Booth*, 162 Pa. St. 100; 29 Wkly. N. C. 286; 34 Wkly. N. C. 440, reversing 14 Pa. Co. Ct. Rep. 189; 3 Pa. Dist. Rep. 142.

⁶⁶ *Greer v. Severson*, 119 Iowa 84; 93 N. W. 72; *O'Connor v. Kielman* (Iowa), 121 N. W. 1088.

note given on condition that the payee, during a specified time, shall abstain from the use of intoxicating liquor is valid, being supported by a sufficient consideration, and on proof that its terms have been complied with a recovery may be had upon it.⁶⁷ A bequest of money to the trustees of a church to apply the interest to the suppression of the manufacture and sale of intoxicating liquor is valid as a charitable trust.⁶⁸

Sec. 1009. Repudiation of executory contract.

A party to an illegal executory contract may repudiate it at any time before its consummation, and, at common law, recover back whatever of the purchase money he has paid upon it. This applies to illegal executory sales of intoxicating liquors.⁶⁹

Sec. 1010. Validity of contract determined by law of place.

The validity of a contract concerning intoxicating liquors is determined by the law of the place where it is consummated.⁷⁰ Thus, if the sale is valid in the State where

⁶⁷ *Lindell v. Rokes*, 60 Mo. 249; 21 Am. Rep. 395.

⁶⁸ *Haines v. Allen*, 78 Ind. 100; 41 Am. Rep. 555.

The oral promise of the principal in a liquor dealer's bond, when in fact no bond was required, to repay the surety the amount of a judgment rendered against him for the amount of a judgment recovered against the principal under a statute imposing a penalty for selling liquor to minors, is not enforceable, for the giving of the bond did not create a liability thereon. *Gorman v. Williams*, 117 Iowa 560; 91 N. W. 819.

The creditors of a debtor can not avoid for him his illegal contracts so as to recover back money

he has paid for liquor, although a statute permitted him to do so. *McGunn v. Hanlin*, 29 Mich. 476; nor can the creditor seize the property he has sold in violation of law. *Brower v. Fass*, 60 Neb. 590; 83 N. W. 832.

Texas Anti-Trust law of 1889. *Norton v. W. H. Thomas, etc. Co.* (Tex. Civ. App.), 93 S. W. 711; *Norton v. W. H. Thomas, etc. Co.* (Tex. Civ. App.), 91 S. W. 780.

⁶⁹ *Smith v. Grobel*, 14 Iowa 429; *Stansfield v. Kunz*, 62 Kan. 797; 64 Pac. 614.

⁷⁰ *P. Schoenhofen Brewing Co. v. Whippel* (Neb.), 89 N. W. 751; *J. & J. Eager Co. v. Bush*, 74 Conn. 534; 51 Atl. 544; *Bluthenol v. McWhorter*, 131 Ala. 642; 31 So. 559; *Gross v. Feehan*, 110 Iowa

made a recovery may be had upon it in a State where, if there made, it would be denied because illegal.⁷¹ Of course, as elsewhere stated, if a sale was made in one State, with the intention and design that the liquor should be resold in another State in violation of the laws of that State, the sale would be illegal, notwithstanding, in the absence of such design and intent it would have been valid and enforceable in such other State. There is no presumption that the sale in another State was invalid, and he who claims it was must plead and prove the fact of its validity.⁷² Of course, if the sale was valid, a note given for the purchase money would be valid.⁷³

Sec. 1011. Place of sale in determining its legality.

In determining the legality of a sale the place where the sale was made must be considered. Thus, where the law requires a licensed retail dealer to sell on the premises described in his license or application for a license, a sale off such premises would be illegal, and the same would be true of a distiller or brewer when the statute requires him to sell on his distillery or brewery premises. Illustrations can be found under other sections of this work where the legality of such sales is discussed. So elsewhere we have discussed, particularly in those sections relating to interstate commerce, the validity of sales where the vendor lives in one State and ships the liquor to the vendee in another, so extensively that it seems useless here to repeat what is there said; for whenever a sale of this kind is in violation of the statute there can be no recovery upon it. Thus, by one line of cases, if the order be taken by the owner in a State

163; 81 N. W. 235; Craigellachie Distillery Co. v. Bigelow, 36 Nov. Sco. 482; Rex v. Bigelow, 36 Nov. Sco. 559; Theo. Hamm Brewing Co. v. Young, 76 Minn. 246; 79 N. W. 11.

⁷¹ Roethke v. Phillip Best Brewing Co., 33 Mich. 340; Oreutt v. Nelson, 1 Gray 536; Kling v.

Fries, 33 Mich. 275; Monaghan v. Reid, 40 Mich. 665; Webber v. Donnelly, 33 Mich. 469; Hill v. Spear, 50 N. H. 253; Wagner v. Breed (Neb.), 46 N. W. 286.

⁷² Kling v. Fries, 33 Mich. 275; Oreutt v. Nelson, 1 Gray 536.

⁷³ Monaghan v. Reid, 40 Mich. 665.

where no sale can be made, and the goods be shipped by common carrier to the purchaser, the sale takes place in that State where they are delivered to the carrier, and consequently their purchase price can be recovered.⁷⁴ But if there be any act to be performed in the State of destination to complete the sale, then the sale takes place in that State, and if liquor cannot there be sold, or cannot be sold without a license which the vendor has not, the sale is invalid.⁷⁵ Thus, if the liquors be shipped under a bill of lading taken in the vendor's name, and this bill he sends to a bank in the State of destination with directions to deliver it to the purchaser on making payment in whole or part of the purchase money, or the giving of acceptable notes, the sale takes place in such State and not in the State of shipment.⁷⁶ But the right to return the liquors if not up to representations or sample will not make it at the place of delivery.⁷⁷ The payment of the freight by the vendor will not change the rule that the State of delivery to the carrier is the place of sale.⁷⁸ A contract having the semblance of an agreement on the part of the vendee to act as the agent of the vendor for liquors shipped to him in a prohibition State will not render the contract void where the

⁷⁴ *Arberger v. Marrin*, 102 Mass. 70; *Backman v. Mussey*, 31 Vt. 547; *Erwin v. Stafford*, 45 Vt. 390; *Schlesinger v. Stratton*, 9 R. I. 578; *Boothby v. Plaisted*, 51 N. H. 436; *Dolan v. Green*, 110 Mass. 322; *Bollinger v. Wilson*, 76 Minn. 262; 79 N. W. 19; *Bacon v. Hunt*, 72 Vt. 98; 47 Atl. 394; *Brockway v. Maloney*, 102 Mass. 308; *Shiretzki v. Julius Kessler & Co.* (Ala.), 37 So. 422; *Craigellachie Distilling Co. v. Bigelow*, 37 Nov. Sco. 482; *Rex v. Bigelow*, 36 Nov. Sco. 559.

⁷⁵ *Brown v. Wieland*, 116 Iowa, 711; 89 N. W. 17; *Wilson v. Stratton*, 47 Me. 120; *Portsmouth Brewing Co. v. Smith*, 155 Mass. 100; 28 N. E. 1130; *J. & J. Eager*

Co. v. Burke, 74 Conn. 534; 51 Atl. 544.

⁷⁶ *Brown v. Wieland*, 116 Iowa 711; 89 N. W. 17.

⁷⁷ *McCarty v. Gordon*, 16 Kan. 35; *Schlesinger v. Stratton*, 9 R. I. 578; *Mack v. Lee*, 13 R. I. 293; *Gill v. Kaufman*, 16 Kan. 571; *Snider v. Koehler*, 17 Kan. 432.

Drawing the bung from the barrel in order to draw a small quantity for testing the liquor will not destroy the nature of the original package. *Wind v. Hler & Co.*, 93 Iowa 316; 61 N. W. 1001; 27 L. R. A. 219. *Contra*, *Wasserboehr v. Boulrier*, 84 Me. 165; 24 Atl. 808; 30 Am. St. 344.

⁷⁸ *Brockway v. Maloney*, 102 Mass. 308.

contract was rather one of sale than of agency.⁷⁹ If a person in a prohibition State send an order by mail to the vendor in another State, who there delivers the liquor to a common carrier to convey to the purchaser, the contract is valid, because it is a contract of the place of shipment and not of the destination of the liquors.⁸⁰ And the same is true where a principal sends his agent into a prohibition State to there take orders for liquors, which he accepts and ships from another State.⁸¹ This is particularly true if the principal has the right to reject or accept the orders on their receipt.⁸² But if the sale is prohibited by a statute in force at the place of shipment, or is there illegal, then, if the vendor accept an order from another State and pursuant thereto ship the liquors to such other State, the sale will be void, and no recovery can be had upon the contract.⁸³ Yet if the order be accepted in a prohibition State, but the delivery be made in person or by agent by the vendor in a non-prohibition State, the sale will be valid;⁸⁴ and a statute declaring sales without a license void has no application to a sale completed in another State, though the liquors be shipped into the State where it was enacted.⁸⁵

⁷⁹ *Wagner v. Breed* (Neb.), 46 N. W. 286.

⁸⁰ *Webber v. Donnelly*, 33 Mich. 469; *Bacon v. Hunt*, 72 Vt. 98; 47 Atl. 394.

⁸¹ *Williams v. Feiniman*, 14 Kan. 288; *Fuller v. Leet*, 59 N. H. 163; *Snider v. Koehler*, 17 Kan. 432; *McCarty v. Gordon*, 16 Kan. 35.

⁸² *Taylor v. Pickett*, 52 Iowa 467; 3 N. W. 514; *Tegler v. Shipman*, 33 Iowa 194; *Craigellachie Distillery Co. v. Bigelow*, 37 Nov. Sco. 482; *Sachs v. Garner*, 111 Iowa 424; 82 N. W. 1007; *Ballinger v. Wilson*, 76 Minn. 262; 79 N. W. 109.

⁸³ *E. S. Shelby Vinegar Co. v. C. L. Hawn & Son*, 149 N. C. 355; 63 S. E. 78; *Dudley v. Buckfield*,

51 Me. 254; *Tredway v. Riley*, 32 Neb. 495; 49 N. W. 268; *Portsmouth Brewing Co. v. Smith*, 155 Mass. 100; 28 N. E. 1130.

⁸⁴ *Carolina Mfg. Co. v. Anthracite Beer Co.*, 25 Pa. Super. Ct. 94.

⁸⁵ *Shiretzki v. Julius Kessler & Co.* (Ala.), 37 So. 422.

That a railroad company may refuse to accept liquors to be transported into a prohibition State, even though the liquor is non-intoxicating if it be marked "beer," see *Malt Extract Co. v. Chicago, etc. R. Co.*, 73 Iowa 98; 34 N. W. 761.

Defendant's clerk received an order at Truro, addressed to B. & H. Halifax, for one bottle of whiskey. He sent the order to Halifax,

Sec. 1012. Sale of liquors to be illegally resold.

If the plaintiff sell liquors with the knowledge and design to enable the purchaser to illegally resell them, he becomes, as it were, a party to the illegal sale when made and cannot recover the purchase price of his own sale, as we have seen under another section;⁸⁶ but if the illegal sale never takes place, then he may recover such purchase price.⁸⁷ Thus, where the plaintiff, a brewing company, induced a defendant to erect a saloon on his own premises in a prohibition district, furnishing him money for that purpose, in which saloon the defendant agreed to sell the company's beer, it was held that it could not recover on a note given for beer so purchased of it, nor the money so loaned, for the contract was an entire one and void.⁸⁸ So a sale of liquors with the design that they shall be shipped to and sold in a prohibition district is so far tainted with illegality, if carried out, as to prevent a recovery of their purchase price.⁸⁹ In some cases to render such a contract void it is held that the vendor must aid and

and it was returned the next day indorsed, "Deliver this order from our Truro warehouse and charge," etc. B. & H. rented from the defendant, who was president of a company, premises at Truro, which they used as a bonded warehouse, but the order was filled from an open case in the defendant's cellar, which was kept for that purpose, and the money received by the clerk was put in the defendant's till and a memorandum of it entered in the cash book as a sale. It was held that the defendant had made a sale of liquor in Truro. *Rex v. Bigelow*, 36 Nov. Sco. 559.

⁸⁶ Secs. 1005, 1015; *Bluthenthal v. McWhorter*, 131 Ala. 642; 31 So. 559; *Woodford v. Hamilton*, 139 Ind. 481; 39 N. E. 47; *Moore v. Winstead*, 24 Ind. App. 56; 55 N. E. 777.

⁸⁷ *Bluthenthal v. McWhorter*, *supra*.

⁸⁸ *Falk v. Ferd Heim Brewing Co.*, 10 Kan. App. 248; 62 Pac. 716.

⁸⁹ *Theo. Hamm Brewing Co. v. Young*, 76 Minn. 246; 79 N. W. 111; *Ruemmeli v. Cravens*, 13 Okla. 342; 74 Pac. 908; 76 Pac. 188; *Starace v. Rossi*, 69 Vt. 303; 37 Atl. 1109; *Beverwyck Brewing Co. v. Oliver*, 69 Vt. 323; 37 Atl. 1110; *Dallas Brewery v. Holmes* (Tex. Civ. App.), 112 S. W. 122; *Furlong v. Russell*, 24 N. B. 478.

A sale of liquor before the payment of the revenue tax was held not void in Tennessee, unless made with intent to avoid payment of the tax. *Ross v. Crow*, 9 Baxt. 420. See *King v. McEvory*, 4 Allen, 110.

abet the illegal resale.⁹⁰ But all the cases hold, except where a statute provides a different rule,⁹¹ that if the vendor had no knowledge of the illegal intention of the purchaser the sale is valid.⁹² But where the owner sold the fixtures and liquors in a saloon, the sale being illegal because no measures were taken to transfer his license to the purchaser and because the purchaser intended to sell liquor without a license, it was held that the creditors of the vendor could not take advantage of the illegality of the sale and subject such property to the payment of their claims.⁹³ *Mere knowledge* by the vendor of the illegal intent of the purchaser to resell the liquors illegally will not avoid the right to recover the purchase price.⁹⁴ But the knowledge of the illegal intention of the purchaser on the part of the seller may be such as to raise the presumption that the sale was made to him with the intent to aid him in making such illegal resale;⁹⁵ yet a reasonable belief, not based upon actual knowledge, of the vendee's intention to illegally resell the goods will not defeat the action to recover their purchase price.⁹⁶ If the vendor aids the purchaser in evading the law in making an illegal sale, then the sale will be void.⁹⁷ Such was held to be the case where the

⁹⁰ Dallas Brewery Co. v. Holmes (Tex. Civ. App.), 112 S. W. 122; Fuller v. Hunt, 182 Mass. 299; 65 N. E. 390; Moore v. Winstead, 24 Ind. App. 56; 55 N. E. 777.

⁹¹ See Heintz v. Le Page, 100 Me. 542; 62 Atl. 605.

⁹² Hotham v. Phillips, 23 N. B. 126; J. & J. Eager & Co. v. Burke, 74 Conn. 534; 51 Atl. 544; Fuller v. Hunt, 182 Mass. 299; 65 N. E. 390.

⁹³ Brower v. Fass, 60 Neb. 590; 83 N. W. 832.

⁹⁴ Bancher v. Massel, 47 Me. 58; Fisher v. Lord, 63 N. H. 514; 3 Atl. 927; Lauten v. Rowan, 59 N. H. 215; Backman v. Wright, 27 Vt. 187; Webber v. Donnelly, 33 Mich. 469; Whitlock v. Workman,

15 Iowa 351; Gaylord v. Soragen, 32 Vt. 110; Hodgson v. Temple, 5 Taunt. 181; Feineman v. Sachs, 33 Kan. 621; 7 Pac. 222; Kreiss v. Seligman, 8 Barb. 439; Dater v. Earl, 3 Gray, 482; Erwin v. Stafford, 45 Vt. 390; Tuttle v. Holland, 43 Vt. 542.

⁹⁵ Tegler v. Shipman, 33 Iowa, 194; Rindskoff v. Curran, 34 Iowa 325.

⁹⁶ Adams v. Couillard, 102 Mass. 467; Fly v. Webster, 102 Mass. 304; Hotchkiss v. Finan, 105 Miss. 86.

⁹⁷ Waysnell v. Reed, 5 Tenn. 599; Bancher v. Mansel, 47 Me. 58; Davis v. Bronson, 6 Iowa 410; Feineman v. Sachs, 33 Kan. 627; 7 N. W. 222; Webster v. Munger,

vendor shipped the liquors in sugar barrels into a prohibition State so that they would not be seized by the officers before the vendee could remove them from the railroad station and secrete them on his premises.⁹⁸ The character of the purchase may be such as to convey to the vendor knowledge that the purchaser intends to illegally sell them, and such may be the case where the amount of liquor purchased is an unusually large amount in the particular instance. Thus, where a hotel keeper purchased and received at one time liquor of the value of \$537, and there was no explanation of the purchase, it was held that the fact of the amount of liquors purchased was sufficient to warrant a conclusion that they were to be unlawfully sold, the vendor knowing that the purchaser had no license to resell them.⁹⁹ A saloon was turned over to a creditor with the understanding that he was to realize what he could out of it and be paid the balance by the firm, and if he should realize more than enough to pay his debt, the balance was to be returned. He sold the saloon and took notes secured by a mortgage on the property. Much of the property was subject to a prior mortgage and was taken under that mortgage. The firm's notes proved worthless and the creditor took the remaining property back, sold what he could, appraised the rest, and credited the account with these sums. It was held that the sale did not amount to the payment of the debt and that the creditor could recover the balance of the account.¹

Sec. 1013. Sales to unlicensed dealers.

If one sell liquors to an unlicensed person to enable him to retail them, knowing that he will do so, or intends to do so, without a license, he cannot recover the purchase price.² But

8 Gray 584; Foster v. Thurston, 11 Cush. 322; Gaylord v. Soragen, 32 Vt. 110.

⁹⁸ Fisher v. Lord, 63 N. H. 514; 3 Atl. 927; Aiken v. Blaisdell, 41 Vt. 655.

⁹⁹ Oakes v. Marrifield, 93 Me. 297; 45 Atl. 31; Hanlon v. State, 51 Ark. 186; 10 S. W. 265; Com-

monwealth v. Martin, 162 Mass. 402; 38 N. E. 708; Wempen v. Girard, 84 Ill. App. 130; Woodford v. Hamilton, 139 Ind. 481; 39 N. E. 47.

¹ Moore v. Winstead, 24 Ind. App. 56; 55 N. E. 777.

² Terre Haute Brewing Co. v. Hartman, 19 Ind. App. 596; 49

the person making the sale must have known at the time that the purchaser intended to make an illegal sale of them;³ and an omission of the purchaser to thereafter comply with the law—such as keeping a record of his sales and making a report of them—will not render what was otherwise a valid sale an invalid one.⁴ In one instance it is held that the burden was on the defendant to show he was of a class who could not sell without a license.⁵ In some States statutes have been passed upon this subject so broad that it is not necessary for the defendant to show that the vendor knew that he intended to resell the liquor illegally.⁶ The failure of the defendant to testify he intended to sell in violation of law is some evidence to support a finding that they were not bought with an intent to resell them legally;⁷ but the failure of the plaintiff to testify that he had no such knowledge of the vendee's intention may be taken as evidence of his knowledge of the illegal intent of the purchaser, where the illegal intent is shown. In the absence of evidence of the extent of the defendant's business as a druggist, it cannot be

N. E. 864; *Terre Haute Brewing Co. v. Newland*, 33 Ind. App. 544; 70 N. E. 190; *Fred Miller Brewing Co. v. Stevens*, 102 Iowa 60; 71 N. W. 186; *Goldman v. Goodrum*, 77 Ark. 580; 92 S. W. 865; *Goodall v. Brewing Co.*, 56 Ohio St. 257; 46 N. E. 983; *Tivorney v. O'Brien*, 29 Viet. L. R. 729; 25 Austr. L. T. 255; 10 Austr. L. R. 101; *Foley v. Leisy Brewing Co.*, 116 Iowa 176; 89 N. W. 230; *Brown v. Moore*, 32 Can. S. C. 93; *Bowie v. Gilmour*, 24 Ont. App. 254; *Kelly v. Earl*, 26 C. P. (Can.) 477; *O'Bryan v. Fitzpatrick*, 48 Ark. 487; 3 S. W. 527; *Kohn v. Melcher*, 43 Fed. 641; *Stansfield v. Kunz*, 62 Kan. 797; 64 Pac. 614; *Briggs v. Rafferty*, 14 Gray 525; *P. Schoenhofen Brewing Co. v. Whipple*, 2 Neb. (un-

official) Rep. 704; 89 N. W. 751; *Weichelbaum v. Hayslip*, 127 Ga. 417; 56 S. E. 413.

³ *Bigelow v. Craigellachie, etc. Co.*, 37 Can. S. C. 55, affirming 37 Nov. Sco. 482; *Mangan v. Auger*, 31 Can. S. C. 186.

⁴ *Barnard v. Houghton*, 37 Vt. 264.

Where a town agent was required to purchase the liquors for the town of the State's agent, his purchase of wholesale dealers did not render the sales void. *Butler v. Northumberland*, 50 N. H. 33; *Kidder v. Knox*, 48 Me. 551.

⁵ *Kelly v. Earl*, 29 C. P. (Can.) 477.

⁶ *Pollard v. Allen*, 96 Me. 455; 52 Atl. 924.

⁷ *Pollard v. Allen* 96 Me. 455; 52 Atl. 924.

said that a presumption arises from the amount of liquors sold that he intended to illegally sell the liquors purchased.⁸

Sec. 1014. Sales to insane person.

Where a statute forbade sales of intoxicating liquors to an insane person, it was held that a recovery could not be had against his estate on the ground that the sale was actually made to his son, for if the contract was made with the son, he, and not his father's estate, was liable.⁹ Such a sale is void under such a statute, although the sale was of liquor to be resold; nor does the failure of the insane person, during a lucid interval, to offer to return the liquor, make the purchase contract valid, for the insane person is incapable of making such an offer; nor can he ratify the contract, nor is the claim against the estate valid by reason of the fact that his estate received and kept the proceeds of the resale of the liquor. If the sale can be made only upon the consent of the parent or guardian of the insane person, then a sale without such consent is void.¹⁰

Sec. 1015. Sale of liquor to be shipped into prohibition State.

Suppose an owner of liquors sells them in a State where he may lawfully make sales to a person whom he knows is purchasing them in order to take them into another State and there resell them where their sale is prohibited, is the sale legal? And a like question arises if the vendor knew that the purchaser was purchasing them with the intention to otherwise violate the law of that State than by a resale.^{10*} A case of this character arose in Massachusetts which may be regarded as a leading case on this subject. The transaction involved in that case was a sale of intoxicating liquors, sold and delivered in that State to the purchaser, a Maine hotel keeper, with a view to their being resold by him in Maine against the laws

⁸ Pollard v. Allen, 96 Me. 455;
52 Atl. 924.

¹⁰ Kelly v. Burke, 132 Ala. 235;
31 So. 512.

⁹ Kelly v. Burke, 132 Ala. 235;
31 So. 512.

^{10*} See §§ 1005 and 1012.

of that State. "The question is to be decided on principles which we presume would prevail generally in the administration of the common law in this country," said Justice Holmes. "Not only should it be decided in the same way in which we would expect a Maine court to decide upon a Maine contract presenting a similar question, but it should be decided as we think that a Maine court ought to decide this very case if the action were brought there. It is noticeable, and it has been observed by Mr. Pollock, that some of the English cases which have gone furthest in asserting the right to disregard the revenue laws of a country other than that where the contract is made and is to be performed, have had reference to the English revenue laws.¹¹ The assertion of that right, however, no doubt was in the interest of English commerce,¹² and has not escaped criticism,¹³ although there may be a question how far the actual decisions go beyond what would have been held in the case of an English contract affecting only English laws.¹⁴ Of course, it would be possible for an independent State to enforce all contracts made and to be performed within it without regard to how much they might contravene the policy of its neighbor's laws. But, in fact, no State pursues such a course of barbarous isolation. As a general proposition, it is admitted that an agreement to break the laws of a foreign country would be invalid.¹⁵ The courts are agreed upon the invalidity of a sale when the contract contemplates a design on the part of the purchaser to resell contrary to the laws of a neighboring State, and requires an act on the part of the seller in furtherance of the scheme.¹⁶ On the other hand, plainly it would not be enough to prevent

¹¹ Citing *Holman v. Jackson*, 1 Cowp. 341; *Pollock Cont.* (5th ed.) 308; *McIntyre v. Parks*, 3 Met. 207.

¹² *Pellecat v. Angell*, 2 Crompt. M. & R. 311, 313.

¹³ Citing *Story Confl. L.* §§ 254, 257, *note*; 3 *Kent Com.* 265, 266; *Wharton, Confl. L.* § 484.

¹⁴ Citing *Hodgson v. Temple*, 5 Taunt. 181; *Brown v. Duncan*, 10

B. & C. 93, 95, 98; *Harris v. Runnells*, 12 How. 79, 83, 84; 13 L. Ed. 901-903.

¹⁵ Citing *Pollock, Cont.* 5th ed. 308.

¹⁶ Citing *Waynell v. Reed*, 5 T. R. 599; *Gaylord v. Soragen*, 32 Vt. 110; 76 Am. Dec. 154; *Fisher v. Lord*, 63 N. H. 514; 2 *New Eng. Rep.* 285.

a recovery of the price that the seller had reason to believe that the buyer intended to resell the goods in violation of law.¹⁷ As in the case of torts, a man has the right to expect lawful conduct from others. In order to charge him with the consequences of the act of an intervening wrongdoer, you must show that he actually contemplated the act.¹⁸ Between these two extremes a line is to be drawn. But as the point where it should fall is to be determined by the intimacy of the connection between the bargain and the breach of the law in the particular case, the bargain having no general and necessary tendency to induce such a breach, it is not surprising that courts should have drawn the line in slightly different places. It has been thought not enough to invalidate a sale that the seller merely knows that the buyer intends to resell in violation even of the domestic law.¹⁹ So of the law of another State.²⁰ But there are strong intimations in the later Massachusetts cases that the law on the last point is the other way,²¹ and the English decisions have gone great lengths in the case of knowledge of intent to break the domestic law.²² However this may be, it is decided that when a sale of intoxicating liquor in another State has just so much greater proximity to a breach of the Massachusetts law as is implied in the statement²³ that it was made with a view to such a breach, it is void.²⁴ If the sale would not have been made but

¹⁷ Citing *Finch v. Mansfield*, 97 Mass. 89, 92; *Adams v. Coullard*, 102 Mass. 167, 173.

¹⁸ Citing *Hayes v. Hyde Park*, 153 Mass. 514-516; 27 N. E. 522; 12 L. R. A. 249.

¹⁹ Citing *Tracy v. Talmage*, 14 N. Y. 162; 67 Am. Dec. 132; *Hodgson v. Temple*, 5 Taunt. 181.

²⁰ Citing *McIntyre v. Parks*, 3 Met. 207; *Sortwell v. Hughes*, 1 Curt. C. C. 244; *Green v. Collins*, 3 Cliff, 494; *Hill v. Spear*, 50 N. H. 253; 9 Am. Rep. 205. "*Darter v. Earl*, 3 Gray, 489, is a decision on the New York law."

²¹ Citing *Suit v. Woodball*, 113 Mass. 391, 395; *Finch v. Mansfield*, 97 Mass. 89, 92.

²² Citing *Pearce v. Brooks*, L. R. 1 Exch. 213; *Taylor v. Chester*, L. R. 4 Q. B. 309, 311.

²³ In this case it was "found that they [the liquors] were sold and delivered in Massachusetts by the plaintiffs to the defendant, a Maine hotel-keeper, with a view to their being resold by the defendant in Maine against the laws of that State."

²⁴ Citing *Webster v. Munger*, 8 Gray 584; *Oreutt v. Nelson*, 1

for the seller's desire to induce an unlawful sale in Maine, it would be an unlawful sale on the principles in *Hayes v. Hyde Park*²⁵ and *Tasher v. Stanley*.²⁶ The overt act of selling, which otherwise would be too remote from the apprehended result—an unlawful sale by someone else—would be connected with it and taken out of the protection of the law by the fact that that result was actually intended. * * * The question is whether the sale is saved by the fact that the intent mentioned²⁷ was not the controlling inducement to it. As the connection between the act in question, the sale here, and the illegal result, the sale in Maine—its tendency to produce it—is only through the later action of another man, the degree of connection or tendency may vary by delicate shades. If the buyer knows that the sale is made only for the purpose of facilitating his illegal conduct, the connection is at the strongest. If the sale is made with the intent to help him to his end, although primarily made for money, the seller cannot complain if the illegal consequence is attributed to him. If the buyer knows that the seller, while aware of his intent, is indifferent to it or disapproves of it, it may be doubtful whether the connection is sufficient.²⁸ It appears to us not unreasonable to draw the line as it was drawn in *Webster v. Munger*,²⁹ and to say that when the illegal intent of the buyer is not only known to the seller but encouraged by the sale as just explained, the sale is void. The accomplice is none the less an accomplice that he is paid

Gray 536, 541; *Hubbell v. Flint*, 13 Gray 277, 279; *Adams v. Colliard*, 102 Mass. 167, 172, 173. "Even in *Green v. Collins* [3 Cliff. 494], and *Hill v. Spear* [50 N. H. 253; 9 Am. Rep. 205], the decision in *Webster v. Munger* [8 Gray, 584], seems to be approved. See also *Langton v. Hughes*, 1 Maul. & S. 593; *McKinnell v. Robinson*, 3 Mees & W. 434, 441; *White v. Buss*, 3 Cush. 448."

²⁵ 153 Mass. 514; 27 N. E. 522; 12 L. R. A. 249.

²⁶ 153 Mass. 148; 26 N. E. 417.

²⁷ "That the seller expected and desired the buyer to sell unlawfully in Maine, and intended to facilitate his doing so, and that he was known to the buyer to have that intent."

²⁸ "Compare *Commonwealth v. Churchill*, 136 Mass. 148, 150."

²⁹ 8 Gray, 584.

for his act.³⁰ The ground of the decision in *Webster v. Munger*³¹ is that contracts like the present are void. If the contract had been valid, it would have been enforced.³² As we have said or implied already, no distinction can be admitted based on the fact that the law to be violated in that case was the *lex fori*. For if such a distinction is ever sound, and again if the same principles are not always to be applied whether the law to be violated is that of the State of the contract or of another,³³ at least the right to contract with a view to a breach of the laws of another State of this Union ought not to be recognized as against a statute passed to carry out fundamental beliefs about right and wrong shared by a large part of our own citizens.”³⁴

³⁰ Citing *Commonwealth v. Harrington*, 3 Pick. 26.

³¹ 8 Gray, 584.

³² Citing *Darter v. Earl*, 3 Gray 482.

³³ “See *Tracy v. Talmage*, 14 N. Y. 162, 213; 67 Am. Dec. 132.”

³⁴ *Graves v. Johnson*, 156 Mass. 211; 30 N. E. 818; 15 L. R. A. 836, citing *Territt v. Bartlett*, 21 Vt. 184, 188, 189, and closing as follows:

“In the opinion of a majority of the court, this case is governed by *Webster v. Munger* [8 Gray 584], and we believe it would have been decided as we decide it if the action had been brought in Maine instead of here. *Banchor v. Mansel*, 47 Me. 58.” We have given the opinion in full.

Under the rule, however, slight assistance on the part of the vendor will render the sale illegal, such as marking the packages so they can be quickly identified by the vendee on arrival at their destination and removed before the officers have their suspicions

aroused. *Gaylord v. Soragen*, 32 Vt. 110; 76 Am. Dec. 154; *Wasserboehr v. Morgan*, 168 Mass. 291; 47 N. E. 126. So shipping it to him intentionally in a disguised form is such an aid as will render the sale illegal. *Aiken v. Blaisdell*, 41 Vt. 655; *Fisher v. Lord*, 63 N. H. 514; 3 Atl. 927; *Feineman v. Sachs*, 33 Kan. 621; 7 Pac. 222; 52 Am. Rep. 547; *Kohn v. Mulcher*, 43 Fed. 641; 10 L. R. A. 439; *Williams v. Davidson*, 64 Kan. 607; 68 Pac. 650.

Shipping the liquor in plain, unmarked boxes is not a concealment. *Williams v. Davidson*, 64 Kan. 607; 68 Pac. 650.

The contract need not contain an agreement to aid to render it void, the fact of aiding being sufficient. *Aiken v. Blaisdell*, 41 Vt. 655. So certain directions given to the carrier as to avoiding seizure by the officers of such other State avoids the contract. *Banchor v. Mansel*, 47 Me. 48.

So is aid given by the vendor to the vendee to evade the pen-

Sec. 1016. Soliciting orders forbidden.

The mere solicitation of an order for liquors in a prohibition State will not render the sale void if the sale be completed

alty for an unlawful sale. *Foster v. Thurston*, 11 Cush. 322; *Backman v. Wright*, 27 Vt. 187; *Tolson v. Johnson*, 43 Iowa 127.

Where this rule prevails, merely shipping liquor upon mail orders into another State is not sufficient evidence of the illegal intent, or rather is not so illegal as to prevent a recovery of their price because of the vendor's knowledge that the vendee intends to resell them illegally. *Backman v. Wright*, 27 Vt. 187.

There are many liquor cases (and we cite here only such) which hold that the fact the seller knew when he sold intoxicating liquors that the purchaser was a dealer in another State contrary to its laws, will not render the contract invalid on account of such knowledge, at least so as to prevent his recovering their price. *Webber v. Donnelly*, 33 Mich. 469.

Fisher v. Lord, 63 N. H. 514; 3 Atl. 927; *Hill v. Spear*, 50 N. H. 253; 9 Am. Rep. 205; *Tuttle v. Holland*, 43 Vt. 542; *Feineman v. Sachs*, 33 Kan. 621; 7 Pac. 222; *Territt v. Bartlett*, 21 Vt. 184; *McConihe v. McMann*, 27 Vt. 95; *Backman v. Wright*, 27 Vt. 187; *Gaylord v. Soragen*, 32 Vt. 110; 73 Am. Dec. 154; *Graves v. Johnson*, 179 Mass. 53; 60 N. E. 383; *Westheimer v. Weisman*, 60 Kan. 753; 57 Pac. 969; *Wasserboehr v. Morgan*, 168 Mass. 291; 47 N. E. 126.

Thus for the vendor to come into the prohibition State and there

solicit a purchaser, when he knew the purchaser would sell the liquors purchased in violation of law, does not render the sale void. *Hill v. Spear*, 50 N. H. 253; 9 Am. Rep. 205.

(It has been held that there must be actual knowledge, and merely having reasonable cause to believe that an unlawful intent existed is not enough. *Ely v. Webster*, 102 Mass. 304; *Adams v. Colliard* 102 Mass. 167; *Hotchkiss v. Finan*, 105 Mass. 86; *Linsey v. Stone*, 123 Mass. 332, distinguishing *Webster v. Munger*, 8 Gray 584.)

On the other hand the vendor's mere knowledge that the purchaser's intention was to resell in another State in violation of the laws of that State is held sufficient to render the contract invalid, and the rule is extended so far as to hold the contract invalid if the vendor had reasonable cause to believe the vendee intended to resell them illegally. *Suit v. Woodhull*, 113 Mass. 391; *Wilson v. Stratton*, 47 Me. 120; *Bluthenthal v. McWhorter*, 131 Ala. 642; 31 So. 559; *J. P. Bollin Liquor Co. v. Brandonburg* (Iowa), 106 N. W. 497; *M. Levy & Son v. Stegemann* (Iowa), 104 N. W. 372; *Corbin v. Houlehan*, 100 Me. 246; 61 Atl. 131; *In re Daniels*, 8 Hawaii 746.

But a sale without any knowledge of the vendee's illegal intention is a valid sale. *J. & J. Eager*

in a non-prohibition State.³⁵ And a statute may not make it an offense, and the contract void, for one to solicit and take

& Co. v. Burke, 74 Conn. 534; 51 Atl. 544.

Other cases hold that some knowledge of the illegal intention of the vendee is not sufficient; it must be actual knowledge. Finch v. Mansfield, 97 Mass. 89; Adams v. Coulliard, 102 Mass. 167; Ely v. Webster, 102 Mass. 384.

Other cases hold that the sale, to be illegal, must have been made "with a view" to an illegal resale in another State. Webster v. Munger, 8 Gray 584; Weil v. Golden, 141 Mass. 364; 6 N. E. 229.

Before the passage by Congress of what is known as the Wilson Act, it was held that the mere fact that the vendor knew the vendee had no license to sell in the State of the destination of the liquor shipped to him, was immaterial, and did not render the sale invalid; for the act of shipment was a lawful transaction in interstate commerce. Carstairs v. O'Donnell, 154 Mass. 357; 28 N. E. 271; Wind v. Her & Co., 93 Iowa, 316; 61 N. W. 1001; 27 L. R. A. 219; Richards v. Woodward, 113 Mass. 285; J. & J. Eager Co. v. Burke, 74 Conn. 534; 51 Atl. 544; Doherty v. Colter, 68 N. H. 37; 38 Atl. 499; Jones v. Sanborn, 68 N. H. 602; 40 Atl. 393.

But see Kohn v. Milcher, 43 Fed. 641; 10 L. R. A. 439.

A statute in one State may make a sale of liquor to be shipped into another State illegal, in which event no recovery can be had upon it. Long v. Lynch, 38 Fed. 489; 4 L. R. A. 831; Dunbar v. Locke,

62 N. H. 442; Hotchkiss v. Finan, 105 Mass. 86. See Doherty v. Cotter, 68 N. H. 37; 38 Atl. 490. (Effect of Wilson act.)

So is a statute prohibiting a recovery on a liquor contract made in another State with intent on the vendor's part that the liquor should be illegally sold in the State enacting it. Corbin v. Houlehan, 100 Me. 246; 61 Atl. 131.

If the sale is completed in the prohibition State, of course there can be no recovery. Thus a sale of liquor shipped from Illinois to Iowa is an Iowa contract, where the written agreement for the sale is forwarded from the former to the latter State and there signed, making in effect a continuing offer to sell on the terms stated in it, which offer is accepted by letter or telegram. Gipps Brewing Co. v. DeFrance, 91 Iowa 108; 58 N. W. 1087; 28 L. R. A. 386. In this case the price of the casks were held not recoverable, and so in Werth v. Roche, 92 Me. 383; 42 Atl. 794.

Evidence of a conversation between the purchaser and the seller's agent, and the fact that the latter saw the former fixing up a place of business, concerning his intention to sell liquor is admissible against the agent's principal, where such agent sold the liquors, to show the principal's illegal knowledge and intent. Wasserboehr v. Morgan, 168 Mass. 291; 47 N. E. 126.

³⁵ Hill v. Spear, 50 N. H. 253; Jones v. Surprise, 64 N. H. 243; 9 Atl. 384.

orders in a prohibition State with the knowledge or reasonable cause to believe that the liquors will be transported into the State and possibly be sold in violation of its laws.³⁶

Sec. 1017. Recovery on foreign sales forbidden by statutes.

In a few States statutes are in force which prohibit a recovery on a sale of liquor made in another State and shipped into the States enacting the statute, and one of these statutes have been held constitutional.³⁷ And where a statute of this kind provided that if a vendee purchase liquors in another State with the intention to sell them in the State of enactment the purchase should be void, it was held immaterial that the vendor did not know of the illegal intention of the vendee.³⁸ Under an early statute in Massachusetts no recovery could be had if the vendor had reasonable cause to believe the vendee intended to illegally sell them in another State,³⁹ and to avoid the contract of sale it had to be shown that the purchaser actually entertained such intention;⁴⁰ and mere proof that the vendor knew the vendee was a liquor dealer did not necessarily show that the buyer intended to resell the liquors in violation of law.⁴¹

Sec. 1018. Sale to house of prostitution.

If the owner of liquor sell it to the keeper of a house of prostitution, mere knowledge on his part that the liquor was

³⁶ *Durkee v. Moses*, 67 N. H. 115; 23 Atl. 793, overruling *Jones v. Surprise*, 64 N. H. 243; 9 Atl. 384; *Dunbar v. Locke*, 62 N. H. 442; *Holden v. Brooks*, 68 N. H. 184; 20 Atl. 247. These three cases were overruled because of the decision in *Leisy v. Hardin*, 135 U. S. 100; 10 Sup. Ct. 681.

See the Connecticut decision of *State v. Ascher*, 54 Conn. 299; 7 Atl. 822.

³⁷ *Reynolds v. Geary*, 26 Conn. 179. See *Carter v. Clark*, 28 Conn. 512, and *Donahue v. Coleman*, 46 Conn. 319, applying this statute.

³⁸ *Meservey v. Gray*, 55 Me. 540; *Heintz v. LePage*, 100 Me. 542; 62 Atl. 605.

See *Bernard v. Field*, 46 Me. 526; *Dearborn v. Hoit*, 41 Me. 120.

³⁹ *Lindsey v. Stone*, 123 Mass. 332; *Bligh v. James*, 6 Allen 570; *Finch v. Mansfield*, 97 Mass. 89; *Charlton v. Donnell*, 100 Mass. 229.

⁴⁰ *Savage v. Mallory*, 4 Allen 492.

⁴¹ *Frank v. O'Neil*, 125 Mass. 473.

thereafter to be illegally sold by the buyer, or applied to some illegal or immoral use, will not prevent his recovering the purchase price, the seller not aiding or participating in the illegal objects otherwise than by the mere act of making the sale.⁴²

Sec. 1019. Recovering back money paid on illegal sales.

The rule at common law is that a person who has voluntarily paid money upon an illegal contract cannot recover it back from the payee on the ground that the contract was void as against public policy or in violation of some statute. "When a contract, not *malum in se*, made in violation of the provisions of a statute, has been executed," said the Supreme Court of Maine, "a party who has performed, by the payment of money, cannot recover it back, unless he can show that it was not paid for value actually received, but obtained wrongfully or by undue advantage, or unless he can exhibit a statute provision expressly authorizing such a recovery. By the common law, therefore, a person who has purchased intoxicating liquors for one not licensed to sell them, and who has received and paid for such liquors, could not recover back the

⁴² Washington Liquor Co. v. Shaw, 38 Wash. 398; 80 Pac. 536; Anheuser-Busch Brewing Ass'n v. Mason, 44 Minn. 318; 46 N. W. 558; 9 L. R. A. 506; Tracy v. Talmage, 14 N. Y. 162; Hill v. Spear, 50 N. H. 253 (these last two cases are the two leading cases in America to the effect that mere knowledge by the vendor of the unlawful intent of a vendee will not bar a recovery upon a contract of sale, yet, if he in any way aids the vendee in his unlawful design to violate the law, such participation will prevent him from maintaining an action to recover the purchase money. Armstrong v. Toler, 11 Wheat. 258; 6 L. Ed. 468; Green

v. Collins, 3 Cliff. 494; Dater v. Earl, 3 Gray, 482; Arfield v. Tate, 7 Ired. L. 259; Read v. Taft, 3 R. I. 175; Cheney v. Duke, 10 Gill & J. 11; Kreiss v. Seligman, 8 Barb. 439; Michael v. Bacon, 49 Mo. 474; Brunswick v. Villeau, 50 Iowa, 120; Webber v. Donnelly, 33 Mich. 469; Bishop v. Honey, 34 Tex. 245; Wright v. Hughes, 119 Ind. 324; 21 N. E. 662; Feineman v. Sachs, 33 Kan. 621; 7 Pac. 222; Rose v. Mitchell, 6 Colo. 102; Banchor v. Mansel, 47 Me. 58; Henderson v. Waggoner, 2 Lea 133; Gaylord v. Soragen, 32 Vt. 110; Mahood v. Tealza, 26 La. Ann. 108; Delavina v. Hill, 65 N. H. 94.

money so paid.”⁴³ This principle is extended so far as to prohibit a garnishee deducting out of the credits in his hands a demand against the principal defendant for money paid on an unlawful sale of liquor.⁴⁴ So an officer selling goods upon a decree foreclosing a mortgage given to secure the payment of a void obligation is not liable for the money he has received and paid over to the mortgagee to a person who had secured the title to such goods before the foreclosure, although such person was not a party to the foreclosure proceedings.⁴⁵ But in a number of States statutes have been enacted permitting a recovery back by the vendee of the purchase price of intoxicating liquors illegally sold him which he has paid. This is for the purpose of discouraging the sale of such liquors. The statute of Iowa is a typical one of this class of legislation. It provides that “all payments and compensations for intoxicating liquors sold in violation of the statute shall be held to have been received in violation of law, and against equity and good conscience, and to have been received upon a valid promise and agreement of the receiver, in consideration of the receipt thereof, to pay, on demand, to the person furnishing such consideration, the amount of said money.”⁴⁶ The Supreme Court of this State has held this statute is constitutional, notwithstanding it restricts the sale of intoxicating liquors brought within the State, on the ground that it is legislation based on the police power of the State, and only incidentally affects interstate commerce.⁴⁷ Such a statute can be enforced only by the purchaser of the liquor, at his option,

⁴³ *Ellsworth v. Mitchell*, 31 Me. 247; *Smith v. Hickman*, 68 Ill. 314; *Carter v. Clark*, 28 Conn. 512; *Thayer v. Partridge*, 47 Vt. 423; *Connolly v. McConnell*, 1 Pennewill (Del.) 133; 39 Atl. 773.

The purchase price of other articles sold at the same time the liquors are cannot be recovered. *Jacobs v. Stokes*, 12 Mich. 381.

⁴⁴ *Thayer v. Partridge*, 47 Vt. 423.

⁴⁵ *Carter v. Clark*, 28 Conn. 512.

⁴⁶ Code Iowa, § 2423. See Also Gen. St. Rhode Island, Gen. Laws, ch. 102, § 60; South Dakota Rev. Codes, § 7621; Vermont Rev. Stat. § 4464; Gen. St. ch. 94, § 32.

⁴⁷ *Connolly v. Scarr*, 72 Iowa 227; 33 N. W. 641. But see now *Hamilton v. Jos. Schlitz Brewing Co.*, 129 Iowa, 172; 105 N. W. 438; *Hamill v. Jos. Schlitz Brewing Co.*, 138 Iowa, 138; 115 N. W. 943.

and only in the specific mode prescribed by the statute.⁴⁸ It applies to one selling the liquors as the agent for another, if he received the money for him;⁴⁹ but it does not apply to liquors sold in another State,⁵⁰ even if the vendor made the contract with a view to the breach of the laws of another State.⁵¹ Although the plaintiff be a licensed dealer, and can lawfully sell the liquors unlawfully sold him by a brewer, the fact of his having a license will not prevent him recovering back the purchase money he has paid for beer sold him by such brewer. The turning point is that the sale by the brewer was the illegality that made it possible to recover back the purchase money paid.⁵² If a licensed retailer sells at wholesale—that being a violation of law—the purchaser from him may recover back the purchase money he has paid.⁵³ If other property be sold at the same time, and as a part of the transaction, with the illegal sale of liquors, then the vendee may recover back the proportional amount paid for the liquor.⁵⁴ The statutes do not apply to illegal sales in another State,⁵⁵

⁴⁸ Thayer v. Partridge, 47 Vt. 423.

⁴⁹ Sellers v. Arie (Iowa), 38 N. W. 814. But not if he did not receive the purchase price. Foley v. Leisy Brewing Co., 116 Iowa 176; 89 N. W. 230; Schober v. Rosefield, 75 Iowa 455; 39 N. W. 706.

⁵⁰ Hamilton v. Jos. Schlitz Brewing Co., 129 Iowa 172; 105 N. W. 438; Bollinger v. Wilson, 76 Minn. 262; 79 N. W. 109; Brown v. Wieland, 116 Iowa 711; 89 N. W. 17; Sachs v. Garner, 111 Iowa 424; 82 N. W. 1007.

⁵¹ Bollinger v. Wilson, 76 Minn. 262; 79 N. W. 109.

⁵² Becker v. Betten, 39 Iowa. 668.

⁵³ Tobert v. Clough, 72 Iowa 220; 33 N. W. 639.

⁵⁴ McGuinness v. Bligh, 11 R. I.

94; Dtorer v. Haskell, 50 Vt. 341.

In this last case the defendant sold a stock in trade, which included intoxicating liquors, to the plaintiff for a gross sum, reserving a lien for that part of the purchase money unpaid. The plaintiff sold part of the liquor and then defaulted in his payment of the remainder of the purchase money in an amount greater than the value of the liquor. The defendant then took possession under his lien, but later consented to a sale by the plaintiff to one R, who paid the defendant the remainder of his claim. It was held that the plaintiff could not recover of defendant the amount R had paid the defendant. Dtorer v. Haskell, 50 Vt. 341.

⁵⁵ Kohn v. Melcher, 29 Fed. 433.

nor does it apply where one partner buys out his co-partner, for the statute is aimed at a sale where the title to the liquors passes from one person to another, and in the instance given the title does not so pass.⁵⁶ Nor can a vendee who has given his note for the purchase money maintain an action until he has paid the note.⁵⁷ If the statute provides that the purchase price may be recovered back "on demand," then a demand must first be made.⁵⁸ The amount paid may be recovered as a set-off or counterclaim.⁵⁹ The action to recover back the money is not a penal one and the statute of limitations applicable to a penal action does not apply, but the statute applicable to a promise to pay money does apply.⁶⁰ The presumption is that if the contract was made in the State where the suit is brought that it was intended payment should there be made, unless it specifically provides otherwise, even though such a presumption will result in evading the contract and permit a recovery.⁶¹ The right to recover back the purchase price is such an one as cannot be taken away by a repeal of the statute after the right has vested.⁶² Where the complaint or petition alleged that the plaintiff purchased liquors of the defendant through its agent, and paid such agent the purchase price, the recovery must be upon the theory thus set forth, even though the defendant deny the agency, and there can be no recovery upon any other theory,⁶³ although if there

⁵⁶ *Jacobs v. Stokes*, 12 Mich. 381.

⁵⁷ *Carlin v. Heller*, 34 Iowa, 256.

⁵⁸ *Schober v. Rosenfield*, 75 Iowa, 455; 39 N. W. 706; *Oswald v. Moran*, 8 N. D. 111; 77 N. W. 281.

A plea of settlement of the cause of action cannot be regarded as a recognition of a prior demand for a return of the money. *Foley v. Leisy, Brewing Co.*, 116 Iowa 176; 89 N. W. 230. Whether a demand was made is a question for the jury. *Foley v. Leisy Brewing Co.*, *supra*.

⁵⁹ *Tolman v. Johnson*, 43 Iowa

127. But not if no demand has been made. *Oswald v. Moran*, 8 N. D. 111; 77 N. W. 281. Otherwise if no demand is necessary. *Gorman v. Keough*, 22 R. I. 47; 46 Atl. 37.

⁶⁰ *Woodward v. Squires*, 41 Iowa 677. Such an action admits of a motion for a new trial. *Woodward v. Squires*, 39 Iowa 435.

⁶¹ *Connolly v. Scarr*, 72 Iowa 223; 33 N. W. 641.

⁶² *Peters v. Goulden*, 27 Mich. 171.

⁶³ *Foley v. Leisy Brewing Co.*, 116 Iowa 176; 89 N. W. 230. In

had been allegation of sales by and payment to the defendant, proof of a sale by and payment to the agent would have been admissible.⁶⁴ A right to recover back the purchase money paid may be assigned,⁶⁵ and on the vendee's death the cause of action survives.⁶⁶

Sec. 1020. Burden to show illegality of sale.

As all men are supposed to not violate the law and to obey its commands, in an action to recover the purchase price of liquors sold, the plaintiff need not aver and prove he had a license when he made the sale,⁶⁷ and he has a right to have the jury instructed that the presumption is the sale was lawful until the contrary is proven.⁶⁸ The burden is upon the defendant to plead and show that the sale was made to him in violation of law.⁶⁹ The fact that the plaintiff refused to

this case it was held competent to permit the president of the defendant company to state what certain matters on bill heads furnished to the agent making the alleged sale meant, and also as to his character and relations to the company.

⁶⁴ *Foley v. Leisy Brewing Co.*, *supra*. In this case it is held that if part of the liquor was sold by the defendant, claimed by the plaintiff to have been another defendant's agent, on such agent's own account, and part by the other defendant, the plaintiff could not recover.

⁶⁵ *Sellers v. Arie*, 99 Iowa, 515; 68 N. W. 814.

⁶⁶ *Gerlau v. Bacon*, 65 Vt. 516; 27 Atl. 198.

The right to recover back money paid for liquors illegally sold is not limited to the sum paid at any one time. *Peters v. Goulden*, 27 Mich. 171.

⁶⁷ *Rohlf v. Bise* (Neb.), 120 N. W. 904; *Kidder v. Norris*, 18 N.

H. 532; *Olson v. Hurley*, 33 Minn. 39; 21 N. W. 842; *Herlock v. Riser*, 1 McCord 481; *Smith v. Joyce*, 12 Barb. 21; *Kling v. Fries*, 33 Mich. 275.

⁶⁸ *Jones v. McLeod*, 103 Mass. 58. An action to recover rent of premises where a saloon was alleged to have been conducted without a license with the plaintiff's knowledge and connivance.

⁶⁹ *Kelly v. Earl*, 29 C. P. (Can.) 477; *Tivomey v. O'Brien*, 29 Vict. L. R. 729; 25 Austr. L. T. 255; 10 Austr. L. R. 101; *Trott v. Irish*, 1 Allen, 481; *Overstreet v. Brubacher*, 98 Mo. App. 75; 71 S. W. 1090; *Denton v. Logan*, 3 Met. (Ky.) 434; *Showyer v. Chamberlain*, 113 Iowa 742; 84 N. W. 661; *Silverman v. Rumbarger*, 4 Pa. Super. Ct. 439; *Julius Winkelmeyer Brewing Ass'n v. Nipp*, 6 Kan. App. 730; 50 Pac. 956; *Carter v. Fischer*, 127 Ala. 52; 28 So. 376.

In South Carolina it is held

testify concerning the sale, on the ground that his evidence might incriminate him, may be taken into consideration in determining the illegality of the sale.⁷⁰ Where the defense is that the sale occurred in a county in which local option was in force, when it devolves upon the defendant to show an actual sale in that county, and if the court does not take judicial notice that the local option law is in force there, then also that the law had been adopted.⁷¹ So, as elsewhere discussed, the purchaser may plead and show that the plaintiff sold the liquors to him knowing he intended to illegally sell them,⁷² and for the purpose of showing knowledge on the part of the plaintiff of his illegal intentions the defendant may show other sales between them, as tending to show the plaintiff's connivance at his illegal course of business.⁷³ In Iowa, where prohibition is the rule, the burden is held to be upon the plaintiff to show the sale was legal.⁷⁴

Sec. 1021. Bills and notes.

A bill or note given for the purchase money of intoxicating liquors illegally sold is invalid, and a recovery can no more be had upon it than a recovery of the purchase price can be had.⁷⁵ And it is void even though given to secure an exten-

that the question of the validity of a sale of liquors in that State, on the ground of their contraband nature can be raised only by the State. *Ex parte* Neal, etc., Co., 58 S. C. 269; 36 S. E. 584.

⁷⁰ *Andrews v. Frye*, 109 Mass. 234.

⁷¹ *Clohesy v. Roedelheim*, 99 Pa. St. 56; *Bluthenthal v. McWhorter*, 131 Ala. 642; 31 So. 559.

⁷² *Terre Haute Brewing Co. v. Hartman*, 19 Ind. App. 596; 49 N. E. 864; *Fred Miller Brewing Co. v. Stevens*, 102 Iowa 60; 71 N. W. 186; *Tivomey v. O'Brien*, 29 Viet. L. R. 729; 25 Austr. L. T. 255; 10 Austr. L. R. 101; *O'Bryan*

v. Fitzpatrick, 48 Ark. 487; 3 S. W. 527.

⁷³ *Briggs v. Rafferty*, 14 Gray 525; *Bluthenthal v. McWhorter*, 131 Ala. 642; 31 So. 559.

⁷⁴ *Westheimer & Sons v. Harbrinck*, 131 Iowa 643; 109 N. W. 189.

⁷⁵ *In re Lemerise*, 73 Vt. 304; 50 Atl. 1062; *Warren v. Chapman*, 105 Mass. 87; *Glass v. Alt*, 17 Kan. 444; *Jones v. Yokum* (S. D.), 123 N. W. 272; *Weil v. Golden*, 141 Mass. 364; 6 N. E. 229; *Downey v. Charles F. S. Gove Co.*, 201 Mass. 251; 87 N. E. 597; *McWhorter v. Blumenthal*, 136 Ala. 568; 33 So. 552; *Smith*

sion of the time for payment of the purchase price after it had become due,⁷⁶ or is given in part for the purchase price of liquor unlawfully sold.⁷⁷ And if only a part of the consideration is invalid, yet no recovery can be had upon the note, because the note is indivisible.⁷⁸ The most difficult question arising in connection with notes is where they have been endorsed to innocent endorsees, for value, before maturity, or before they have been dishonored. A note thus endorsed is generally held valid in the endorsee's hands, even though a statute provides that all payments and compensations for intoxicating liquors sold "shall be deemed to be received in violation of law, without consideration, against law, equity and good conscience."⁷⁹ But where a statute provided that "no action of any kind shall be had or maintained in any court in this State for the recovery of or possession of intoxicating liquor or the value thereof, except such as is purchased in accordance with the provisions of" it, a promissory note in Vermont was held void in the hands of an innocent and *bona fide* holder for value who took it in the usual course of business.⁸⁰ But if the endorsee paid nothing for the note, then it is void in his hands, although he took it without notice before its maturity.⁸¹

v. Benton, 20 Ont. 344; Dreyfus v. Goss, 67 Kan. 57; 72 Pac. 537; Oakes v. Merrifield, 93 Me. 297; 45 Atl. 31; Wagner v. Scherer, 89 N. Y. App. Div. 202; 85 N. Y. Supp. 894.

⁷⁶ Glass v. Alt, 17 Kan. 444.

⁷⁷ Nourse v. Pope, 13 Allen.

⁷⁸ Wadsworth v. Dunnam, 117 Ala. 661; 23 So. 699; Warren v. Chapman, 105 Mass. 87.

⁷⁹ Cazet v. Field, 9 Gray, 329; Norris v. Langley, 19 N. H. 423; Doe v. Burnham, 31 N. H. 426; Great Falls Bank v. Farmington, 41 N. H. 321; Campbell v. Jones, 2 Tex. Civ. App. 263; 21 S. W. 723; Cottle v. Cleaves, 70 Me. 256; Field v. Tibbetts, 57 Me. 358;

39 Am. Dec. 779 (see Baxter v. Ellis, 57 Me. 178); Hapgood v. Needham, 59 Me. 442; Wing v. Ford, 89 Me. 140; 35 Atl. 1023; Pindar v. Barlow, 32 Vt. 828.

⁸⁰ Streit v. Sanborn, 47 Vt. 702. But see Pindar v. Barlow, 31 Vt. 529; Converse v. Foster, 32 Vt. 828.

⁸¹ Oakes v. Merrifield, 93 Me. 297; 45 Atl. 31; Eberstadt v. Jones, 19 Tex. Civ. App. 480; 48 S. W. 558; Doherty v. Cotter, 68 N. H. 37; 38 Atl. 499; Jones v. Sanborn, 68 N. H. 602; 68 Atl. 602.

See also Downey v. Charles F. S. Gove Co., 201 Mass. 251; 87 N. E. 597.

Sec. 1022. Contract in restraint of trade—Measure of damages.

It has not been the policy, either in England or in this country, to encourage the traffic in intoxicating liquors. In this country public policy and the whole action of the legislative power has uniformly been to limit, restrict or absolutely prohibit the traffic, and hence, a contract in restraint of the traffic, if made upon a sufficient consideration, will be enforced, though the restraint be territorially co-extensive with the State.⁸² Accordingly, a bond for \$1,000, conditioned that the obligor should sell no more spirituous or malt liquors or wines within a county named, after a specified time, or cause the same to be sold, within said county, either directly or indirectly, after the time specified, was held to be a valid contract, and that the sum of \$1,000 named in the bond for a breach of its conditions, was liquidated damages and not a penalty.⁸³ The theory for so holding was that where a covenant is for the abstaining from doing some particular act or acts, or for their performance, which are not measurable by any exact pecuniary standard, and it is agreed that the party covenanting shall pay a stipulated sum for a violation of any such covenant, that sum is to be deemed liquidated damages, and not a penalty.⁸⁴

Sec. 1023. Covenants in deed not to use premises for sale of intoxicating liquors.

A covenant in a deed that the premises conveyed are not to be used for saloon or dramshop premises is valid, and an injunction will lie to prevent a breach of such covenant, although the violation of the covenant might cause no substantial damages.⁸⁵ A covenant of this kind runs with the

⁸² Harrison v. Lockhart, 25 Ind. 112; McAllister v. Howell, 42 Ind. 15.

⁸³ Studabaker v. White, 31 Ind. 211.

⁸⁴ Bagley v. Peddie, 5 Sandf. (N. Y.) 192.

⁸⁵ Star Brewery Co. v. Primer,

59 Ill. App. 581; affirmed 163 Ill. 652; 45 N. E. 144; Sutton v. Head, 86 Ky. 156; 5 S. W. 410; 9 Am. St. 274; Taylor v. Becker, 6 Ohio Dec. 151; 6 Wkly. L. Bull. 25; *In re Snyder's Lease*, 2 Pa. Dist. Rep. 785; Hotcher v. Andrews, 5 Bush, 561; Sullivan v. Kohlenberg, 31

land.⁸⁶ But an agreement by an owner of premises with an adjoining landowner that for ten years he will neither sell nor permit to be sold on the premises intoxicating liquors is not a covenant running with the land, and subsequent purchasers are not bound thereby, unless they had such notice of it as to imply that they assumed its provisions as a part of the consideration.⁸⁷ But where a parol agreement existed between the grantor and grantee that the latter would not use the land conveyed for saloon purposes, the fact that parts of the land had been resold without any reference to the agreement was held not to defeat the grantor's rights to enjoin the prohibited use of so much of the premises as the first grantee still owned.⁸⁸ It was also held in the same case that the fact that the grantee had permitted a druggist who occupied a store room on the premises, and had a license to sell liquors in packages to so sell them, but not to be drunk on the premises, would not prevent such grantor obtaining an injunction.⁸⁹ The owner of land in platting it may annex a condition to the plat that no liquors shall ever be sold on any of the lots of the platted premises, and all persons purchasing such lots will be bound thereby, especially if such a condition be inserted in their deeds or conveyances.⁹⁰ But where no such provision is contained in the plat, yet it is the general plan of the original owner to prohibit the sale of liquor upon each and every lot of the plat, an action will not lie by grantees of certain lots against one of their number to enforce the

Ind. App. 215; 67 N. E. 541; *Haines v. Einwachter* (N. J. Ch.) 55 Atl. 38.

As to standing by and seeing the grantor go to great expense to prepare the premises conveyed for the sale of intoxicating liquor, see *Haines v. Einwachter* (N. Y. Ch.) 55 Atl. 38.

⁸⁶ *Sutton v. Head*, 86 Ky. 156; 5 S. W. 460; 9 Am. St. 274; *Sullivan v. Kohlenberg*, 31 Ind. App. 215; 67 N. E. 541; *In re Snyder's License*, 2 Pa. Dist. Rep.

785; *Hotcher v. Andrews*, 5 Rush 561.

⁸⁷ *Sjoblom v. Mark*, 103 Minn. 193; 114 N. W. 746. See *Sullivan v. Kohlenberg*, 31 Ind. App. 215; 69 N. E. 541.

⁸⁸ *Hall v. Solomon*, 61 Conn. 476; 23 Atl. 876; 29 Am. Rep. 218.

⁸⁹ *Hall v. Solomon*, *supra*.

⁹⁰ *Whealkate Min. Co. v. Mulari*, 152 Mich. 607; 116 N. W. 360; 15 Det. Leg. News 278; *Judd v. Robison*, 41 Colo. 222; 92 Pac. 724.

covenants in a purchaser's deed to which they are not parties, such purchaser not being chargeable with constructive notice of the general plan of the plat or scheme for restricting the use of all the property in the plat at the time he purchased his lot, by the record of other deeds of property in such plat containing similar covenants; and such a covenant in his deed is not for their benefit.⁹¹

Sec. 1024. Avoiding leases.

In several States statutes are in force which provide that if a tenant use the leased premises for the unlawful sale of intoxicating liquors the landlord may cancel the lease or the lease shall be deemed forfeited. Where such a statute is in force an action of forcible entry and detainer may be maintained at once upon the perpetration of the unlawful act, and it is not necessary to first obtain a decree declaring the lease forfeited.⁹² Payment of rent in advance for the period during which the violation of law takes place will not save the lease from forfeiture,⁹³ and even a sublessee of a part of the premises may be ejected.⁹⁴ Where a statute provides that if a tenant shall violate the liquor statutes it shall work a forfeiture of his lease, a violation of a liquor statute passed after such first statute—as one forbidding a sale on Sunday—works such a forfeiture.⁹⁵ Such statutes are declaratory of a principle that existed at common law independent of statutory enactment.⁹⁶ To forfeit the lease it is not necessary to stipulate in the lease that it should be forfeited on a violation of the liquor statutes.⁹⁷ Inasmuch as the sale of intoxicating liquors is of itself not an illegal business, a lease of premises to be used for that purpose is not void nor voidable,⁹⁸ and it is

⁹¹ Judd v. Robison, 41 Colo. 222; 92 Pac. 724.

⁹² McGarvey v. Puckett, 27 Ohio St. 669; Moser v. Stebel, 29 Ohio Cir. Ct. Rep. 487.

⁹³ McGarvey v. Puckett, 27 Ohio St. 669.

⁹⁴ People v. Bennett, 14 Hun, 63.

⁹⁵ Moser v. Steabel, 29 Ohio Cir. Ct. Rep. 487.

⁹⁶ Moser v. Steabel, 29 Ohio Cir. Ct. Rep. 487.

⁹⁷ Commonwealth v. Morris, 129 Ky. 440; 112 S. W. 580; 33 Ky. L. Rep. 987.

⁹⁸ Weitzel v. Slavin, 13 Ohio Cir. Ct. Rep. 221; 7 Ohio Dec.

not avoided by their subsequent use for that purpose.⁹⁹ Nor is a lease of premises within a prohibited distance of a school-house void if a valid and existing license could have been transferred from other premises within the prohibited district as provided by a statute.¹ A lessee cannot escape payment of his rent by showing that premises leased as club rooms were converted into a gambling house, or liquor shop for illegal sales, in the absence of evidence to show that the lessor knew that the object for which the rooms were rented was that of gambling or selling intoxicating liquors illegally.² Thus, where a lessor, on renting premises for a restaurant, fearing that liquors might be illegally sold in the leased premises and thus become subject for the Iowa mullet tax, took from the lessee a bond that he would not engage in any unlawful business and would hold the lessor harmless for any expenditure under the liquor prohibition law, it was held that it was valid in the absence of evidence of connivance on the lessor's part, and that it could not be successfully urged that the bond was a mere cover for an agreement to use the premises for an unlawful purpose. To avoid the bond on that ground, the burden was on the lessee to show it.³ If a landowner rent his premises expressly for a saloon, a subsequent statute making the sale of intoxicating liquors unlawful in such a building avoids the lease and releases the lessee from all future rent;⁴

155; *Goodall v. Gerke Brewing Co.* (Ohio St.), 46 N. E. 983; *McKeever v. Beacom*, 101 Iowa 173; 70 N. W. 112.

⁹⁹ *Kittredge v. Allemania Society*, 3 Ohio N. P. 312.

¹ *Shedlinsky v. Budweiser Brewing Co.*, 17 N. Y. App. Div. 470; 45 N. Y. Supp. 174.

² *Commagere v. Brown*, 27 La. Ann. 314.

³ *Harbison v. Shirley*, 139 Iowa 605; 117 N. W. 963.

⁴ *Hooker v. Mueller* (Mich.), 123 N. W. 24 (local option adopted); *Heart v. East Tennessee Brewing Co.* (Tenn.), 113 S. W. 364;

O'Bryane v. Hadley (Ala.), 50 So. 87.

In the last case it is also held if the premises were also rented for the sale of liquors, cigars and "soft drinks," then prohibition would not annul the lease and release the lessee from future rents.

But the lessee of premises for saloon purposes for five years is bound thereby, even though he is unable to procure a license, and even though a license is never granted for more than one year. *Burkett v. Loed* (Ind.), 88 N. E. 346.

but the fact that a corporation cannot be licensed to keep a saloon will not make it unlawful for a brewing company to lease premises in order to have its own beer sold in them.⁵ Where a lease provided that if the lessee should be convicted of any violation of the liquor laws, the lessor might re-enter and thereupon the lease should determine, it was held that this provision could not be restricted to such a conviction as would prejudice the license, but must be construed as referring to any conviction whatsoever of a violation of such laws.⁶ An agreement by a lessor to procure a license for the lessee is not contrary to public policy.⁷ Where a statute imposes a penalty on a landowner who permits his premises to be used for the sale of intoxicating liquor, a landlord who has knowledge his tenant is so using the premises cannot recover of him for their use and occupation.⁸ If premises be leased for a grocery store they cannot be used for a saloon, and an injunction lies to restrain such use of the demised premises.⁹ If a lease contain a clause prohibiting the sale of intoxicating liquors on the premises, and providing for its forfeiture if this clause be violated, it is not binding on a sublessee who takes his sublease without any knowledge of such provision.¹⁰

Sec. 1025. Covenant not to build, etc., public house on land.

“It¹¹ is provided by s. 21 of the English Beerhouse Act, 1830, and s. 44 of the Refreshment Houses’ Act, 1860, that covenants against houses being used as public houses shall

⁵ *Conservative Realty Co. v. St. Louis Brewing Ass’n*, 133 Mo. 261; 113 S. W. 229.

⁶ *Ohlsson v. Kuhr*, 18 Jut., 205.

A covenant not to sublet licensed premises is violated by the lessee subletting to his wife. *Patterson v. Murray*, 15 N. Z. L. R. 487.

⁷ *Cavanaugh v. Iowa Beer Co.*, 136 Iowa 276; 113 N. W. 856; *Boucher v. Capitol Brewing Co.*, [1905], 9 Ont. L. R. 266.

When lease is void as to both

lessor and lessee, *Justice v. Lowe*, 26 Ohio St. 372.

⁸ *Mitchell v. Scott*, 62 N. H. 596.

⁹ *Jalageas v. Winton*, 119 Ill. App. 139.

¹⁰ *Ft. Worth Fair Ass’n v. Ft. Worth Driving Club (Tex.)*, 121 S. W. 213.

¹¹ This section is taken from *Patterson’s Licensing Acts* (19 ed.), p. 110.

extend to houses licensed under the Beerhouse Acts and the Refreshment Houses' Act, 1860. The existence of these sections has been overlooked in some of the decisions of the courts on this subject.¹² A covenant not to sell ale, beer, wine or spirits, was held to include sale of beer though only sold in bottles.¹³ A covenant not to use a public house was held not to include off license for sale of beer.¹⁴ A covenant not to use 'as an inn, public house, or tap room, or for the sale of spiritous liquors or ale or beer,' was held to include off license to sell spirits in bottle.¹⁵ A covenant not to use as a beer-house, inn, or public house, for the sale of spirituous liquors, was held not to include off beer licenses.¹⁶ A covenant not to carry on trade of hotel or tavern keeper, publican or beershop keeper, or seller by retail of wine, beer, spirits, was held not to include off license for wine and spirits in bottle.¹⁷ A covenant not to use for an inn, public house or beerhouse, was held not to extend to tenant of assignee if he had no notice of covenant.¹⁸ A covenant not to erect a shop was held to include a public house.¹⁹ A covenant not to let or demise for eating house was held not the same as permitting tenant to so use it.²⁰ A covenant not to open tavern, beerhouse or place licensed for sale of liquors, was held to bind the assignee of land, with notice of the covenant, although no damage shown.²¹ A covenant not to use as a public house, tavern or beershop was held

¹² This and the next three sections are taken, with a few changes, from Patterson's Licensing Acts. (19 ed.), pp. 110-133.

¹³ Wilson v. Hart [1866], L. R. 1 Ch. 463.

¹⁴ Pease v. Coats [1866], L. R. 2 Eq. 688; 36 L. J. Ch. 57; 30 J. P. 819; 14 L. T. 886.

¹⁵ Fielden v. Alater [1869], L. R. 7 Eq. 523; 38 L. J. Ch. 379; 20 L. T. 485; 17 W. R. 485.

¹⁶ London & Northwestern Rail Co. v. Garnett [1869], L. R. 9 Eq. 26; 39 L. J. Ch. 25; 21 L. T. 352; 18 W. R. 246.

¹⁷ Jones v. Bone [1870], L. R. 9 Eq. 674; 39 L. J. Ch. 405; 23 L. T. 304; 18 W. R. 489; 34 J. P. 468, distinguishing Fielden v. Alater, *supra*.

¹⁸ Carter v. Williams [1870], L. R. 9 Eq. 678; 39 L. J. Ch. 560; 23 L. T. 183; 18 W. R. 593.

¹⁹ Hall v. Box [1870], 18 W. R. 820.

²⁰ Kemp v. Bird [1877], 5 Ch. D. 974; 46 L. J. Ch. 828; 42 J. P. 36; 25 W. R. 838.

²¹ Richards v. Revitt [1877], 7 Ch. D. 224; 44 L. J. Ch. 472; 26 W. R. 166; 37 L. T. 632.

to include off license for beer.²² A covenant not to use as public house, tavern or beerhouse was held not to include off beer license held by a grocer.²³ A covenant by purchaser not to carry on trade of retailer of wine, spirits, beer, was held to apply to sublessee of purchaser though having no notice of covenant using off licenses.²⁴ A covenant by purchaser not to carry on trade binds purchaser's lessee who is bound to inquire into lessor's title.²⁵ Where a covenant provided the purchaser was not to erect tavern, public house or beer-shop, it was held a sub-tenant of the assignee of purchaser was bound not to use an off beer license.²⁶ Where by a covenant not to carry on certain offensive trades and not to erect on a particular piece of land 'any beerhouse or shop or any hotel of less annual value than £50,' it was held the word 'shop' is limited to beershop.²⁷ Where no steps had been taken for five years to enforce a covenant not to build a shop on the land or to use any house as a shop, or to carry on any trade therein, and the character of the neighborhood had changed, the court refused an injunction to enforce the covenant.²⁸ A covenant provided that no shop or other building erected on a plot of land should be used as an inn, tavern or beerhouse, nor should any wine, beer, or other intoxicating liquors be sold thereon. For upwards of twenty-four years spirits had been sold openly under a license in shop erected on site. It was held that the shop was not now bound by the restrictive covenant.²⁹ A defendant covenanted not to use a

²² London & Suburban Co. v. Field [1881], 16 Ch. D. 645; 38 L. J. Ch. 549; 44 L. T. 444.

²³ Holt v. Collyer [1881], 16 Ch. D. 718; 45 J. P. 456; 44 L. T. 214.

²⁴ Thornewall v. Johnson [1881], 50 L. J. Ch. 641; 44 L. T. 768; 29 W. R. 707.

²⁵ Patman v. Harland [1881], 17 Ch. D. 353; 50 L. J. Ch. 642; 44 L. T. 728; 29 W. R. 707.

²⁶ Nicol v. Fenning [1881], 19 Ch. D. 258; 45 L. T. 738; 51 L. J. Ch. 166.

²⁷ Formby v. Barker [1903], 2 Ch. 539; 72 L. J. Ch. 716; 51 W. R. 646; 89 L. T. 249.

²⁸ Sayers v. Collyer [1884], 28 Ch. D. 103; 54 L. J. Ch. 1; 55 L. T. 723; 33 W. R. 91; 49 J. P. 244.

²⁹ Hepworth v. Pickles [1900], 1 Ch. 108; 69 L. J. Ch. 55; 48 W. R. 184; 81 L. T. 818. See also *In re Summerson* [1900], 1 Ch. 112, *note*.

house as a coffee house. He was a dealer in tea and proposed as ancillary to his business for the convenience of his customers to sell light refreshments, consisting of cups of tea and coffee, bread and butter, etc., to be consumed on the premises. It was held that this was a violation of the covenant.³⁰ A club of working men were the lessees of premises, the lease of which contained a covenant that they should not be used for the sale of wines, malt, or spirituous liquor. The rules provided for the purchase of liquor and its distribution at fixed prices among the members, by whom it was consumed upon the premises, the profits being applied to the general purposes of the club. It was held not a sale within the meaning of the covenant."³¹

Sec. 1026. Covenant to take all beer from landlord.

"Where³² the purchaser of land covenanted to take all beer from C, the vendor, who was to have exclusive right to supply, an assignee of purchaser was restrained by an injunction from taking beer from another than C.³³ Under covenant by publican to take all beer sold at this house and other house from lessor, an assignee of second house, with notice, was held bound by covenant. A covenant to supply beer means good marketable beer. Under a covenant to take beer and covenant to supply beer, the first covenant is conditional on second covenant.³⁴ A covenant by tenant to purchase all beers he sells from his landlord implies covenant of landlord to supply the beer, and is not broken by tenant buying lessor's beer through agent.³⁵ Under a covenant by lessee and assigns of public house to take all beer from lessor

³⁰ *Fitz v. Hes* [1893], 1 Ch. 77; L. T. 188; 17 W. R. 662; 33 J. P. 62 L. J. Ch. 258; 68 L. T. 108; 2 R. 132.

³¹ *Rankin v. Hunt* [1894], 10 R. 249.

³² This section is taken from *Patterson's Licensing Acts* (19 ed.), p. 113.

³³ *Catt v. Tourle* [1869], L. R. 4 Ch. 654; 38 L. J. Ch. 665; 21

These houses are known in England as "tied houses."

³⁴ *Luker v. Dennis* [1877], 7 Ch. D. 227; 47 L. J. Ch. 174; 37 L. T. 827; 26 W. R. 167.

³⁵ *Edwick v. Hawkes* [1881], 18 Ch. D. 199; 50 L. J. 577; 45 L. T. 168.

and assigns, it was held that the covenant might be enforced by assign of lessor though beer made at a different brewery and that the covenant ran with the land.³⁶ A executed an agreement under seal to take an hotel as yearly tenant to B & Company, and covenanted to purchase all his beer of B & Company 'and their successors in business.' B & Company sold and conveyed their brewery, including the hotel and business, to C & Company, who were brewers, and who incorporated B & Company's business with their own. It was held that the covenant ran with the land and that C & Company, as successors in business of B & Company and owners of the reversion in fee of the hotel, were entitled to the benefit of it.³⁷ Under a covenant by lessee to buy wine from lessor, and upon compliance with covenant lessee to be entitled to abatement of rent, it was held that the covenant ran with the land, so that assigns of lessee were bound by the burden and entitled to the benefits of the covenant as against the assigns of the lessors.³⁸ Under a covenant to take all beer required for the business and reduction of rent so long as all beer taken, it was held that the covenant to take all beer was absolute and that lessee had not the option to deal with a rival brewer and pay the full rent.³⁹ A covenant by lessor of public house that lessee should take all beer from the lessor and that the lessor may distrain for the unpaid price of beer sold makes the lease a bill of sale and it must be registered as such as regards that covenant, but the lease is not void as to other covenants.⁴⁰ Under a covenant in brewer's lease to buy beer of 'lessor or his firm or their successors in business' whether binding the lessee to buy beer of the assigns of the reversion of the premises but not of business of lessor, on the ground that lessor within interpretation clause was included, when context allowed 'ex-

³⁶ Clegg v. Hands [1890], 44 Ch D. 503; 55 J. P. 180

387; 76 L. T. 273; 45 W. R. 434; 13 L. T. R. 310.

³⁷ Manchester Brewery Co. v. Coombs [1901], 2 Ch. 608; 70 L. J. Ch. 814; 82 L. T. 347; 16 T. L. R. 299.

³⁹ Hanbury v. Cundy [1888], 58 L. T. 155.

³⁸ White v. Southend Hotel Co. [1897], 1 Ch. 767; 66 L. J. Ch.

⁴⁰ Stevens v. Marston [1890], 55 J. P. 404; 64 L. T. 274; 39 W. R. 129.

ecutors, administrators and assigns,' it was held that the interpretation clause did not apply, and the lessee was not so bound.⁴¹ A proviso in a brewer's lease if during the ten-bound.⁴¹ A proviso in a brewer's lease that if during the tenant to the landlords in respect of malt liquors, etc., supplied by them to him, and if such sum or sums shall remain unpaid for twenty-four hours after a demand in writing, it shall be lawful for the landlords to enter and distrain upon the premises in respect of the amount so due, and to dispose of the distress in the same way as landlords may distrain for rent in arrear, was held to be void for non-registration under the Bills of Sales Act, 1882.⁴² Where an agreement between brewers and publican that the proposed licensed premises should be a "tied" house in consideration of brewers "supporting" the application for license, it was held that the agreement was valid and was not illegal either as against public policy or as amounting to champerty; the suggestion that it was the case of an interested magistrate influencing the rest not being made out.⁴³ Where a defendant covenanted to buy from plaintiffs all liquors for consumption on the premises, which they would be willing to supply at the "fair current market price," it was held that the words "fair current market price" meant a price which was current and fair in the case of tied houses, and which was not in excess of the general market rate.⁴⁴ A lessor demised a public house to a limited company, with a proviso that if the company should enter into liquidation, whether compulsorily or voluntarily, it should be lawful for the lessor to re-enter. By an underlease the company demised the public house to defendant at a yearly rent of £800, reducible to £300 if he should buy all his beers from the company. The company, which was perfectly solvent, was voluntarily wound up for the purpose of being amal-

⁴¹ Birmingham Breweries, Limited v. Jameson [1898], 67 L. J. Ch. 403; 78 L. T. 512; 14 T. L. R. 396.

⁴² Pulbrook v. Ashley [1887], 56 L. J. Q. B. 376; 35 W. R. 779.

See also *Ex parte Hopcraft v. Flabell* [1868], 14 W. R. 168.

⁴³ Savill Brothers, Limited v. Langman [1898], 79 L. T. 44; 14 T. L. 504.

⁴⁴ Arnold v. Radford [1901], 17 T. L. R. 301.

gamated with two other companies. It was held that the voluntary winding up evolved a forfeiture, and that the lease and underlease were wholly gone.⁴⁵ In this case the underlessee sought relief from the forfeiture, and the court, in granting relief, increased the rent as the "tie" had gone.⁴⁶ The defendant was lessee of a public house, the plaintiffs being his lessor's landlords, and the lease which was made on July 18, 1899, provided that the lessee should take all his ale, beer and porter and malt liquors (except spirits) from his landlords if they should be willing to supply the same "at the prices set forth in the schedule hereto." The landlords claimed that under the Customs Consolidation Act, 1876, Sec. 20, and the Finance Act, 1900, Sec. 8, they were entitled to throw the whole 1s. a barrel and therefore the 6d. which they claimed, on the defendant. It was held that there being the right on the part of the landlords to say that they would supply at the price in the schedule, it was not a contract within the Customs Consolidation Act, 1876, Sec. 20, and that they could not recover the extra duty."⁴⁷

⁴⁵ Fryer v. Ewart, [1902], A. C. 187; 71 L. J. Ch. 433; 86 L. T. 242; 18 T. L. R. 426; 9 Mans. 281.

⁴⁶ Ewart v. Fryer [1901], 1 Ch. 499.

⁴⁷ Newbridge Rhondda Brewery Co., Limited v. Evans [1902], 86 L. T. 453; 18 T. L. R. 396.

See further, Cooper v. Turbill [1808], 3 Camp. 286; Stancliffe v. Clarke [1852], 7 Ex. 439, and Handcock v. Rushe [1896], 60 J. P. 633.

A leasehold was mortgaged to brewers who entered, took possession and leased the premises to tenants, binding them to take beer from them under which they made a large profit. The brewers afterward sold the public house under the power of sale in the mortgage. It was held in an action

for an accounting that the mortgagees were not entitled to *interest* on the cost of the beer supplied while they were carrying on the business; that they were not bound to account for the profits of the beer sales to the tenants; but that they were chargeable with the increased rent they might have obtained if the tenants had been under no restriction as to the purchasing their beer. White v. City of London Brewing Co., 58 L. J. Ch. 98; 39 Ch. D. 559; 60 L. T. 19; 36 W. R. 881; affirmed 58 L. J. Ch. 855; 42 Ch. D. 237; 38 W. R. 82.

In New Zealand "tied house" contracts are forbidden by statute. Ryland v. Crawford, 17 N. Z. 79; Patterson v. Murray, 15 N. Z. L. R. 487.

A statute of New Zealand for-

Sec. 1027. Miscellaneous covenants as to public houses and servants.

“A covenant⁴⁸ by lessor of public house not to keep house for sale of beer or spirits within half a mile does not run with land in favor of assignee of the lease.⁴⁹ On a parol lease of public house there is no implied agreement by tenant not to do anything to forfeit his licenses.⁵⁰ Under a covenant not to carry on public house within half a mile, the half a mile means as the crow flies.⁵¹ Under an agreement for a new lease to contain similar covenant to the covenant in old lease (which was to keep up licenses), it was held that the lessor was only entitled to a covenant from the tenant to do his best to keep up license.⁵² S agreed to rent beer house and covenanted to do nothing to imperil his license. It was held that S's going abroad and leaving a manager was not a breach of the agreement.⁵³ A lessee covenanted to use his utmost endeavor to continue the house open as a public house. The license was taken away by a justice on account of the disorderly conduct of a sub-tenant, and was not renewed for six years, when the lease expired. It was held that the covenant was broken, because the lessee had done no act to endeavor

to have all agreements “whereby any person or body corporate is purported to be bound to purchase beer, wines, etc., from any other person or body corporate, to the exclusion of any other persons or body corporate.” An hotel held a lease which provided that if the lessee elected to purchase beer, wines, etc., exclusively from a specified brewery, he should be entitled to a substantial reduction in the weekly rent reserved in the lease. It was held that such a contract was not forbidden by the statute. *Clifton Cook Brewery v. Ryan*, 19 N. Z. 595. In this case bad beer was supplied during a part of the time, and this was held

no defense in an action to recover the rent.

As to a mortgage of a “tied” house, see *Tooth v. Parker*, 17 W. N. (N. Z.) 17.

⁴⁸ This section is taken from *Patterson's Licensing Acts* (19 ed.), p. 116.

⁴⁹ *Thomas v. Hayward* [1869], L. R. 4 Ex. 311; 38 L. J. Ex. 175.

⁵⁰ *Maw v. Hindmarsh* [1873], 28 L. T. 644.

⁵¹ *Moufflet v. Cole* [1872], L. R. 8 Ex. 32; 42 L. J. Ex. 8; 21 W. R. 175.

⁵² *Shepherd v. Walker* [1876], 34 L. T. 230.

⁵³ *Moore v. Robinson* [1879], 48 L. J. Q. B. 156; 40 L. T. 99; 28 W. R. 312.

to get license renewed.⁵⁴ Lessees covenanted that they would "during the term keep open and use and allow to be used the dwelling house hereby demised as an inn and alehouse for the reception and entertainment of all persons legally resorting thereto" and "annually at all other proper times at their own expense apply for and use their best endeavors to obtain such licenses and authorities as are or may be or become necessary for keeping open and using the premises hereby demised as and for an inn and alehouse." The house had a six-day license. In 1903 the renewal of the license was refused on the ground that it was not required. The lessee did not appeal to quarter sessions against the refusal. The lessor brought an action against the lessees for damages for breach of the covenant. Lord Alverstone, C. J., before whom the case was tried, held that the defendants were bound to do their utmost to retain the license, and was of opinion that they had not done so. The defendants, he thought, did not care whether the license was renewed or not, and had only fought the case at Brewster Sessions in a half-hearted way. He therefore held that there had been a breach of the covenant, and assessed the damages at seven and a half years' purchase of the difference between the house licensed and unlicensed.⁵⁵ Under a covenant by lessee of public house to do nothing that can or may affect his lease or make void any of the licenses, where the lessee committed three offenses on the same day, and was convicted of two of them, but none of them was endorsed on the license, it was held that this was no breach of the covenant.⁵⁶ An agreement was to take lease of public house with usual covenants. One covenant was in case of assignment to register the same with the landlord's solicitor, paying a fee. It was held not a usual covenant, and the purchaser not bound to complete it.⁵⁷ A covenant

⁵⁴ *Linder v. Prior* [1838], 8 C. & P. 518.

⁵⁵ *Hawke v. Plymouth Breweries, Limited, Bodmin Assizes* [June 27, 1906], (not reported).

⁵⁶ *Wooler v. Knott* [1876], 1 Ex. D. 265; 45 L. J. Ex. 884; 35 L. T. 121; 24 W. R. 1004; 40 J. P.

788. See also *Ward and Jordan's contract* [1902], 1 I. R. 73. But query, having regard to Licensing Act [1902], sec. 9.

⁵⁷ *Brookes v. Drysdale* [1877], 3 C. P. D. 52; 37 L. T. 467; 26 W. R. 331.

not to allow house to be used as a beershop or public house is broken by grocer's off-license to sell beer.⁵⁸ Under mutual covenants by adjoining owners and assigns not to carry on trade of innkeeper or retailer of liquors, an assignee of one of them can enforce the covenant against a neighbor. The assignee includes a lessee.⁵⁹ An assignment of good-will of public house gives the assignee the right to get the license transferred.⁶⁰ A lessee of public house covenanted to do nothing to forfeit or endanger licenses. It was held that a mere conviction by sublessee was not a breach, and that such covenant ran with the land, and might be enforced by the assignee of reversion.⁶¹ A covenant by purchaser not to erect house for trade was held to prevent a hotel, and that covenants by mutual purchasers under building scheme enforceable.⁶² Restrictive covenants with reference to a building scheme that no building or any lot shall be used for a licensed inn, or beer or wine shop, save on plot marked "Hotel" binds the assignee of a purchaser of a prohibited lot.⁶³ A covenant not to carry on trade of innkeeper or retailer of wine, spirits or beer, includes the sale of liquors under an excise license held by a theater proprietor.⁶⁴ Under a covenant by tenant not to do act whereby his license may be forfeited or its renewal withheld, two convictions by the tenant endorsed on license was held a breach of the covenant.⁶⁵ Under a covenant of a similar nature, the defendant was convicted of an offense which was not endorsed on his license; an opposition to its renewal was not successful. It was held

⁵⁸ *St. Albans (Bishop) v. Batterby* [1878], 3 Q. B. D. 359; 42 J. P. 581; 47 L. J. Q. B. 571; 26 W. R. 679; 38 L. T. 685.

⁵⁹ *Taite v. Gosling* [1879], 11 Ch. D. 273; 48 L. J. Ch. 397; 40 L. T. 251; 27 W. R. 394

⁶⁰ *Rutter v. Daniel* [1882], 46 L. T. 684; 30 W. R. 801.

⁶¹ *Fleetwood v. Hull* [1889], 23 Q. B. D. 35; 58 L. J. Q. B. 341; 54 J. P. 229; 60 L. T. 790; 37 W. R. 714.

⁶² *Spicer v. Martin* [1888], 14 App. Cas. 12.

⁶³ *Nalder & Collyer's Brewery Co., Limited v. Harman* [1900], 64 J. P. 358; affirmed C. A. 83 L. T. 257.

⁶⁴ *Buckle v. Fredericks* [1890], 44 Ch. D. 244; 62 L. T. 884; 55 J. P. 165; 38 W. R. 742.

⁶⁵ *Harman v. Powell* [1892], 65 L. T. 255; 56 J. P. 150.

to be a breach of the covenant, but relief from forfeiture was granted upon terms that defendant should insure the license.⁶⁶ A covenant by lessee to pay liquidated damages if license is forfeited, lost or withheld, covers a case where the renewal of the license is withheld without any fault on the part of the lessee.⁶⁷ By a lease of a public house it was covenanted that if the licensing authority should for any cause whatsoever refuse to renew the license, the lease should determine, but the above provision should not take effect unless and until the lessee should have effected an insurance of the demised premises in accordance with the covenant thereafter contained; and the lessee covenanted with the lessor to insure and keep insured against loss or forfeiture the license of the premises in the sum of £400. The lessee insured the license, but excluded from the policy the risk of non-renewal on the ground that the license was not required by the necessities of the neighborhood. In 1904, before the licensing act, 1904, came into force, the licensing justices refused the renewal upon the ground that it was not required by the necessities of the neighborhood. Lord Alverstone, C. J., held that there had been a "loss" of the license within the meaning of the covenant, and that the lessee had committed a breach thereof by not insuring against such loss.⁶⁸ A covenant by lessee was to keep open, use and occupy the premises as a fully licensed house during the term of the lease. There were two convictions in respect of the premises. In 1904 the renewal of the license was objected to on the grounds that there were too many public houses in the neighborhood, that the premises were structurally unsuitable, and that the house had not been well conducted. The licensing justices refused the renewal without stating any reasons, and the quarter sessions, on appeal, affirmed their decision without stating any reasons. The court of appeal, affirming the decision, held that the convictions were *prima facie* evidence that the house

⁶⁶ Blessley v. John, Times, May 1, 1899.

⁶⁷ Dalley v. Phillips and Marriott, Limited [1901], 18 T. L. R. 18.

See also Rae v. Yates Castle Brewery [1903], 67 J. P. 427

⁶⁸ Williams v. Lassell and Sharman, Limited [1906], 22 T. L. R. 443.

was not well conducted and that there had been a breach of the covenant.⁶⁹ A covenant by lessee was not to do or suffer to be done, or omit or suffer to be omitted, any act contrary to the provisions of any licensing act for the time being in force, whereupon a conviction should be made, and would in that event pay to the lessor the sum of £50, as and by way of liquidated damages for any and every such act. The lessee was convicted of selling intoxicating liquors during prohibited hours. He was held liable to pay the full sum of £50 as liquidated damages.⁷⁰ A covenantor and his assigns covenanted amongst other things that he and his assigns would "keep the premises open every lawful day, and conduct the business in a proper and orderly manner, so as to afford no ground or pretense for discontinuing the licenses thereof," and would not "willfully do or suffer any act or thing which might be a breach of the rules and regulations established by law for the conducting of licensed public houses, or be a reasonable ground for the withdrawing or withholding of all or any of the licenses for sale of beer and cider, wine and spirituous liquors therein." It was held that "discontinuing" here meant forfeiting the license, and not refusing to renew it.⁷¹ A lease of licensed premises to a company contained the following covenant: "Provided always that the company will not at any time during the continuance of the said term, without the consent the lessor first had and obtained, convert the said demised premises into a shop, warehouse, or place of sale for goods or merchandise, or into a private dwelling house, or open or use, or suffer the same to be opened or used, for any other purpose than as a beerhouse, and also will at all times during the said term keep and conduct the same in a regular and proper manner in every respect, and will apply for and use their best endeavors when required to obtain a renewal of the existing licenses or permission of her Majesty's justices of the peace for the vending of wines, ale,

⁶⁹ *Cory v. Plymouth Breweries, Limited*, C. A. [July 24, 1906] (not reported).

⁷⁰ *Ward v. Monaghan* [1895], 59 J. P. 392.

⁷¹ *Bryant v. Hancock* [1899], A. C. 442; 68 L. J. Q. B. 889; 64 J. P. 84; 81 L. T. 96; 15 T. L. 490.

See also *Noble v. Hart* [1897], 34 Sc. L. R. 151.

beer and tobacco on the said demised premises; and shall not knowingly or willingly do or suffer any act whereby the same may become endorsed, forfeited, or the renewal thereof refused; and will not commit any offense against the licensing laws for the time being in force.” The lessees having underlet the premises, the under-lessee was convicted of an offense against the licensing laws, by reason of which the renewal of the license was refused. In an action by the lessor against the lessees for breach of the covenant, it was held that there had been a breach of the covenant at all times during the term to keep and conduct the premises in a regular and proper manner in every respect, for which the lessees were liable.⁷² A lease of a public house contained a covenant by the lessee for himself, his heirs, executors, administrators and assigns, that he would use the premises as a public house or beerhouse only, and would carry on, or suffer, on the premises no other trade, business or manufacture during the term, without the consent of the lessor, and that he would not do, or suffer to be done on the premises, any act whereby the licenses might be forfeited or endorsed or the renewal of them withheld. The lease of the premises having been assigned to the defendant, he underlet them to an under-lessee, who was convicted of an offense against the licensing laws, by reason of which the renewal of the licenses was refused. In an action by the plaintiff, as assignee of the reversion against the defendant, as assignee of the lease, for breach of the above-mentioned covenant, it was held that the sublessee not being the servant or agent of the defendant, the latter could not be said to have done or suffered to be done the act by reason of which the license was not renewed, and therefore the action was not maintainable.⁷³ The lessee covenanted for himself and assigns that he would “at all times during the continuance of this demise use and keep open the said premises as a licensed public house for the sale of ale, wine,

⁷² Palenthorpe v. Home Brewery Co., Limited [1906], 2 K. B. 5; 75 L. J. K. B. 555; 94 L. T. 871; 54 W. R. 489; 22 T. L. R. 505,

distinguished Bryant v. Hancock, *supra*.

⁷³ Wilson v. Twamley [1904], 2 K. B. 99; 88 L. T. 803; 52 W. R. 529; 20 T. L. R. 440.

beer and spirits therein, and will so conduct and manage the same as to afford no reasonable or lawful ground or pretense for the justices refusing to renew, endorsing or objecting to the renewal of the licenses now attached to the said premises for the sale of ale, wines and spirituous liquors." An offense was committed by a tenant of the lessees, and it was held to be a breach, the covenant being absolute.⁷⁴ The defendant expended money upon converting a village public house into an inn with good accommodations for guests who desired to stay there. The plaintiffs, who were the owners of the house, gave him a lease thereof for a term of fifty years, and the defendant covenanted that he would not use the premises otherwise than as an inn, tavern or licensed house, and that he would during the term, so long as the requisite license could be obtained, keep the house open in due and proper course of business as an inn, tavern or licensed victualling house during the greatest number of days and the greatest number of hours that should be allowed by law, and would conduct and manage the same in a lawful and proper manner, and would not do or suffer anything whereby the licenses or any of them might be or become liable to be forfeited or suspended or the renewal thereof withheld or whereby the trade or business or good-will thereof might be or become liable to be prejudicially affected, or break the laws affecting licensed victuallers, either by act of commission or omission, and would not affix any advertisement or placard in the premises except trade advertisements. The defendant proposed to exhibit a notice in the house that no one would be served with refreshment on Sunday except visitors staying in the hotel and their guests and travelers, and that no one would be served with alcoholic drink more than once during any morning or afternoon or evening of any week day. The court of appeals held that the proposed mode of carrying on the business was a breach of the covenants of the lease, and granted an injunction, restraining the defendant from acting on the notice and from erecting, affixing or putting up the

⁷⁴ Mumford v. Walker [1901], 71 L. J. K. B. 19; 85 L. T. 518; 18 T. L. R. 80.

notice in any part of the premises.⁷⁵ An agreement for the lease of a public house contained no reference as to the covenants to be inserted in the lease. The lessor insisted upon covenants by the lessee: (1) To reside on the premises and personally conduct the business; (2) not to assign without consent, and that the proviso for re-entry should extend to the breach of any covenant. The lessee objected that these were not "usual" clauses. It was held that covenants one and two could not be insisted on as "usual" covenants; and on this point the fact that the subject matter of the lease was a public house made no difference, and that the proviso for re-entry could not be limited to the case of non-payment of rent.⁷⁶ M, a traveler, agreed with R, a brewer, that for two years after the determination of his employment he would not be concerned in selling malt liquor or aerated waters within a certain district. R never dealt in aerated waters, nor required M to obtain orders for them. M, after leaving R's employment, became a traveler to rival brewers within the prescribed district. An injunction was granted restraining M from selling malt liquors by wholesale or retail within the district, but injunction refused as to aerated waters. It was also held in this case that selling wholesale and retail were not two distinct businesses, but only different modes of carrying out the one business of selling malt liquors.⁷⁷ A reversionary lease was granted to defendant by plaintiff's predecessor for a term of years, to take effect on the determination of the tenancy of the then tenant. One of the covenants of the lease was that the lessee should, during the continuance of the term thereby granted, use the demised premises as and for a fully licensed public house only as long as the necessary license could be obtained for that purpose. The license was forfeited during the tenancy of the tenant, and before the date of the commencement of the defendant's lease. The premises accordingly were greatly depreciated. It

⁷⁵ Dartford Brewery Co., Limited, v. Till [1906], 70 J. P. 519; 95 L. T. 836; 22 T. L. R. 792.

⁷⁶ *In re Lander and Bagley's Contract* [1892], 3 Ch. 41.

⁷⁷ *Rogers v. Maddocks* [1892], 3 Ch. 346.

was held that there was no implied condition in the lease that the premises should be maintained as a fully licensed house at the commencement of the defendant's lease, and that the defendant was liable for the rent reserved under the lease.⁷⁸ A covenant in a lease was that the plaintiff (the lessee) would not assign, underlet or part with the possession of the licensed premises without the consent in writing of the defendant (the lessor) unless such consent should be unreasonably withheld, and also that she would at all times during the term reside upon the premises and personally carry on the business of a licensed victualer thereon. The lease was for fourteen years, from December 25, 1904, at a rental of £100 a year. The plaintiff applied for consent to assign her lease to a limited company who were brewers. The defendant was willing for the plaintiff to assign the lease to a private person or to brewers, but if to brewers (who would "tie" the house), the rent must be increased from £100 to £125 a year, and the lease extended to twenty-one years. The company refused to take the lease on these terms. The court of appeals held, without deciding the point as to the right to impose an increased rent, that the covenant amounted to a covenant not to assign to a limited company.⁷⁹ A covenant in a lease for a term of fifty years at a yearly rent of £100 provided that "until a license to sell beer or wine upon the premises should have been granted and obtained as hereinafter mentioned," the lessors agreed to accept £40 a year, and "further, that after a license to sell beer or wine upon the premises had been obtained, and until a victualer's license should have been granted," and "as hereinafter mentioned * * * to accept the rent from the time such license to sell beer or wine was granted at the rate of £60 a year." There was also a covenant by the lessee to apply for all licenses until a full license had been obtained. The lessee obtained an "off" beer license. The lessor claimed the additional rent of £20 a year. It was held by the court of appeal that the additional

⁷⁸ *Blum v. Ansley* [1900], 64 T. L. R. 70, reversing *Swinfen J. P.* 184.

⁷⁹ *Jenkins v. Price* [1907], 24 Ch. 507.

rent was only to become payable when a license to sell beer or wine to be consumed on the premises (that is, an "on" license) and been granted to the lessee, and therefore the additional rent of £20 was not payable.⁸⁰ A covenant in a lease for a term of twenty-one years at a certain yearly rent provided: "Also paying the additional yearly sum of £10 in the event of an 'off license' being obtained for the sale of beer on the said premises, such additional rent to commence from the date of the granting of such 'off license,' the first payment to be made on the quarterly day for payment of rent next ensuing after the said 'off license' shall have been granted;" and also provided that the lessee should not use or exercise upon the demised premises the trade or business of a common brewer, distiller, coffee-house keeper, etc., "but the said lessee is to be at liberty to carry on the business of an off license beerhouse keeper for the sale of beer drawn from the cask and engine as well as in bottle upon the said premises if he obtains the necessary license for so doing;" the lessee was not to make any alteration on the demised premises "without the consent in writing of the lessors beyond adapting the said premises suitable for the purpose of carrying on the business of an off license beerhouse keeper thereon." An off wine and spirit license had in fact been granted in respect of the premises in 1879, and an off beer license in 1880, and these licenses had been renewed from year to year and transferred from time to time as occasion required. At the granting of the lease in 1903 it appears that the lessor was not aware that an off beer license was in existence in respect of the premises. The lease was assigned to the defendants on August 17, 1906, when the existence of the license came to the knowledge of the lessor. Upon the assignment of the lease to the defendants they obtained a transfer of the license. The lessor thereupon claimed the higher rent. It was held that on any renewal or transfer of the license there was within the meaning of the lease a sufficient granting of an off license to sell beer to make the

⁸⁰ *Hain v. Royal Brewery, Brentford, Limited* [December 15, 1904] (not reported).

higher rent payable, and that the defendants were liable to pay the higher rent from August 17, 1906, the date of the transfer. The decision was, on appeal, affirmed by the court of appeal.⁸¹ The tenant of licensed premises covenanted to pay the rent and to keep the premises continuously open as an hotel and to conduct and manage the hotel in an orderly manner and not to do anything whereby the license might be endangered. He made default in payment of a quarter's rent and shut up the hotel for short periods, as he had not the means to carry it on. In an action by the lessors to recover possession of the premises, the judge at chambers, upon the application of the plaintiffs made an order for the appointment of a receiver of the rents and profits of the hotel, and the defendant was ordered to deliver up to the receiver all books, papers and licenses relating thereto, and also possession of the premises so far as was necessary for the purposes of the receiver, who was to be at liberty to appoint some fit and proper person to reside upon the premises, and to hold the licenses and conduct the business under his supervision. The court of appeal held that the order, so far as it appointed a receiver of the licenses and of the rents and profits of the hotel, and gave him possession thereof as was necessary for preserving the license, was right; but that it went too far in ordering the defendant to deliver over all books and papers, and authorized the receiver to appoint some one to conduct the business: and that therefore the order should be modified in that respect by ordering the defendant to hand over the licenses to the receiver, and the receiver would be authorized to appoint some fit and proper person to do such things as were necessary to prevent the licenses being endangered.⁸² Lady Henry Somerset was held not entitled

⁸¹ *Isaacs v. Stansfield & Co., Limited* [November 1, 1907] (not reported).

⁸² *Leney & Sons, Limited v. Calingham and Thompson* [1907], 24 T. L. R. 55. A similar course was adopted in *Charrington & Co., Limited, v. Camp* [1902], 1 Ch. 386;

71 L. J. Ch. 196; 86 L. T. 15; 18 T. L. R. 152; and *Whitbread & Co. v. Grain* [1907], 23 T. L. R. 462; but the order as drawn up in *Charrington's Case* went too far. As to exclusive license and right to use refreshment rooms at a theater, see *Edwardes v. Barring-*

to exercise her powers as tenant for life under a settlement by granting a lease of the White Hart Hotel, Reigate, or of any other licensed premises forming part of the settled estates containing any covenant to the effect that the demised premises should not be used for the sale of intoxicating liquors, or not containing proper provisions for the continuance or renewal of all licenses which at the time of the demise might be held in respect of the demised premises.”⁸³

Sec. 1028. Contracts of sale of licensed premises.

“The case⁸⁴ of transfer of licenses is often mixed up with the sale of the business of a publican. In *Claydon v. Green*,⁸⁵ the vendor of a public house agreed to sell the business and assign the license on February 5, 1867. It turned out that the licenses were held in the name of the vendor’s son, who had gone to America, and was not heard of, and the business had been carried on in the name of another son, no indorsement or application for transfer being deemed possible. The court held that the vendor, not being able to perform his contract, the purchaser was entitled to recover back his deposit. In *Day v. Luhke*,⁸⁶ a vendor covenanted to transfer the license on a given day. On the day in question the holder of the license could not be got to authorize an application to the justices, and so a transfer was not obtained. It was held that the vendor, having failed to carry out the contract, the purchaser could repudiate the contract. So when the license cannot be secured the contract for sale of the public house as a going concern may always be repudiated.⁸⁷ But the vendor is not bound, apart

ton [1902], 50 W. R. 358; 85 L. T. 650; 18 T. L. R. 169.

⁸³ *In re* Earl Somers, deceased; *Cocks v. Lady Henry Somerset* [1895], 11 T. L. R. 567. As to mutual dealings between brewer and licensee of a “tied house” on the licensee’s bankruptcy, see *In re Rushworth; Ex parte Holmes* [1906], 32 T. L. R. 41.

⁸⁴ This section is taken from

Patterson’s Licensing Acts (19 ed.), p. 128.

⁸⁵ [1868] L. R. 3 C. P. 511; 37 L. J. C. P. 226; 18 L. T. 607; 16 W. R. 1126.

⁸⁶ [1868] L. R. 5 Eq. 336; 37 L. J. Ch. 330; 16 W. R. 719; 32 J. P. 499.

⁸⁷ *Cowles v. Gale* [1871], L. R. 7 Ch. 12; 41 L. J. Ch. 14; 25 L. T. 524; 20 W. R. 70.

from special contract, to procure a transfer of the license to the purchaser.⁸⁸ Where parties contract on the footing of a license being in force, and it appears that the existing license is subject to qualifications, the contract cannot be enforced.⁸⁹ Where a vendor contracts to sell the beer of a free house, the purchaser may rescind and claim the return of his deposit if upon the date fixed for completing it the vendor is in a position to sell only a lease of a tied house.⁹⁰ The conditions of sale of a public house stated that it was in the occupation of a tenant. A brewer, intending to use the public house for the sale of his beer, agreed to buy it. He afterwards learned that it was under lease to another brewer for a term of which eight years were unexpired. It was held that the purchaser was not bound to ascertain from the tenant the term of his tenancy; and that in such case the vendor could not enforce specific performance.⁹¹ At the expiration of the lease the licensee may be entitled to the good will according to his covenant, in which case the good will may require to be valued.⁹² Or the good will may be declared to go with the house.⁹³ But the good will carries the right to get the transfer of a license, if procurable.⁹⁴ Where a mortgage contained no reference to the good will of the house and the mortgagees were never in possession, it was held that the good will bore no part of the mortgage debt.⁹⁵ A covenant is often given by the vendor of the good will not to carry on business within a certain distance. Such distance

⁸⁸ Tadcaster Tower Brewery Co. v. Wilson [1897], 1 Ch. 705; 61 J. P. 360; 66 L. J. Ch. 402; 76 L. T. 459; 45 W. R. 428; 13 T. L. R. 295.

⁸⁹ Modlen v. Snowball [1861], 4 De. G. F. & J. 143; 31 L. J. Ch. 44.

⁹⁰ Warren v. Moore [1897], 14 T. L. R. 138.

⁹¹ Caballero v. Henty [1874], L. R. 9 Ch. 447.

⁹² See Llewellyn v. Rutherford [1875], L. R. 10 C. P. 456; 44 L. J. C. P. 281; 32 L. T. 610.

⁹³ *Ex parte* Punnett [1880], 16 Ch. D. 226; 50 L. J. Ch. 212; 44 L. T. 226; 29 W. R. 129.

⁹⁴ Rutter v. Daniel [1882], 46 L. T. 684; 30 W. R. 801. As to the value of tied houses included in a brewer's goodwill, see *Page v. Ratcliffe* (No. 2) [1896], 75 L. T. 371.

⁹⁵ *In re* Bennett, *Clark v. White* [1899], 1 Ch. 316; 68 L. J. Ch. 104; 47 W. R. 406.

is, unless the context varies it, measured in a **straight line**.⁹⁶ A testator, a brewer, by his will directed that his **trustees** should offer his business for sale, but without **consideration** for the good will thereof, namely, the brewery, dwelling houses, malting house and the licensed houses connected therewith or attached thereto, to his two sons on certain conditions, and the question was whether these sons, who had the option of purchase, had to pay for the seven public houses which were tied to the brewery, valuing them as licensed houses; in other words, whether the good will was confined to the business or whether it also included the separate good will of the public houses. Parker, J., held that no part of the value of the public houses which are tied to a particular brewery can be deemed to be a part of the value of the good will of the brewery itself. He accordingly declared that as regards the tied houses, for the purpose of the option, they must be valued on the basis of the estimated rental which they were capable of producing if let as licensed houses in the open market to intending lessees, whether they be brewers or not, and therefore they were not included in the good will of the brewery.⁹⁷ If a tendered lease contains a covenant to leave the assignment with the ground landlord's solicitor, the sale may go off.⁹⁸ If, at the termination of a lease, the good will is to be allowed to the tenant, the tenant may sue the landlord for the same.⁹⁹ If there is a covenant on bankruptcy of lessee for landlord to re-enter, the license does not pass to the trustee of bankrupt, for a license is not property.¹ Where

⁹⁶ *Moufflet v. Cole* [1872], L. R. 8 Ex. 32; 42 L. J. Ex. 8; 27 L. T. 678; 21 W. R. 175.

⁹⁷ *Re Saunders* (deceased); *Saunders v. Saunders*, Ch. D. [March 7, 1907] (not reported).

⁹⁸ *Brooks v. Drysdale* [1877], 3 C. P. D. 52; 37 L. T. 467; 26 W. R. 331.

⁹⁹ *Llewellyn v. Rutherford* [1875], L. R. 10 C. P. 456; 44 L. J. C. P. 281; 32 L. T. 610, *supra*.

¹ *Re Britnor* [1877], 46 L. J. Bk. 85; 25 W. R. 560. See a sale set aside describing hotel as "let to a most desirable tenant" (*C.*) *Smith v. Land Corporation* [1884], 28 Ch. D. 7; 49 J. P. 182; 51 L. T. 718. As to sale of trade fixtures in a public house, see *Lea v. Whitaker*; [1872] L. R. 8 C. P. 70; 37 J. P. 183; 27 L. T. 676; 21 W. R. 230. As to sale of public house subject to condition that

a purchaser discovers that a representation made to him by a vendor is untrue, if the vendor suggests that if time be given him the representations may be cured, and the purchaser put in as good a position as if the representation had been true; the purchaser by giving the vendor time does not lose his right to rely on the misrepresentation and determine the contract, if at the end of the time the vendor fails to make good his suggestion.² Where a purchaser agreed to take an assignment of a lease of a public house with a stipulation that there were twelve and a half years to run, but subsequently discovered that the lease was determinable at the end of five years at the option of the lessors, it was held that the purchaser was justified in refusing to complete and in claiming a return of the deposit he had paid.³ The lessee of a public house contracted to sell under an open contract the lease to a brewery company. The lease contained a covenant that the lessee would not assign, underlet or otherwise part with the demised premises without the written consent of the lessor, but that such consent should not be unreasonably withheld in the case of a respectable and responsible tenant. The lessor refused to consent chiefly on the ground that he wished to retain the lease as a 'free house,' and it was held that the vendor had not made out a sufficient title which could be forced on the purchaser.⁴ In estimating the price to be paid as compensation for compulsorily taking the reversionary interest in a public house after the end of a twenty-five years' lease, it was held that evidence was properly received as to the possibility of such interest being enhanced by still having

gagee should allow mortgagor to remain, and premature rescission by intending purchaser, see *Smith v. Butler* [1900], 1 Q. B. 694; 69 L. J. Q. B. 521; 48 W. R. 583; 82 L. T. 281; 16 T. L. R. 208.

As to stamp duty on the sale of a "lease and goodwill" of a hotel, see *West London Syndicate v. Inland Revenue Commissioners*, [1898], 2 Q. B. 507; 67 L. J. Q.

B. 956; 79 L. T. 289; 47 W. R. 125; 14 T. L. R. 569.

² *Tibbatts v. Boulton* [1895], 73 L. T. 534.

³ *Creton v. Savory* [1879], 10 Ch. D. 736.

⁴ *In re Marshall & Salt's Contract* [1900], 2 Ch. 202; 69 L. J. Ch. 542; 48 W. R. 508; 83 L. T. 147.

a license attached to the premises.⁵ A signboard of a public house erected on a post by the wayside is usually an incorporeal hereditament which passes with the house.⁶ The right to have a signboard affixed to an adjoining house may be lawfully claimed as an easement.⁷ A metropolitan borough council has power to enter into arrangement with a landowner as part of a scheme for widening a road, to remove a sign post belonging to him to a position on the edge of the public footpath.⁸ A valuable picture painted by David Cox and fixed outside an inn as a signboard was held to belong to the landlord as a fixture.⁹ A brewer's lease which gives a power to distrain upon the tenant's default in paying for goods supplied to him has been held to be a bill of sale."¹⁰

⁵ *Belton v. London County Council* [1893], 68 L. T. 411; 57 J. P. 185; 62 L. J. Q. B. 222; 41 W. R. 315; 9 T. L. 232. See also *Bourne v. Mayor, etc., of Liverpool* [1863], 32 L. J. Q. B. 15.

In re an Arbitration between Chandler's Wiltshire Brewery Co. and London County Council [1903], 1 K. B. 569; 72 L. J. K. B. 250; 67 J. P. 119; 51 W. R. 573; 88 L. T. 271; 19 T. L. R. 268.

By an agreement in writing the lessee of a theater granted and let to the plaintiff the free and exclusive right to sell refreshments, etc. The theater was compulsorily purchased for a public improvement, and the plaintiff claimed compensation under § 45 of the Lands Clauses Consolidation Act [1845]. It was held that the agreement created a license and not an interest in land within § 68, and that the claim for compensation failed.

Frank Warr & Co., Limited v. London County Council [1903], 67 J. P. 403; 88 L. T. 689; 19 T. L.

R. 436; affirmed, C. A. 20 T. L. R. 346.

As to the valuation of a tied public house with reference to a "betterment" assessment consequent on a public improvement, see *In re an Arbitration between the London County Council and the City of London Brewery Co.* [1898], 1 Q. B. 387; 61 J. P. 808; 67 L. J. Q. B. 382; 77 L. T. 436; 46 W. R. 172; 14 T. L. R. 69.

⁶ *Hoare v. Metropolitan Board of Works* [1874], L. R. 9 Q. B. 296; 38 J. P. 535.

⁷ *Moody v. Steggles* [1879], 12 Ch. D. 261; *Francis v. Hayward* [1882], 22 Ch. D. 177; 47 J. P. 517.

⁸ *Hoare & Co., Limited v. Lewisham Borough Council* [1902], 87 L. T. 281; 17 T. L. R. 72.

⁹ *Ex parte D'Eresby* [1881], 44 L. T. 781; 29 W. R. 527.

¹⁰ *Pulbrook v. Ashley* [1887], 56 L. J. Q. B. 376; 35 W. R. 779. See also *Ex parte Hoperoft* [1868], 14 W. R. 168.

PART II.

DRUNKENNESS.

1835

CHAPTER XXXII.

CIVIL DAMAGES.

- I. RIGHT OF ACTION.
- II. GROUNDS OF ACTION.
- III. DEFENSES.
- IV. PERSONS ENTITLED TO SUE.
- V. PERSONS LIABLE
- VI. ACTIONS
- VII. EVIDENCE.
- VIII. DAMAGES.
- IX. TRIAL AND REVIEW.

ARTICLE I.—RIGHT OF ACTION.

SECTION.

- 1029. Remedy under common law.
- 1030. Remedy under statute.

SECTION.

- 1031. Constitutionality of statute.

Sec. 1029. Remedy under common law.

The right of persons injuriously affected by the sale of intoxicating liquors to recover damages is not entirely restricted to the right given them by statute. In several jurisdictions it has been held that when, by the continued sale of intoxicating liquors, a person has been unable to perform the duties owing by him to another, under the common law, the seller was liable in damages to persons to whom the duty was owing for any loss that he thereby sustained.¹ However, it may be stated

¹ In the case of *Holleman v. Harward*, 119 N. C. 150; 25 S. E. 972, the court said: "It is lawful to sell laudanum as a medicine. It is also lawful to sell spirituous liquors as a beverage upon the

dealers complying with the license laws, except in the cases prohibited by statute. Certainly no fair inference can be drawn from this that damages may not be recovered from one who knowingly and willfully

as a general rule, that unless the rights of persons having peculiar interests in the buyers of intoxicating liquors, such as a wife in her husband, or parent in the child, are invaded by the sales of intoxicating liquors and the seller of such liquors has notice of the injurious effects of the liquors so sold upon the buyer,² the right to recover damages for injuries resulting from the sales of intoxicating liquors is purely statutory,³ and the action is governed entirely by the provisions of the statute.⁴

sells or gives laudanum or intoxicating liquors to a wife, in such quantities as to be attended by such consequences to the wife as are set out in the complaint in this action. We have in our State (Code, § 1077) a statute which makes it unlawful to sell liquor in any quantity to a minor (except he is a married man), and § 1078 gives to the person injured damages therefor. But suppose we had not statute on the subject of liquor selling to minors, would the law permit with impunity a dealer or other person to sell liquor to a man's child, without his knowledge or consent, in such quantities as to produce habitual intoxication, or to render him unfit for employment?" See also *Harrison v. Berkley*, 1 Strobb. L. (S. Car.) 525; 47 Am. Dec. 578; *Hoard v. Peck*, 56 Barb. (N. Y.) 202; *Westbrook v. Miller*, 90 N. Y. Supp. 558; 98 App. Div. 590. A common law declaration upon the statute is sufficient. *Kehrig v. Peters*, 43 Mich. 475; 2 N. W. 801.

The usual statutory right to recover damages because of illegal sales to a person, resulting in his death, is not restricted to narrower limits than Lord Campbell's Act, and while loss of support is

a pecuniary injury, it is not the only damage for which a recovery may be had. *Murphy v. Willow Springs Brewing Co.*, 81 Neb. 223; 115 N. W. 763.

The action given by statute survives the death of the defendant. *Moriarty v. Bartlett*, 34 Hun. 272. But the death of the plaintiff abates the cause of action. *Ellis v. Brooks*, 101 Tex. 591; 102 S. W. 94; 103 S. W. 1196. It is not assignable. *Magee v. McCan*, 69 Me. 79.

² *Holleman v. Harward*, 119 N. Car. 150; 25 S. E. 972; *Hoard v. Peck*, 56 Barb. (N. Y.) 2021; *Struble v. Nodwift*, 11 Ind. 64.

³ In the case of *Cruse v. Aden*, 127 Ill. 231; 20 N. E. 73; 3 L. R. A. 327, the court said: "It was not a tort at common law to either sell or give intoxicating liquor to 'a strong and able-bodied man,' and it can be said safely that it is not anywhere laid down in the books that such act was ever held at common law to be culpable negligence, that would impose legal liability for damages upon the vendor or donor of such liquor."

⁴ *Cruse v. Aden*, 127 Ill. 231; 20 N. E. 73; 3 L. R. A. 327.

As to change of statute and its

Sec. 1030. Remedy under statutes.

While the action is governed entirely by the statutory provision in each State, it may be stated in a general way that the purpose of the statute is to give a remedy when one is injured in his person or property by an intoxicated person or when a person is injured in his or her means of support by reason of the intoxication of any person.⁵ It was not intended as a means of speculation, however, and, therefore, unless a person has been injured in his person or property or means of support, although the intoxicated person may lose time, neglect his business, earn less money, lose it by neglect of business or become injured by reason of the intoxication, there can be no recovery.⁶

effect on accused actions, see *Palmer v. Schurz* (S. D.), 117 N. W. 150.

⁵ *Gardner v. Day*, 95 Me. 558; 50 A. 892.

⁶ In the case of *Confrey v. Stark*, 73 Ill. 137, the court said: "Where the husband has an abundance of means of support for himself and family, and liquor is sold to him, and he becomes intoxicated, but does not injure the person of the wife, or his or her property, we are at a loss to see how a recovery can be had, because there is no injury to either the person of the wife, to the property or to her means of support; and it is only for the injury to some one or more of them that a right of recovery is given. The law was not intended as a means of speculation, but as a protection against injury to the wife and children of the drunkard, to preserve the property used by the family from destruction, or injury, and to protect the family against

immediate or probable want of adequate support; not to enable the affluent, or those well provided for, to sue and recover simply because the husband and father may become intoxicated, and, whilst in that condition, loses time, neglects his business or becomes injured, or earns less money, or even loses it by neglect of business, and hence is not possessed of as large means as he otherwise would have been."

An action by a State to recover penalties is a civil action. *James v. Helm*, 129 Ky. 323; 111 S. W. 335; *Fowler v. Rome Dispensary*, 5 Ga. App. 36; 62 S. E. 660.

In Mississippi the attachment provided for is upon a new ground, distinct from that given by the Civil Code. *Adams v. Johnson*, 72 Miss. 896; 17 S. E. 682.

In Canada it is a civil action, *Willett v. Viens*, 2 Que. S. C. 514; *Sauvage v. Trouillet*, 3 Mon. S. C. 276; *Ex parte Trembly*, 7 Mon. S. C. 17.

Sec. 1031. Constitutionality of statutes.

The civil damage acts of the several States have uniformly been held constitutional.⁷ The principle upon which is based this ruling is found in the police power of the several States,⁸ and it should be borne in mind in determining the constitutionality of these statutes, that no one possesses an inalienable or constitutional right to keep a saloon for the sale of intoxicating liquors.⁹ If the Legislature sees fit to permit the sales of intoxicating liquors, it has the right to allow them upon such terms and conditions as, in its discretion, it may impose, and if a party takes advantage of the permit to sell, he cannot object, on constitutional grounds, to a liability which he has voluntarily assumed, in consideration of the benefit conferred.¹⁰ Thus, a statute which, in the absence of proof of actual damages, authorizes a recovery for a fixed sum is not in violation of the constitutional provision which denies the right to take private property "without due process of law."¹¹ Nor is a civil damage statute

⁷ *Horning v. Wendell*, 57 Ind. 171; *Moran v. Goodwin*, 130 Mass. 158; 39 Am. Rep. 443; *Howes, Treas., v. Maxwell*, 157 Mass. 333; 32 N. E. 152; *Kreiter v. Nichols*, 28 Mich. 496; *Cramer v. Danielson*, 99 Mich. 531; 58 N. W. 476; *Bedore v. Newton*, 54 N. H. 117; *Baker v. Pope*, 2 Hun, 556; *Franklin v. Schermerhorn*, 8 Hun, 112; *Bertholf v. O'Reilly*, 74 N. Y. 509; *Mardorf v. Hemp* (Penn.), 6 A. 754; *Sibila v. Bahney*, 34 Ohio State, 399; *Stanton v. Simpson*, 48 Vt. 628; *State ex rel. Hemhall v. Ludington*, 33 Wis. 107; *Werner v. Edmiston*, 24 Kans. 147.

⁸ In *Howes, Treas., v. Maxwell*, 157 Mass. 333; 32 N. E. 152, the court said: "If the Legislature, in the exercise of its police power, has the right to prohibit absolutely the sale of intoxicating liquors, it has the right to allow

them to be sold on such terms and conditions as it sees fit to impose." See also *Franklin v. Schermerhorn*, 8 Hun, 1121; *Bertholf v. O'Reilly*, 74 N. Y. 569.

⁹ *State v. Gerhardt*, 145 Ind. 439; 44 N. E. 469; *Sherlock v. Stuart*, 96 Mich. 193; 55 S. W. 845.

¹⁰ *Bertholf v. O'Reilly*, 74 N. Y. 509.

¹¹ In the case of *Cramer v. Danielson*, 99 Mich. 531; 58 N. W. 476, the court said: "We do not think the statute open to the objections suggested. The Legislature, by the enactment, but recognized a well-known fact in assuming that a sale of intoxicating liquors to a minor of necessity works an injury to any plaintiff to whom the information comes of such a disregard of right."

unconstitutional on the ground that it puts a person twice in jeopardy for the same offense.¹² Nor is an act which provides a recovery against persons who contribute to the intoxication of any person unconstitutional on the ground that it holds one man responsible for the act of another.¹³ Nor is an act unconstitutional as being an unlawful "taking" or "depriving" of property within the Constitution which creates a cause of action for damages in favor of a person injured in person or property by the act of an intoxicated person against the owner of real property, whose only connection with the injury is that he leased the premises where the liquor causing the intoxication was sold or given away, with knowledge that intoxicating liquors were to be sold thereon.¹⁴ Nor does an act which requires a person receiving a license to give a bond conditioned that he will not sell to a husband after he has been notified by the wife not to, abridge the privileges and immunities guaranteed a citizen by the Constitution of the

¹² In the case of *Bedore v. Newton*, 54 N. H. 117, the court said: "It has been further argued that the law is a penal law, and that it is unconstitutional because it inflicts a second penalty, to be measured only by the caprice of a jury, for an offense already made punishable by a prescribed and definite fine. This view cannot be sustained for the reason that it is not true in fact. The statute gives to certain specified persons the right to recover the damage actually caused to them by the defendant's illegal act, and nothing more. Whether the defendant has been or may thereafter be prosecuted for his violation of the criminal law of the State no more concerns the party who has suffered a private wrong and damage by the same act in this case, than in case of an assault and battery, a larceny or other crime, whereby

damage is inflicted on an individual by the same act which constitutes a public wrong or crime."

¹³ In the case of *Sibila v. Bahney*, 34 Ohio State, 399, the court said: "The business of the defendant, as conducted by him, being in open violation of the statute, a provision that holds him responsible for an injury to which his unlawful conduct contributes, cannot be said to be in conflict with any right guaranteed by the Constitution. By causing, in conjunction with others, the injury for which the action is brought, by an act in clear violation of the statute, he becomes a joint tortfeasor, and, as at common law, is liable for the entire damages resulting from such injury."

¹⁴ In the case of *Bertholf v. O'Reilly*, 74 N. Y. 509, the court said: "The liability imposed upon the landlord for the acts of the

United States.¹⁵ Nor is an act unconstitutional because it abridges the licensee's rights under his license, for the reason that such licensee takes his license subject to all existing laws, and to such as may thereafter be passed.^{15*} Nor is a civil damage statute unconstitutional as being in conflict with a provision of the Constitution prohibiting the Legislature from passing an act with more than one subject, where such statute is a part of the general liquor law of the State, and the title of the act provides for the licensing, restriction and regulation of the business.¹⁶

ARTICLE II.—GROUNDS OF ACTION.

SECTION.

- 1032. Construction of statute.
- 1032a. Right of action in general.
- 1033. Illegality of sale.
- 1034. Sale contrary to notice.
- 1035. Injuries to person—Mental suffering.
- 1036. Injuries to property.
- 1037. Injuries to means of support.
- 1038. Proximate cause of injury.
- 1039. Injuries produced by an intoxicated person.

SECTION.

- 1040. Injuries produced by reason of intoxication of any person.
- 1041. Sales causing death of purchaser.
- 1042. Commission of crimes by intoxicated person.
- 1043. Injury to person and property by reason of crime of drunken person.
- 1044. Injury to means of support by reason of punishment of drunken person.

tenant is not a new principle in legislation. His liability only arises when he has consented that the premises may be used as a place for the sale of liquors. He selects the tenant, and he may, without violating any constitutional provision, be made responsible for the tenant's act connected with the use of the leased property."

¹⁵ Bell v. State, 28 Tex. App. 96; 12 S. W. 410.

^{15*} In the case of Moran v. Goodwin, 130 Mass. 158; 30 Am. Rep. 443, the court said: "The claim

that the statute is unconstitutional, because in derogation of the contract of license itself, clearly cannot be supported. The license is not a contract. The license is simply an authority to sell according to law, and subject to all the limitations, restrictions and liabilities which the law imposes." See also Baker v. Pope, 2 Hun, 556; Horning v. Wendell, 57 Ind. 171.

¹⁶ Garrigan v. Kennedy, 101 N. W. 1081; Palmer v. Schurz (S. D.), 117 N. W. 150.

Sec. 1032. Construction of statutes.

The rule of construction for this class of statutes is well set out in a New York case¹⁷ as follows: "While a statute of this character should not be enlarged, it should be interpreted, where the language is clear and explicit, according to its true intent and meaning, having in view the evil to be remedied and the object to be attained. The evident object was to suppress the sale and use of intoxicating liquors, and to punish those who, in any form, furnished means of intoxication, by making them liable for damages which might arise, which were caused by the parties who furnished such means."¹⁸ This salutary rule is not in conflict with the rule that the civil damage statutes being highly penal in character, and providing a right of action unknown to the common law, and in which the party prosecuting has a decided advantage, should receive a strict construction,¹⁹ because, although a party's right to recover under such statutes is limited strictly to the terms thereof; nevertheless the terms of such statutes are not to be narrowed by construction so as to defeat their evident purpose.²⁰ These statutes have no extra territorial effect,²¹ because as the right to recover damages for injuries resulting from the sales of intoxicating liquors is purely statutory, and as an act to be actionable must be tortious by the law of

¹⁷ *Mead v. Stratton*, 87 N. Y. 493; 41 Am. Rep. 386; *Trice v. Robinson*, 16 Ont. Rep. 433.

¹⁸ *Gardner v. Day*, 95 Me. 558; 50 A. 892; *Schneider v. Hosier*, 21 Ohio State, 98.

¹⁹ *Freese v. Tripp*, 70 Ill. 496; *Lewis v. City Na. Bank*, 72 Ill. 543; *Meidel v. Anthis*, 71 Ill. 241; *Schulte v. Schleeper*, 210 Ill. 357; 71 N. E. 323; *McLees v. Niles*, 93 Ill. App. 442; *Walker v. Daily*, 101 Ill. App. 575; *Schneider v. Hosier*, 21 Ohio State, 98 *Sackett v. Ruder*, 152 Mass. 397; 25 N. E. 736; *Fenty v. Meadowe*, 72 Ill. 540.

²⁰ *Westbrook v. Miller*, 90 N. Y. Supp. 558; 98 App. Div. 590;

Smith v. Wilcox, 47 Vt. 537; *Currier v. McKee*, 99 Me. 364; 59 Atl. 442.

²¹ In the case of *Goodwin v. Young*, 34 Hun, 252, the court said: "Our statute gives a cause of action for the injury, and this, as it is a special statutory provision, must refer to an injury done in this State. It cannot be intended to have an extra territorial effect. The statute is peculiar in that it makes an innocent man liable for the wrongful act of another. But we are confident that its effect must be limited to the State."

the place where it is committed,²² it cannot be said that the law of one State which makes the sales of intoxicating liquors actionable under certain conditions can be applied if such sales are not actionable in the State where the injury was sustained. Nor are such laws retroactive.²³

Sec. 1032a. Right of action, in general.

As a general rule, under the civil damage laws, three acts must occur before there can be a recovery, to-wit: First, sale, gift or furnishing of intoxicating liquors by the defendant or his authorized agent or servant; second, the intoxication of another person resulting in whole or in part from such sale, gift or furnishing of the liquor; third, injury to the person, property or means of support of a third person by reason of such intoxication.²⁴ And as the action is statutory, the right to recover is limited strictly to the terms of the statute.²⁵ Thus where one person drinks intoxicating liquors purchased by another, the vendor is not liable for the evil consequences of the intoxicating liquors so drunk, where the statute limits the liability of the dealer to "sales" or "gifts" made by him or his authorized agents, though such liquors be drunk in the presence of the vendor.²⁶ But where the statute prohibits the dealer from "selling," "giving" or

²² See *Forest v. Tolman*, 117 Mass. 109.

²³ *Dubois v. Miller*, 5 Hun, 332.

²⁴ In *Homire v. Halfman*, 156 Ind. 470; 60 N. E. 154, the court said: "Under the act it is necessary that two facts should occur beside the sale or gift of the liquor by the defendant to constitute a cause of action, to-wit: intoxication resulting from its use in whole or in part and the loss of the means of support by the plaintiff in consequence of such intoxication. The statute requires nothing more." See also *Gardner v. Day*, 95 Me. 558; 50 A. 892; *Boos v. State*, 11 Ind. App. 257; 39 N. E.

197; *Wesnieski v. Vanek*, 99 N. W. 258; *Baker v. Summers*, 201 Ill. 52; 66 N. E. 302; *Johnson v. Carlson*, Neb. 95 N. W. 788; *Seagin v. Ehmke*, 120 Iowa, 464; 94 N. W. 938; *Aldrich v. Sager*, 9 Hun, 537; *Schafer v. State*, 49 Ind. 460.

²⁵ *Brannan v. Adams*, 76 Ill. 331.

²⁶ In *Siegil v. People*, 106 Ill. 99, the court said: "It is impossible that, by the mere act of one person's drinking liquor ordered and paid for by another, a liability can be imposed on the vendor, under the sections before us." See also *Goddard v. Burnham*, 124 Mass. 578.

“furnishing” intoxicating liquors to minors, it has been held that a saloon keeper who, without a protest, allows an adult to buy intoxicating liquor and give it to a minor to drink in his saloon violates the act prohibiting the “furnishing” of intoxicating liquors to minors.²⁷ In several jurisdictions it has been held that the term “give” was broad enough to make liable the saloon keeper who, at the direction of an adult, who pays for the intoxicating liquor, delivers it to a minor who drinks it.²⁸ And in Iowa it was held that the term “selling” was broad enough to make liable the saloon keeper who, at the direction of another, gave intoxicating liquors to one who became intoxicated thereby and was injured.²⁹ Even in those jurisdictions which preclude liability on the part of the vendor where the person to whom the law prohibits a sale or a gift drinks the liquor ordered and paid for by another, it is held that it is always a question for the jury to determine whether or not the transaction was one merely to evade legal liability on the part of the dealer,

²⁷ *People v. Neumann*, 85 Mich. 98; 48 N. W. 290. See also *Carrier v. Bernstein* (Iowa), 76 N. W. 1076; *State v. Best* (N. Car.), 12 S. E. 907; *State v. Munson*, 25 Ohio St. 381.

²⁸ In *Topper v. State*, 118 Ind. 110; 20 N. E. 699, the court said: “All persons who participate in an act or transaction which is a misdemeanor are alike guilty. This is a principle that is elementary and does not require a citation of authorities. The appellant sold to Cunningham a glass of lager beer to be drunk by Kepler, who was a person under the age of twenty-one years, and by the direction of Cunningham at the time he called for the beer, the appellant poured out and delivered it to Kepler, to be drunk by him. We may state the argument syllogistically as follows: Whoever gives away in-

toxicating liquor to a minor is guilty of a misdemeanor. Cunningham and the appellant, acting in concert, did give away to Kepler, a minor, intoxicating liquor; therefore, Cunningham and the appellant are guilty of a misdemeanor.” See also *Page v. State*, 4 South, 697; 84 Ala. 446. But *contra*, see *Kurz v. State*, 79 Ind. 488.

The act of defendant must have been effective in causing the injury. *Steel v. Thompson*, 42 Mich. 594; 4 N. W. 536; but it need not be the sole cause of the injury. *Acken v. Tinglehoff* (Neb.), 119 N. W. 456.

²⁹ In *Judge v. Jordon*, 81 Iowa, 519; 46 N. W. 1077, the court said: “The court charged the jury that if Jordon or his bartender, acting upon the direction of Gage, furnished Judge intoxicating

in which event the dealer would be responsible.³⁰ Again, there can be no recovery under the statute where the sales or gifts of intoxicating liquor simply caused or contributed to a habit of drinking which ultimately resulted in an habitual intoxication and from which an injury resulted where such habitual intoxication was not directly caused either in whole or in part by such sales or gifts.³¹ Nor is the fact that a dealer has sold liquor continually to plaintiff's husband in violation of her request not to do so sufficient to maintain an action, unless it is further shown that such sales resulted in or contributed to the intoxication of the husband and from which intoxication injury resulted to plaintiff.³² Nor would the mere sale of intoxicating liquors to an intoxicated person or to a person in the habit of becoming intoxicated establish a cause of action unless it was further shown that such person drank the liquors so bought, because such liquors could not be said to contribute to the intoxication of the buyer, unless they were drunk by him.³³ Nor would the proof of sales or gifts of intoxicating liquor caus-

liquors, or furnished it to others in his saloon, from whom the plaintiff's husband obtained it, then it was selling to said Gage and the plaintiff's husband, substantially as alleged in plaintiff's petition."

³⁰ In *Siegel v. People*, 106 Ill. 99, the court said: "A case might oftentimes exist undoubtedly where the barkeeper ought to know, from the circumstances, that the person purchasing is being used by a minor simply as a screen to conceal his own participation, and in such case the vendor should be held responsible. He may not close his eyes to obvious facts, and then plead his ignorance of what all others knew; but in such case the fact should be left to the jury to be determined from the evidence."

³¹ *Seagin v. Ehmke*, 120 Iowa, 464; 94 N. W. 938; *Ennis v. Shiley*, 47 Iowa, 552; *Cox v. Newkirk*, 73 Iowa, 42; 34 N. W. 492; *Arnold v. Barkalow*, 73 Iowa, 183; 34 N. W. 807; *Bannon v. Adams*, 76 Ill. 331.

³² *McEntee v. Spiehler*, 12 Daly, 435.

³³ In *Welch v. Jugenheimer*, 56 Iowa, 11; 8 N. W. 673, the court said: "The mere selling of intoxicating liquors to a person intoxicated or in the habit of becoming intoxicated, does not of itself confer the right of action. In order that a right of action may exist, the liquor sold must cause or contribute to intoxication, and the wife must sustain some injury by the intoxication."

ing or contributing to the intoxication of a party be sufficient unless it were also established that by reason of such intoxication plaintiff was injured in person or property or means of support.³⁴ Nor would the sureties upon a saloon keeper's bond conditioned that they would pay all damages which the community or individuals might suffer by reason of the traffic of their principal be liable where the saloon keeper while intoxicated upon the liquors of his own saloon shot and killed plaintiff's husband; because the liquors so drunk by the saloon keeper were not "sold" or "furnished" by him within the meaning of the law. It is not necessary, however, to maintain a cause of action under these statutes, that a cause of action should also be maintainable against the intoxicated person on the same state of facts.³⁵

Sec. 1033. Illegality of sale.

Three distinct rules are deducible from the decisions with reference to the question as to whether the sale or gift of intoxicating liquor must be illegal before there can be a recovery under this class of statutes. In a number of jurisdictions it is held that even in the absence of words in the statute

³⁴ In *Fentz v. Meadows*, 72 Ill. 540, the court said: "The statute gives the wife a right of action only in cases where, by the selling liquor to a drunken husband, the wife has been injured thereby in person or property or means of support." See also *Kellerman v. Arnold*, 71 Ill. 632; *Keedy v. Howe*, 72 Ill. 133; *Albrecht v. Walker*, 73 Ill. 69; *Confrey v. Stark*, 73 Ill. 187; *Brantigan v. White*, 73 Ill. 561; *Graham v. Fulford*, 73 Ill. 596; *Gilmore v. Mathew*, 67 Me. 517.

In case of *Curten v. Atkinson*, 36 Neb. 110; 54 N. W. 131, the court said: "The plaintiff in error, by the conditions in their

bond, undertook to answer for all damage which the community or individuals might suffer by reason of the traffic of their principal in intoxicating liquors. They are presumed to have had in view all the damage incident to the sale or furnishing of liquor to third persons, but they had a right to interpret and rely upon the language of the statute according to its ordinary and grammatical sense. They did not undertake that Shiel [saloon keeper] would not drink liquor, and the use thereof by him was in no sense a breach of the conditions of the bond."

³⁵ In *ain v. Russell*, 8 Hun, 319.

restricting its operation to unlawful sales, there can be no recovery for injuries caused by the sale, gift or furnishing of intoxicating liquors to another, unless such sale, gift or furnishing was in violation of law.³⁶ Two reasons have been asserted by the courts maintaining the above noted proposition for so holding: 1. If a saloon keeper was held liable for the sales of intoxicating liquors which, under the law, he was legally entitled to make, he would necessarily become bound for the good behavior of the buyer, and such sales would make him a guarantor that the intoxicating liquors sold should not cause intoxication, in whole or in part, from which an injury would result.³⁷ 2. In those States where a bond is given by the saloon keeper to guarantee his adherence to the law, it could not be said that the sureties thereon would be liable where injury resulted by reason of a lawful sale or gift of intoxicating liquor to another, because the sureties have not obligated themselves to protect the public against the effects of lawful sales or gifts made by the seller.³⁸ In several jurisdictions, however, it has been held that unless the terms of the statute restrict liability to injuries growing out of unlawful sales, it extends to lawful and unlawful sales alike.³⁹ The

³⁶ *Myers v. Conway*, 55 Iowa, 166; 7 N. W. 481 (but see *Carrier v. Bernstein*, 78 N. W. 1076); *Bell v. Zelmer* (Mich.), 42 N. W. 606; *Peacock v. Oaks*, 85 Mich. 578; 48 N. W. 1082; *Granger v. Knipper*, 2 Cin. R. 480; *Baker v. Beckwith*, 29 Ohio St. 314; *Mason v. Shay*, 5 Ohio Dec. 194; *Sibila v. Bahney*, 34 Ohio St. 399; *Russell v. Tippin*, 12 Ohio Cir. Ct. 521.

³⁷ In *Baker v. Beckwith*, 29 Ohio St. 314, the court said: "If the mere act of selling or giving away intoxicating liquors renders the seller liable for all consequences resulting from intoxication produced by the liquors so sold or given away, then intoxicating liquors sold for medicinal or mechanical

purposes, and diverted from their intended use, might subject the seller to heavy damages for an act not intended to evade or violate the provisions of the statute. Such a construction of the statute would require the seller to become bound for the good behavior of the buyer, and make him a guarantor that the liquors sold should not cause intoxication, in whole or in part, from which an injury would result."

³⁸ *Bell v. Zelmer*, 75 Mich. 66; 42 N. W. 606.

³⁹ *Roth v. Eppy*, 80 Ill. 283; *Moran v. Goodwin*, 130 Mass. 158; *Jones v. Bates*, 26 Neb. 693; 42 N. W. 751; *Elshire v. Schulyler*, 15 Neb. 651; 20 N. W. 29.

reason of this rule is found in the fact that the license to sell simply protects the licensee against a prosecution by the State, and that as the business of selling intoxicating liquors is fraught with many dangerous consequences, and as the civil damage statute was framed for the purpose of protecting the innocent victims of the traffic against its ravages, the seller of intoxicating liquors takes his license with the knowledge that he is engaging in a dangerous business, and that he is liable for any civil consequences growing out of his sales or gifts resulting in injuries to third persons.⁴⁰ In several jurisdictions, notably in Indiana, liability under this class of statutes is limited by the terms of the statute to the sales or gifts of intoxicating liquor made in violation of the provisions of the liquor law.⁴¹ Under this kind of a provision it has been held that the liability of the seller is limited to his violation of such of the liquor laws as were in force at the time the civil damage act was enacted, but that no such section of the liquor law could be repealed by a subsequent enactment of a similar law which did not expressly repeal the old law so as to avoid civil liability by the seller for his violation of the old law.⁴²

⁴⁰ In *Jones v. Bates*, 26 Neb. 693; 42 N. W. 751, the court said: "The license is in the nature of a regulation, but is no protection to the person furnishing the liquors, except as against the State. Notwithstanding the license, the person licensed furnishes liquor at his peril, and if he contributes to the intoxication of an individual, by reason of which an injury results to any one, he will be liable. The act of furnishing the liquor is regarded in law as a tort and all who furnish it as wrongdoers."

⁴¹ *Mitchell v. Ratts*, 57 Ind. 259; *State ex rel. Hudspeth v. Cooper*, 114 Ind. 12; *Mulcahy v. Givens*, 115 Ind. 286; 17 N. E. 598; *Wall v. State*, 10 Ind. App. 530; 38 N.

E. 190 *Beem v. Chestnut*, 120 Ind. 390; 22 N. E. 315; *Boos v. State*, 11 Ind. App. 257; 39 N. E. 197; *Brandt v. State*, 17 Ind. App. 311; 46 N. E. 682; *Baecher v. State*, 19 Ind. App. 100; 49 N. E. 42.

⁴² *State v. Cooper*, 114 Ind. 12; 16 N. E. 518 (opinion reported in 13 N. E. 861, set aside); *Mulcahy v. Givens*, 115 Ind. 286; 17 N. E. 598.

Where a statute forbids a sale to a drunken man, it is no defense that he had not been notified not to sell him liquor. *Palmer v. Schurz* (S. D.), 117 N. W. 150; *Berkemeider v. State* (Ind.), 88 N. E. 634.

In Texas, sales made in good

Sec. 1034. Sale contrary to notice.

In many jurisdictions the statute makes provision for the giving of notice to saloon keepers by certain persons against selling or giving intoxicating liquors to persons in the habit of becoming intoxicated. These statutes vary in the several States with reference to the persons who may give the notice, the manner of service upon the saloon keeper and the penalties that appertain to the saloon keeper for violating their provisions. The general rule, however, with reference to all this class of statutes is that if a saloon keeper violates their provisions and sells or gives intoxicating liquors to a person in the habit of becoming intoxicated after having received notice in the manner prescribed by law not to do so, he and his bondsmen are liable to any third person for any injuries that may result to such third person by reason of the sales or gifts of intoxicating liquors made to the person named in the notice.⁴³ It is not necessary that the notice be in the language of the statute.⁴⁴ All that is required is that the notice be sufficient to put the saloon keeper on his inquiry concerning the habits of the individual mentioned in the notice.⁴⁵ Thus it has been held that a notice which did

faith to a drunkard, where no notice has been given, seems to be a good defense, by statute. *Birkman v. Fahrenthold* (Tex. Civ. App.), 114 S. W. 428. But the good faith must be set up by answer. *Ferenthold v. Till* (Tex. Civ. App.), 113 S. W. 635.

On a charge of a sale or gift to an intoxicated person, it is only necessary to prove the sale or gift of the liquor by the defendant, intoxication resulting from its use in whole or in part, and loss of means of support by the plaintiff in consequence thereof. *Berke-meir v. State* (Ind.), 88 N. E. 634.

⁴³ *Kennedy v. Saunders*, 142 Mass. 9; 6 N. E. 734; *Tate v. Donovan*, 143 Mass. 590; 10 N. E. 492; *Taylor v. Carroll*, 145 Mass.

95; 13 N. E. 348; *Sackett v. Ruder*, 152 Mass. 397; 25 N. E. 736; 9 L. R. A. 391; *Finnegan v. Lucy*, 157 Mass. 439; 32 N. E. 656; *Snyder v. Launt*, 1 App. Div. 142; 37 N. Y. Supp. 408; *Casey v. Painter*, 50 Ohio St. 527; 38 N. E. 24; *Pegram v. Stortz*, 31 W. Va. 220; 6 S. E. 485; *Kolling v. Bennett*, 18 Ohio Cir. Ct. R. 425; 10 C. C. D. 81; *Eilke v. McGrath*, 38 S. W. 877 (Ky.); *Riden v. Gremm*, 97 Tenn. 220; 36 S. W. 1097; 35 L. R. A. 587; *Fay v. Williams* (Tex.), 41 S. W. 497.

⁴⁴ *Kennedy v. Saunders*, 142 Mass. 9; 6 N. E. 734.

⁴⁵ *Tate v. Donovan*, 143 Mass. 590; 10 N. E. 492; *Taylor v. Carroll*, 145 Mass. 95; 13 N. E. 348.

not contain the words "spirituous or intoxicating liquors," being in the language used in the statute, was not bad for such omission.⁴⁶ Nor is a notice insufficient because it does not state that the person mentioned in the notice is "in the habit of using spirituous or intoxicating liquor to excess."⁴⁷ The notice, however, must disclose the fact that the person giving it is one entitled, under the law, to do so; or it must be shown in evidence that the person notified understood that the person giving the notice was one legally entitled to serve it.⁴⁸ It is not necessary that the person entitled under the law to give the notice should sign the same in person. It is a sufficient signing if some one in such person's presence and under his directions signs his name for him.⁴⁹ In Texas, where the law requires the notice to be served by the wife through the sheriff, it has been held that it is not sufficient to read a copy of the notice to the saloon keeper, but that the original or a copy must also be delivered to him.⁵⁰ It has been held, however, that it is not necessary to set out the notice and return in the declaration or complaint, it being sufficient to make the allegations that "defendants were duly and lawfully served with a written notice not to sell," etc.⁵¹ And it is held in Ohio, where the statute provides for the filing of the notice with the township clerk, that a notice filed with such clerk is "notice to a person selling liquors in a municipal corporation within the territorial limits of the township, though not filed in the office of the clerk of the

⁴⁶ In *Kennedy v. Saunders*, 142 Mass. 9; 6 N. E. 734, the following notice was held sufficient: "Dear Sir: My husband has been in the habit of getting liquor here and coming home drunk. Now, if you care anything for a wife and three children, I don't want you to give him any more drinks; and, if you do, I shall take means to protect myself."

⁴⁷ In *Tate v. Donovan*, 143 Mass. 590; 10 N. E. 492, the following notice was held sufficient: "Bos-

ton, September 17, 1883. To Mr. M. J. Donovan: I hereby warn you not to harbor my husband nor sell him any more liquor or beer after this date, or I will put you to trouble."

⁴⁸ *Sackett v. Ruder*, 152 Mass. 397; 25 N. E. 736.

⁴⁹ *Fennegan v. Lucy*, 157 Mass. 439; 32 N. E. 656.

⁵⁰ *Regan v. Wooten* (Tex.), 16 S. W. 546.

⁵¹ *Riden v. Gremm*, 97 Tenn. 220; 36 S. W. 1097.

municipal corporation.”⁵² The notice is effectual, though served upon the saloon keeper before the person proscribed has become intoxicated or contracted a habit of intoxication.⁵³ The rule is that before persons become amenable to the provisions of the statute under consideration, they must be engaged in the business of selling intoxicating liquors, and that it does not apply to persons giving intoxicating liquors as an act of hospitality.⁵⁴ But it is also held that the statute applies equally to licensed and unlicensed dealers, and before there can be any recovery from an unlicensed dealer for injuries resulting from sales of intoxicating liquors sold to a person in the habit of becoming intoxicated, notice, in accordance with the terms of the statute, must have been given such dealer.⁵⁵ In Kentucky it is the rule that the notice, to be binding upon the saloon keeper, so that a civil action for damages can be based thereon, must be served on the saloon keeper personally, and that the service of the notice upon his regularly authorized bartender is not sufficient.⁵⁶ In Massachusetts, under the terms of the statute, where a declaration contained four counts, two of them being for sales of liquor to a person drinking to excess after notice and the other two counts being for permitting such person to loiter in and about the premises, it was held that the plaintiff might recover separate damages under each count, although only one notice had been given.⁵⁷

⁵² *Casey v. Painter*, 50 Ohio St. 527; 38 N. E. 24.

⁵³ *Kolling v. Bennett*, 18 Ohio Cir. Ct. R. 425; 10 O. C. D. 81.

⁵⁴ *Pegram v. Stortz*, 31 W. Va. 220; 6 S. E. 485.

⁵⁵ *Snyder v. Launt*, 1 App. Div. 142; 37 N. Y. Supp. 408.

⁵⁶ In *Eilke v. McGrath*, 100 Ky. 537; 38 S. W. 877, the court said: “Before the cause of action could arise for selling the liquors, it was necessary that the person so selling [the one licensed] should have received written notice forbidding

such sale. It means that the notice must be served on the one who is authorized to carry on the business, not his agents or employes who may assist in conducting it.”

⁵⁷ *Kennedy v. Saunders*, 142 Mass. 9; 6 N. E. 734.

An allegation that M, a constable, served the notice on the defendant, is sufficient without alleging he delivered it to him. *Birkman v. Fahrenthold* (Tex. Civ. App.), 114 S. W. 428.

If plaintiff withdraw the notice

Sec. 1035. Injuries to person—Mental suffering.

One of the causes for recovery under this class of statutes is "injury to the person" as a result of intoxicating

to saloon men not to sell, but that fact was not made known to the defendant, it is no defense for him. *Birkman v. Farenthold* (Tex. Civ. App.), 114 S. W. 428; *Farenthold v. Tell* (Tex. Civ. App.), 113 S. W. 635.

Service on an employe of the defendant is not sufficient. *Eilke v. McGrath*, 100 Ky. 537; 38 S. W. 877.

The notice must be in writing where the statute provides for a written one; but the defendant may waive a written notice, even as against his bondsmen. *State v. Mann* (Ind.), 86 N. E. 976.

Only the person giving the notice can revoke it; which, of course, would be the plaintiff. *Farenthold v. Tell* (Tex. Civ. App.), 113 S. W. 635.

A signed notice as follows is sufficient: "My husband has been in the habit of getting liquor here and coming home drunk. I don't want you to give him any more drink." *Kennedy v. Saunders*, 142 Mass. 9; 6 N. E. 734.

It is immaterial what the defendant thought was the reason for the revocation of the notice. *Farenthold v. Tell* (Tex. Civ. App.), 113 S. W. 635.

The person designated by the statute to give the notice must give it; and that person is usually the wife. *Thornley v. Reilly*, 17 Ont. App. 204; affirming 26 C. L. J. 26.

The inability of the defendant to read will not relieve him of

responsibility for sales thereafter made; especially if he knew what the notice was about and to whom it referred. *Cayionette v. Girard*, 28 L. C. J. 177; 1 Mon. Sup. Ct. 182.

Where the defendant alleged in his defense that he made no sales to plaintiff's husband until after she had withdrawn her notice not to sell and had given him permission, "notwithstanding which she has made no complaint to defendant until after the filing of this suit," it was held proper to permit her son to testify she had sent him to defendant's place to tell him to stop selling liquor to her husband. *Birkman v. Farenthold* (Tex. Civ. App.), 114 S. W. 428.

A printed notice not to sell to a drunkard therein named is sufficient. It is not necessary that it set out all that is necessary to make a case. Knowledge of the seller that the person named in the notice is the same person he is selling to is not necessary. *Queen v. Dias*, 1 Can. Cr. Cas. 534.

In Tennessee under the Act of March 16, 1889, for a saloon keeper to sell liquors to an habitual drunkard after being served with notice by his wife not to do so is negligence, rendering him liable for all damages suffered by the wife in consequence thereof. *Riden v. Grimm*, 97 Tenn. 220; 36 S. W. 1097; 35 L. R. A. 587.

Parol proof of the contents of

liquors sold or given by a dealer to another and drunk by him.⁵⁸ The term "injury to the person" is synonymous with the term "personal injury," and will not permit a recovery for anything less than some physical injury to the person or health of another.⁵⁹ Thus, mere mental suffering, disgrace, or loss of companionship are not included in the term "injury to the person," and are not, therefore, sufficient to base a recovery upon under this class of statutes, unless physical injury to the person or health of complainant accompanies them.⁶⁰ Nor are threats and vulgarity directed by the intoxicated person to another sufficient to warrant a recovery, unless it was further established that by reason of the use of such threats and vulgarity complainant's health was impaired; for it is obvious that physical injury may result indirectly from what affects directly only the mind.⁶¹ Nor is the term "injury to the person" sufficiently comprehensive to include injury to the wife's health caused by overwork, made necessary by the intoxication of the husband.⁶² But where the intoxicated husband frightened the wife, used threatening and abusive language to her, and compelled her to go out of doors and leave her home for three or four hours, it was held that the driving of the wife out of the home and compelling her to stay away therefrom for that time, was a "physical injury" to the wife within the meaning of the

the notice cannot be given (unless the notice is lost). *Montross v. Alexander*, 152 Mich. 513; 116 N. W. 190.

⁵⁸ *Calloway v. Laydon*, 47 Iowa, 456.

⁵⁹ *Albrecht v. Walker*, 73 Ill. 69; *King v. Haley*, 86 Ill. 106; *Calloway v. Laydon*, 47 Iowa, 456; *Mulford v. Clewell*, 21 Ohio State, 191; *Elshire v. Schuyler*, 15 Neb. 561; 20 N. W. 29; *Wilson v. Booth*, 57 Mich. 249; 23 N. W. 799. In *Mulford v. Clewell*, 21 Ohio State, 191, the court said: "As to the third count, we think the action of the court sustainable on that

ground. It alleges no actual violence by the husband, no physical injury to the person or health of the wife. It merely charges that she has suffered mental anguish, disgrace, and loss of society or companionship. This is not sufficient. It does not amount to 'injury to the person' within the meaning of the statute."

⁶⁰ *Mulford v. Clewell*, 21 Ohio State, 191.

⁶¹ *Calloway v. Laydon*, 47 Iowa, 456; 29 Am. Rep. 489.

⁶² *Elshire v. Schuyler*, 15 Neb. 561; 20 N. W. 29.

statute.⁶³ It is probably needless to say that the statute, unless it so specifies, is not limited to injuries to the persons of those who stand in some domestic relation to the intoxicated person, but includes any person who suffers a physical injury at the hands of an intoxicated person.⁶⁴ Thus, it was held in Indiana that under a provision of the statute which provided that "every husband, wife, child, parent, guardian, employer or other person" who shall suffer an injury in person, property or means of support by reason of the intoxication of another" shall have a cause of action against the saloon keeper who sold or gave intoxicating liquors to such person in violation of law, the term "or other person" was broad enough to include all other persons not especially enumerated in the statute.⁶⁵ But it is held in Michigan under a similar statute that the intoxicated person himself cannot recover against the saloon keeper for personal injuries sustained by him by reason of an intoxicated condition brought about by the sales or gifts of intoxicating liquor, made by the saloon keeper to him.⁶⁶ In Illinois, under a provision of the statute which requires the saloon keeper causing the intoxication to pay a reasonable compensation to any person who may take charge

⁶³ In *Peterson v. Knoble*, 35 Wis. 80, the court held the following instruction good: "It is not necessary that a man get drunk and actually beat his wife, or bruise or wound her. If a man in such condition turns his wife out of doors, that is an indignity offered to her, for which she may receive compensation."

⁶⁴ *King v. Haley*, 86 Ill. 106, 29 Am. Rep. 14; *Bodge v. Hughes*, 53 N. H. 614.

A wife may recover from a saloon keeper selling liquor to her husband whereby he is rendered unfit to drive a carriage; and while she is riding with him in one he so drives that it is overturned and she is injured; and the question of her contributory neg-

ligence in riding with him does not arise, because the action is purely statutory. *Wright v. Treat*, 83 Mich. 110; 47 N. W. 243.

A husband may recover of a saloon keeper for unlawfully selling liquor to a person who was so excited thereby that he killed such husband's wife. *Forfeter v. Moore*, 67 N. H. 460; 36 Atl. 369. So a wife where the drunken person threw her husband, likewise intoxicated, on the floor to his injury. *Smiser v. State*, 17 Ind. App. 519; 47 N. E. 229; *McCurdy v. Swift*, 17 C. R. (Can.) 126.

⁶⁵ *English v. Beard*, 51 Ind. 489.

⁶⁶ *Brooks v. Cook*, 44 Mich. 617; 7 N. W. 216.

of and provide for such intoxicated person, it was held that there could be no recovery for care given and provision made for one who while in a state of intoxication had received an injury at the hands of an intoxicated person, for the reason, as stated by the court, that the intoxication of the injured party was not the proximate cause of the injury.⁶⁷ The rule enunciated by this case, however, is hardly a safe one in the light of the trend of the modern authorities.

Sec. 1036. Injuries to property.

A second element of damages usually enumerated by the class of statutes under discussion is "injury to property." The general rule may be stated to be that whenever property is willfully or negligently destroyed or injured by an intoxicated person, and such intoxication is the proximate cause of such act, the dealer in intoxicating liquors who causes or contributes to such intoxication (or as in some States, the dealer who sells or gives intoxicating liquors to such person in violation of law, causing or contributing to his intoxication) is liable to the owner of the property to the extent of the damage that he has sustained by reason of such injury to or destruction of his property.⁶⁸ Thus, it has been held that an unlicensed saloon keeper who sold and gave another intoxicating liquors until he was helpless and unconscious, and while in that condition he put him into a sleigh to which was attached a quiet horse, belonging to a third person, and that by reason of his inability to manage the horse, it ran away and was killed, the saloon keeper was lia-

⁶⁷ In *Schulte v. Schleeper*, 210 Ill. 357; 71 N. E. 325, the court said: "Where the disability which makes necessary the care given and provision made for an intoxicated person results, not from the intoxication, or from anything consequent upon that intoxication, but from the independent act of a third party, which is the direct and immediate cause of that dis-

ability, there can be no recovery against the dramshop keeper under section 8."

⁶⁸ *Dunlap v. Wagner*, 85 Ind. 529; 44 Am. Rep. 42; *Woolheather v. Risley*, 38 Iowa, 486; *Wiggenhorn v. Kountz*, 23 Neb. 669; 37 N. W. 600; *Kilburn v. Coe*, 48 Howard Pr. 144 (N. Y.); *Mulford v. Clewell*, 21 Ohio St. 191.

ble to the third person for the value of the horse.⁶⁹ And where a husband took a horse belonging to his wife and while intoxicated sold it without her knowledge and consent and squandered the money received therefor, it was held that the saloon keeper causing or contributing to the intoxication of the husband was liable to the wife for the value of the horse.⁷⁰ Nor is it necessary, where the husband has disposed of the chattels belonging to the wife, while in a state of intoxication, for the wife to make a demand upon or give notice to the person causing or contributing to the intoxication of her husband before bringing suit against him under the statute to recover the value of the chattels disposed of; because the wrongful act upon which the suit is based is the sale of intoxicating liquor and not the conversion of property.⁷¹ And where the husband took one thousand dollars of the wife's money and squandered it in saloons for intoxicating liquors, by which he became an habitual drunkard, it was held that the wife could recover the amount so spent with the saloon keepers who sold the intoxicating liquors by which he was made an habitual drunkard.⁷² In Pennsylvania, where the

⁶⁹ *Dunlap v. Wagner*, 85 Ind. 529; 44 Am. Rep. 42. See note 74.

⁷⁰ In the case of *Woolheather v. Risley*, 38 Iowa, 486, the court said: "The court charged the jury on this point that to entitle the plaintiff to recover for the horse, if disposed of by her husband as alleged, it was not necessary that she should prove that she was the absolute legal owner of said horse under the laws of this State, but it will be sufficient if the evidence shows that plaintiff claimed to own the horse, and treated it as her own, and that her husband had knowledge thereof, and up to the time of sale had conceded his wife's ownership of the horse, and treated and regarded it as hers." The facts here stated hypothetically, in this instruction, if found

to be true, would, as between the husband and wife, constitute the horse hers. Whether it would have been hers, under the evidence, as to creditors, or a purchaser from her husband in possession, was not material, for the defendant does not occupy either of those relations. If, as between the plaintiff and her husband the horse was hers, and he sold and disposed of it as alleged, while under the influence of intoxicating liquors furnished to him by the defendant the plaintiff was injured in her property to the extent of the value of the horse."

⁷¹ *Mulford v. Clewell*, 21 Ohio St. 191.

⁷² *Greenlee v. Schoenheit*, 23 Neb. 669, 37 N. W. 600.

civil damage statutes limits the liability to "injury to person or property," it has been held that where a husband, in a state of intoxication, quarrels with another, and kills him, and the murderer is sent to prison for twelve years, the wife cannot maintain a suit for damages against the saloon keeper furnishing the liquor which made her husband intoxicated on the ground of injury to her property, because she has no property right in the earning capacity of her husband and the injury, if any, is to her means of support, for which the statute gave no remedy.⁷³ And in New York it is held that, where a minor contracts with an adult for his board and keep, in consideration of which he agrees to work for the adult, and a saloon keeper unlawfully sells the minor intoxicating liquors, from the effects of which he falls and is seriously injured, the adult, although he furnishes the minor care, medical attendance, board and clothing during his illness, and although, by reason of the injuries, the minor is incapacitated from labor, is not, within the meaning the law, injured in his property.⁷⁴

⁷³ *Bradford v. Boley*, 167 Penn. St. 506; 31 Atl. 751.

⁷⁴ In *Streever v. Birch*, 62 Hun 298; 17 N. Y. Supp. 195, the court said: "The plaintiff claims property as to which he says he has been injured. Then he must show the property. If he has no title to the property, he cannot recover for the injury. What, then, is the property of the plaintiff which he says has been injured? Not the care and medical attendance which he has kindly afforded Tappan (the minor), because as we have seen already, Tappan is liable to pay the value of this. Not the value of board and clothing which he has furnished, for as above shown, that can be set off against any claim which Tappan might make for compensation

for services. The only property he can claim is the right to Tappan's services, of which he avers that he has been deprived for two months. Then the question must arise, had he a valid title to those services? We have already seen, in the case of *Baum v. Stone*, that, while the plaintiff is entitled to compensation for necessities furnished, he is not entitled to enforce as valid the specific contract made in relation thereto; that is, Tappan is not legally bound to render those services for the necessities furnished. If he renders services he is entitled to their value. If he receives necessities he is bound to pay their value. But the contract of services for necessities and \$100 is not binding; hence the plaintiff has no

Sec. 1037. Injuries to means of support.

Probably the most common element of damage under this class of statutes is "injury to the means of support." "Means of support" has been defined in an early Ohio case⁷⁵ as follows: "In its general sense it embraces all those resources from which the necessities and comforts of living are or may be supplied, such as lands, goods, salaries, wages or other sources of income. In its limited sense it signifies any resources from which the wants of life may be supplied."⁷⁶ A cause of action for injury to means of support arises, then, when a person who owes a legal duty to support another is disqualified from so doing, either in whole or part, by intoxicating liquors unlawfully sold or given him by a dealer therein.⁷⁷ It is not necessary to maintain the action, that the person to whom the duty of support is owing must be wholly dependent upon the person who is incapacitated from supplying the means of support by reason of the intoxicating liquors unlawfully sold or given away. It is sufficient if the means of support as furnished by the person owing the duty is injured or destroyed.⁷⁸ Indeed, it has been held under a stat-

property therein. We cannot see, therefore, that the plaintiff has been injured in property; for property must be something which one legally owns; not that to which he has only a moral claim, or which another person will probably permit him to have."

A father may recover the price of his horse injured by his intoxicated son, which intoxication has been caused by liquors illegally sold him; and the father is not guilty of contributory negligence by reason of the fact he let his son have the horse to drive, knowing he was in the habit of getting drunk. *Bertholf v. O'Riley*, 8 Hun, 16; *Morenees, v. Crawford*, 51 Hun, 8; 5 N. Y. Supp. 453. See note 71.

⁷⁵ *Schneider v. Hosier*, 21 Ohio St. 98.

⁷⁶ *Meidel v. Anthis*, 71 Ill. 241; *McMahon v. Sankey*, 133 Ill. 636; 24 N. E. 1027.

⁷⁷ *Chmelir v. Sawyer*, 42 Neb. 362; 60 N. W. 547; *Lossman v. Fidelia Knights*, 89 Ill. App. 437.

⁷⁸ In the case of *Hackett v. Smelsley*, 77 Ill. 109, the court said: "Where one is legally bound to furnish support to another, it cannot be truly said that the reduction of the estate of the person so bound, to insolvency, or that the impairment or destroying of his ability to provide the support, does not injure such other in his or her means of support. A wife is being supported by her husband—is entitled to be so; that source of support is lost to her. She is thereby injured in means of support, she has lost part thereof,

ute which gave a parent a cause of action for injuries to his means of support by reason of the intoxication of any person, that the law applies to those who receive support voluntarily as well as to those who have a legal right thereto.⁷⁹ And certainly where a party has the legal as well as the moral right to the earnings of another, as in the case of a father to the earnings of a minor son, and such person's earning capacity is either injured or destroyed by reason of intoxicating liquors illegally sold or given to him by a dealer, the person having the legal right to the earnings of such other has a cause of action against the dealer for his loss thus sustained.⁸⁰ Nor is it necessary, to maintain the action, to show a deprivation of the bare necessities of life. Any substantial sub-

and has not the same and equal means of support now, that she had before the loss. * * * Because the wife may be able-bodied, and can earn a livelihood, it does not follow that she does not suffer injury in means of support by loss of her legal supporter. Nor does it so follow where she may have independent means of support of her own. There are always independent means of support. No one is absolutely dependent for support, for, where there is the absence of other means of support, it is provided by public authority." See also *Reath v. State*, 16 Ind. App. 146; 44 N. E. 808.

⁷⁹ In the case of *Stevens v. Cheney*, 33 Hun (N. Y.), 1, the court said: "The law affords the same protection to those who perform these duties voluntarily as to those who act under compulsion. And we are of the opinion that if the plaintiff was a poor person, it was the duty of the son to aid in his support; and if he voluntarily did this, and the plaintiff has been deprived of his means

of support by reason of the intoxication, that then he may recover, even though his child is over the age of twenty-one years." See also *Du Puy v. Cook*, 35 N. Y. Supp. 632; 90 Hun, 43.

⁸⁰ In the case of *Reath v. State*, 16 Ind. App. 146; 44 N. E. 808, the court said: "Here the law gave to appellee the earnings of the son until he became twenty-one. The father had just as much right to rely upon them as upon his own exertions. These earnings of the son did go into the family fund, and either lightened the burden placed upon the father, or enabled him the better to support himself and family. The father's capacity to earn money was of course, liable to be diminished at any time. He had a legal right to rely to some extent upon the future earnings of the son until he should arrive at his majority. They were a means of support upon which he had both a moral and a legal right to depend, and when this means was taken away he was entitled to recover for its loss."

traction from the maintenance suitable to the man's business and condition in life will support an action.⁸¹ It is no bar to an action under such a statute that the person owing a duty to support another has been an habitual drunkard for a number of years and has contributed nothing to such other's support for the length of time that he has been a drunkard, if it is proven that, by reason of sales and gifts of intoxicating liquors to him by the dealer he continues to squander his earnings, and continues in his non-support of the one legally entitled thereto.⁸² This holding is upon the presumption that the money which has been dissipated in drink would otherwise have gone to those entitled to the drunkard's support.⁸³ But there can be no recovery for injuries to means of support where there is no present diminution thereof, but simply that because of sales and gifts of intoxicating liquor to a drunkard, the accumulation of money by him was not as large as it otherwise would have been, and that therefore the greater danger of prospective want by the person entitled to support in case she would survive him. This has been so held because such damages would be purely speculative.⁸⁴ It has been held that an action for injuries to means of support must be based upon illegal sales or gifts of intoxicating liquor from which damage to a third person's means of support results, and that a dealer is not liable under the civil damage statute for injuries to a woman's means of support where her husband was killed in the dealer's saloon because of the dealer's failure to maintain an orderly place.⁸⁵ In some jurisdictions, however, it is held that where the sales or gifts of intoxicating liquors injure the means of support of another, although such sales or gifts were not illegal, and although they did not pro-

⁸¹ *Hering v. Ervin*, 48 Ill. App. 369; *Gorey v. Kelley*, 90 N. W. 554.

⁸² *League v. Ehmke*, 120 Iowa, 464; 94 N. W. 938; *Woolheather v. Risley*, 38 Iowa, 486; *Ennis v. Shiley*, 47 Iowa, 552; *Welch v. Jugenheimer*, 56 Iowa, 11; 8 N. W. 673; 41 Am. Rep. 77; *Rouse*

v. Melsheimer, 82 Mich. 172; 46 N. W. 372.

⁸³ *Rouse v. Melsheimer*, 82 Mich. 172; 46 N. W. 372.

⁸⁴ *Radley v. Sieder*, 99 Mich. 431; 58 N. W. 366.

⁸⁵ *State v. Knotts*, 24 Ind. App. 477; 56 N. E. 941.

duce the intoxication, but merely contributed thereto, a cause of action arises against the dealer for such injuries.⁸⁶ In concluding this section it is probably needless to remark that the statutes, as a general rule, do not limit a recovery for injuries to the means of support to the wives of persons damaged in this particular. Aside from injuries suffered in their means of support by the wives of drunkards, the most common example of persons entitled to bring the action on the ground of injuries to the means of support are minor children dependent upon their parent for support;⁸⁷ husbands who are deprived of their wives' services;⁸⁸ employers where the drunkenness of some of their employes interferes with the labor of their other employes.⁸⁹

⁸⁶ *Elshire v. Schuyler*, 15 Neb. 561; 20 N. W. 29.

⁸⁷ *Houston v. Graw*, 45 Neb. 813; 64 N. W. 245. But see § 1039, *note* 96.

⁸⁸ In case of *Moran v. Goodwin*, 130 Mass. 158; 39 Am. Rep. 443, the court said: "That the relation of husband and wife may be such that in fact, as well as in law, the wife may be wholly or in part a means of support of her husband, is very clear; and whether such relationship exists, and how far the means of support are injured, are purely questions of fact, to be determined by the jury upon proper instructions from the court."

⁸⁹ *Duroy v. Blinn*, 11 Ohio St. 331.

Where a statute imposed a duty upon a brother to support his sister, it was held that she could maintain the action, even though she herself could not have enforced such brother's duty to support her. *Nagle v. Keller*, 237 Ill. 431; 86 N. E. 694; affirming 141 Ill. App. 444.

The fact that the plaintiff, a wife, had obtained a divorce of her husband pending the suit does not prevent her recovering, especially if the sales produced in him total disability through drunkenness, to support her. In such instance mortality tables can be put in evidence on the question of damages. *Merrimane v. Miller* (Mich.), 118 N. W. 11.

If it appears that the loss of support was caused by sales of liquor made by the defendant, then a right of action is established, regardless of the extent of the intoxication, for the statute does not recognize degrees of intoxication. *Lahey v. Crist*, 130 Ill. App. 152.

In an action for injury to plaintiff's feelings because of sales to his son, the defendant may show in mitigation of damages that the son was in the habit of becoming intoxicated before the sales in question. *Liebler v. Carrel*, 155 Mich. 196; 118 N. W. 975; 15 Detroit Leg. N. 976. See *Friend v. Dunks*, 39 Mich. 733.

Sec. 1038. Proximate cause of injury.

The effect of the Civil Damage Statutes, as remarked by a leading New York case,⁹⁰ was to enlarge the scope of the common law, which looks only to the proximate cause of the mischief, in attaching legal responsibility, and allows a recovery to be had against those whose act contributed, although remotely, to produce it. A clearer view of the subject will be had by dividing it into the following subdivisions:

(a) Injuries produced by an intoxicated person.

(b) Injuries produced by reason of the intoxication of any person.

Sec. 1039. Injuries produced by an intoxicated person.

The modern rule seems to be that liability under this class of statutes is established by the proof of the sales or gifts of intoxicating liquors producing intoxication in whole or in part, and the act of the intoxicated person causing injury to the plaintiff in his person, property or means of support. It is not necessary that the injury for which a recovery is sought should be the natural, reasonable, or probable consequence of the defendant's act in selling or giving away the intoxicating liquor to the person thereby made intoxicated and causing the injury.⁹¹ The test, as made by the Michigan

Sales to an habitual drunkard at times when he was sober, and which do not make him drunk, may be considered by the jury. *Jokers v. Borgman*, 39 Kan. 109; 44 Am. Rep. 625.

⁹⁰ *Bertholf v. O'Reilly*, 74 N. Y. 509; 30 Am. Rep. 323.

⁹¹ In the case of *Homire v. Halfman*, 156 Ind. 470; 60 N. E. 154, the court said: "Under the act it is necessary that two facts should concur besides the sale or gift of the liquor by the defendant to constitute a cause of action, to wit, intoxication resulting from its use in whole or in part, and

the loss of the means of support by the plaintiff in consequence of such intoxication. The statute requires nothing more. The act itself establishes a rule of evidence, applicable to and controlling in all cases arising under its provisions, which in some respects is new, and has produced a radical change of the common law. The statute makes no distinction whether the loss of the means of support is the direct or remote result of the intoxication. It only requires that it should be established that the loss of the means of support is the result of such intoxication."

court is, Would the injury have resulted if the person causing the injury had not been intoxicated? If it would have occurred, there can be no recovery; if it would not have occurred except for the intoxication, a recovery is possible.⁹² Much confusion has resulted from the loose way in which the term "proximate cause of the injury" has been used by courts and writers. The rule seems to be clearly defined in a recent Maine case "that when the injury is caused by an intoxicated person it need not be shown that the intoxication caused the injurious act. In such a case it is sufficient if, while in a state of intoxication, to which intoxicating liquors furnished by the dealer contributed, such intoxicated person commits the act which results in injury to the person, property or means of support of the person seeking redress. The furnishing by the dealer of the intoxicating liquor must have contributed as a proximate cause to the intoxication and the act of the intoxicated person must have been the cause of the injury; but it is not necessary

In the case of *Broekway v. Patterson*, 72 Mich. 122; 40 N. W. 192; 1 L. R. A. 708, the court said: "The statute provides as plainly as the English language can state it that this action shall lie for any injury occasioned by an intoxicated person. It is not for the injured party to produce proof, or for the jury to speculate upon the probabilities, whether the intoxication was the natural cause of the act which caused the death. The act itself by a person intoxicated fixes the liability for the damage upon the person selling or furnishing the liquor which caused the intoxication."

See also the following cases: *McEvoy v. Humphrey*, 77 Ill. 388; *Mulcahey v. Givens*, 115 Ind. 286; 17 N. E. 598; *Beem v. Chestnut*, 120 Ind. 390; 22 N. E. 303; *Dunlap v. Wagner*, 85 Ind. 529; 44

Am. Rep. 42; *Franklyn v. Schermerhorn*, 8 Hun (N. Y.), 112; *Volans v. Owen*, 74 N. Y. 526; 30 Am. Rep. 337; *Bertholf v. O'Reilly*, 74 N. Y. 509; *Meade v. Stratton*, 87 N. Y. 493; 41 Am. Rep. 386; *New v. McKechnie*, 95 N. Y. 632; *Beers v. Walhizer*, 43 Hun, 254; *McCarty v. Wells*, 51 Hun, 171; 4 N. Y. Supp. 672; 20 N. Y. St. 630; *Bacon v. Jacobs*, 63 Hun, 51; 17 N. Y. Supp. 323; *Thomas v. Dansby*, 74 Mich. 398; 41 N. W. 1088; *Hutchinson v. Hubbard*, 21 Neb. 33; 31 N. W. 245; *Schneider v. Hosier*, 21 Ohio St. 98; *Mulford v. Clewell*, 21 Ohio St. 191; *Wightman v. Devere*, 33 Wis. 570.

⁹² *Thomas v. Dansby*, 74 Mich. 398; 41 N. W. 1028; *Doty v. Postol*, 87 Mich. 143; 49 N. W. 534.

that the intoxication should have been the proximate cause of injury, or of the act which caused it.”⁹³ The reason for the rule is that “the Legislature seems to have regarded intoxicating liquor as dangerous to society and to have intended that whoever, by furnishing liquor, contributed to the intoxication of any person, should be held responsible for injuries inflicted by him while in that condition without placing upon the sufferer the burden of showing that the injury was due to the intoxication.”⁹⁴ Thus, it has been held that a person who is wounded by the discharge of a pistol in the hands of a drunken man who was flourishing it about has a cause of action against the dealer who furnished the intoxicating liquor to the man who did the shooting.⁹⁵ And when a person is injured while intoxicated in a scuffle with another, also intoxicated, the wife of the party injured has a cause of action against the dealer causing or contributing to the intoxication of the person causing the injury to her husband for any damage to her means of support that she may have thereby sustained.⁹⁶ And when the wife of an intoxicated person while riding with her intoxicated husband was thrown to the ground and injured by reason of his reckless driving, it was held that she might recover of the dealer who caused or contributed to such intoxication for

⁹³ *Currier v. McKee*, 99 Me. 364; 59 A. 442.

⁹⁴ *Currier v. McKee*, 99 Me. 364; 59 A. 442.

⁹⁵ In the case of *King v. Haley*, 96 Ill. 106, the court said: “It appears plaintiff was a passenger on a freight train, and was in charge of stock he was shipping to market. He had no quarrel with Koffman, the drunken man, who came aboard the train, insane with intoxication. In his ravings he was constantly flourishing a pistol, loaded as the sequel showed, with powder and leaden ball, which he in some way discharged,

inflicting a severe wound on plaintiff. That is the exact case the statute has provided against by giving the party injured a right of action for the damage sustained. Accordingly, whoever caused the intoxication of the party who inflicted the injury, under this statute, is responsible to plaintiff for the damages sustained by the direct act of the intoxicated person.”

⁹⁶ *Thomas v. Dansby*, 74 Mich. 398; 41 N. W. 1088; *Munz v. People*, 90 Ill App. 637. But see *Houston v. Graw*, 45 Neb. 813; 64 N. W. 245.

the injuries she thus sustained.⁹⁷ But where a dealer's bartender sold intoxicating liquor to another, and during an altercation between such bartender and the purchaser, the bartender threw a glass at the purchaser which struck and injured complainant, it was held that the sale of intoxicating liquor to the purchaser was not the cause of the injury and that, therefore, the dealer was not liable under the civil damage statute.⁹⁸ Nor could a wife maintain an action for damages under this statute for injury received by her in falling on a slippery sidewalk while following her intoxicated husband to see where he obtained intoxicating liquor.⁹⁹

Sec. 1040. Injuries produced by reason of intoxication of any person.

Where the injury is sustained by reason of the intoxication of any person, the rule seems to be that the statute does not require that the selling or giving of the intoxicating liquor by the dealer should be the proximate cause of plaintiff's injury, but only that such sales or gifts should have contributed to the intoxication of the person incapacitated thereby, and that the intoxication should have been the proximate cause of the injury.¹ Thus, where the son of plaintiff upon whom she was dependent for support was made intoxicated by liquors sold to him by a dealer, and while in that condition attempted to assault another who, in defending himself, broke the jaw of plaintiff's son, thereby incapacitating him from work, it was held that the intoxication of plaintiff's son was the proximate cause of the injury to plaintiff and that the dealer was liable to her under the civil damage statute for injury to her means of support thus occasioned.² The reason of this ruling is found in the fact that the person who broke the jaw of plaintiff's son was acting in

⁹⁷ *Mulehey v. Givens*, 115 Ind. 286; 17 N. E. 598; *Wright v. Treat*, 83 Mich. 110; 47 N. W. 243.

⁹⁸ *Lueken v. People*, 3 Ill. App. (3 Bradw.) 375.

⁹⁹ *Johnson v. Drummond*, 16 Ill. App. (16 Bradw.) 641.

¹ *Currier v. McKee*, 99 Me. 364; 59 A. 442.

² *Currier v. McKee*, 99 Me. 364; 59 A. 442; *Woodring v. Jacobson* (Wash.), 103 Pac. 809.

self-defense and was not a wrongdoer. As was well said in this case,³ "it is the wrongful or negligent act of a third party intervening which breaks the chain of causation and relieves the wrongdoer of the consequences of his wrongful act; but if in the right, he is not responsible, and the party injured must seek reparation from him whose wrongful act was the first in the order of events causing the injury." Thus, where plaintiff's son was struck by a railroad train while walking along the track in an intoxicated condition, the railroad company not being in fault, it was held that the intoxication of the son was the proximate cause of the injury and that the dealer causing or contributing to the intoxication was liable.⁴ And where plaintiff's husband was convicted of drunkenness, it was held that the intoxication was the proximate cause of the conviction, and that the dealer causing or contributing to such intoxication was liable to the wife for any injuries to her means of support that she thereby sustained.⁵ But it has been held that where an intoxicated person was robbed of his money while in such a state, the dealer causing or contributing to such intoxication was not liable for such loss, for the reason that the intervening act which produced the injury was the wrongful act of a third person for which he was legally responsible.⁶ It is not neces-

³ *Currier v. McKee*, 99 Me. 364; 59 A. 442.

⁴ *McNary v. Blackburn*, 180 Mass. 473; 61 N. E. 885; *Calhoun v. Spencer*, 177 Mass. 473; 59 N. E. 78.

⁵ *Lucker v. Liske*, 111 Mich. 683; 70 N. W. 421.

⁶ In the case of *Gage v. Harvey*, 66 Ark. 68; 48 S. W. 898; 43 L. R. A. 143; 74 Am. St. Rep. 70, the court said: "If a third person intervenes between the act of the defendant and the injury, and does a culpable act, for which he is legally responsible, which produces the injury, and without it the injury would not have occurred, and

the act of the defendant furnished merely an occasion for the injury, but not an efficient cause, the defendant would not be liable; for no one is responsible for the independent wrong of a responsible person to whom he sustains no relation which makes him liable for his wrong independent of an actual participation therein or connection therewith. * * * In the case before us the intervening act produced the injury complained of, and was the wrongful act of a third person for which he was legally responsible. The sale and consumption of the liquor may have furnished the opportunity or

sary that the dealer should foresee the results of an intoxication which he caused, or contributed to, before he is held liable for any injuries sustained in consequence thereof, for even at the common law men are held liable every day in tort for the natural and proximate results of their wrongs, although the particular result could not have been foreseen specifically as necessary at the time of the act.⁷ It is probably unnecessary to suggest that the liability of the dealer for injuries produced by reason of the intoxication of any person is not confined "to cases of injury resulting from drunkenness immediately and during its continuance," but also includes those cases where the drunkenness results in sickness, insanity, or other disability induced by the intoxication.⁸ Thus, where a person had been intoxicated practically all of the time for several years upon intoxicating liquors sold to him by the dealer so that his mind had become affected thereby, and such person committed suicide, the widow was held to have a cause of action against the dealer under the civil damage statute, although her husband was not intoxicated at the time he took his own life.⁹

occasion for the wrongful act of the third person, but was not the proximate cause of the injury. Hence the saloon keeper, who sold the liquor which produced the intoxication, and the sureties on his bond, are not liable for damages."

⁷ McNary v. Blackburn, 180 Mass. 141; 61 N. E. 885; Eddy v. Courtright, 91 Mich. 264; 51 N. W. 887; Brockway v. Patterson, 72 Mich. 122; 40 N. W. 192; 1 L. R. A. 708; Dunlap v. Wagner, 85 Ind. 529; 44 Am. Rep. 42; Roth v. Eppy, 80 Ill. 283.

⁸ In the case of Mulford v. Clewell, 21 Ohio St. 191, the court said: "It seems to us, also, that the court erred in saying to the jury, as it did, that in order to maintain a case under these stat-

utes, it must appear that the injury resulted directly and immediately from the drunkenness, and during its continuance, and not from insanity, sickness or inability, induced by intoxication. The health of the husband, and his ability to labor, are often, to a greater or less extent, the means of the wife's support. In many cases, to destroy these, is to destroy her means of support."

⁹ In the case of Garrigan v. Kennedy, 17 S. D. 258; 101 N. W. 1081, the court said: "It is quite apparent from the testimony introduced that Garrigan was practically intoxicated the larger portion of his time between December, 1900, and the time of his death, and that during that time the defendant,

Sec. 1041. Sales causing death of purchaser.

It may be stated, as a general rule, that where the death of any person is the result of his intoxication, it is not necessary to show that the selling or giving of the intoxicating liquor by the dealer was the proximate cause of the death, but only that such sales or gifts contributed to the intoxication of the person and such intoxication was the proximate cause of his death.¹⁰ In determining whether the intoxication was or was not the proximate cause of a death, it is not necessary that it should have been the immediate cause. As is stated in a late Indiana case,¹¹ "if the death resulted from a cause incidental to some controlling agency, although such cause is nearer in point of time to the result, such controlling agency is the dominant and proximate cause. If the two causes were independent of each other, that nearest in place and time is chargeable with the loss. But where the immediate cause of the death grew out of and resulted from some

Kennedy, furnished him with more or less of intoxicating liquors producing his intoxication. The natural result of such continued intoxication would be to weaken and destroy the mind of Garrigan, and lead him to commit suicide. The jury were authorized, therefore, to draw the inference from the facts proved and admitted that the sale of intoxicating liquors by Kennedy to Garrigan was the proximate cause of his death." *Palmer v. Schurz* (S. D.), 117 N. W. 150; *Dice v. Sherberneau*, 152 Mich. 601; 116 N. W. 416; 15 Det. L. N. 255.

Drunken husband hooked by cow not vicious, seller not liable. *Lartz v. Gibson*, 13th Bradw. (Ill.) 487.

A saloon keeper may be held liable for assaults of men he has made drunk, resulting in the death of the persons assaulted.

Smiser v. State, 17 Ind. App. 519; 47 N. E. 229; *Forfeter v. Moore*, 67 N. H. 460; 36 Atl. 369; *Bell v. Zelmer*, 75 Mich. 66; 42 N. W. 606.

A State dispensary cannot be held liable. *Fowler v. Rome Dispensary*, 5 Ga. App. 36; 62 S. E. 660.

¹⁰ *Wall v. State*, 10 Ind. App. 530; 38 N. E. 190; *McCarty v. Wells*, 51 Hun, 171; 4 N. Y. Supp. 672; *Smith v. People*, 141 Ill. 447; 31 N. E. 425; *People v. Brumbach*, 24 Ill. App. 501; *Mead v. Stratton*, 87 N. Y. 493; 41 Am. Rep. 386; *Fink v. Garman*, 40 Penn. State, 95; *Hart v. Duddleson*, 20 Ill. App. 618; *Davis v. Standish*, 26 Hun (N. Y.), 608.

¹¹ *Nelson v. State*, 32 Ind. App. 88; 69 N. E. 298; *Baecher v. State*, 19 Ind. App. 100; 49 N. E. 42; *Smiser v. State*, 17 Ind. App. 519; 47 N. E. 229.

dominant cause, such dominant cause is the proximate cause of the death." Thus, where a dealer sells intoxicating liquor to a person in an intoxicated condition by reason of which he becomes so intoxicated that he exposes himself to the elements and contracts pneumonia from the effects of which he dies, it is held that the intoxication is the proximate cause of the death and the dealer held liable.¹² Again, a dealer was held liable where he illegally sold intoxicating liquor to a man in a state of intoxication and who, while in such state, recklessly drove his team to which was attached a wagon in which he was seated into a rut in the highway, thus precipitating him to the ground, from the effects of which injury he died.¹³ And where a dealer sold a minor intoxicating liquor from the effects of which he became intoxicated and while in that condition fell into the river and was drowned, it was held that the father had a cause of action against the dealer on his bond.¹⁴ A New York

¹² In the case of *Nelson v. State*, 32 Ind. App. 88; 69 N. E. 298, the court said: "Even if it appeared that the death resulted from pneumonia, if the pneumonia was the direct result of excessive drinking of intoxicating liquor unlawfully sold, the intoxication was the proximate and efficient cause of the death."

¹³ *Wall v. State*, 10 Ind. App. 530; 38 N. E. 190.

¹⁴ *Boos v. State*, 11 Ind. App. 257; 39 N. E. 197.

These cases, together with the other cases in Indiana, notably the case of *Dunlap v. Wagner*, 85 Ind. 529, overrule the cases of *Collier v. Early*, 54 Ind. 559; *Krach v. Heilman*, 53 Ind. 517, and *Baches v. Dant*, 55 Ind. 181, to the effect that there can be no recovery under the civil damage statute unless the death of the party was threatened, necessary and probable re-

sult of selling to him of intoxicating liquor by the dealer.

In the case of *Dunlap v. Wagner*, 85 Ind. 529, the court said: "Appellee relies upon the cases of *Krach v. Heilman*, 53 Ind. 517; *Collier v. Early*, 54 Ind. 559, and *Baches v. Dant*, 55 Ind. 181. In the last named case the facts were, that the husband, while intoxicated, fell down a flight of stairs and was killed, and it was held, solely upon the authority of the two cases first named, and without discussion or reference to any of our other cases, that the action would not lie. In the second of the cases named, the intoxicated man lay down upon a railroad Thornton's Intoxicants WK 394 track and was killed by a passing train, and the action was held not maintainable, and this case, like the other, rests entirely upon *Krach v. Heilman*, *supra*. It is

case ²⁰ put the proposition in the following form: "This question was not whether the death of the deceased was the natural, reasonable, or probable consequence of the defendant's act, but it was enough if intoxication, caused in whole or in part by liquor sold by the defendant, was the cause of the death of the plaintiff's husband, if by reason thereof the plaintiff's means of support were injuriously affected." ²¹ So it has been held that where a dealer sells

difficult, if not impossible, to reconcile the doctrine of the case under immediate mention with the earlier cases of *Formtain v. Draper* (49 Ind. 441); *English v. Beard* (51 Ind. 489); *Barnaby v. Wood* (50 Ind. 405), or the later one of *Schlosser v. State ex rel.*, 55 Ind. 82. Nor has the doctrine anywhere found favor; on the contrary, it has been disapproved. It is quite certain that it can not be harmonized with the uniform current of judicial decisions, and it is clear that the New England highway cases, upon which it is chiefly founded, can hardly be in point upon such a question, owing to the peculiarities of the statute of the New England States; and it is likewise certain that two of the cases cited as authority are now everywhere recognized as unsound."

In the case of *Collier v. Early*, 54 Ind. 559, the court said: "We are of the opinion that the complaint does not state facts sufficient to constitute a cause of action against the appellant, in favor of the appellee. The appellant cannot be held liable for consequences which are not naturally caused by his acts. The death of Early, caused by a train of cars, is an effect which is not naturally,

necessarily, nor even probably connected with the fact of unlawfully selling intoxicating liquor to him by the appellant, whereby he became drunk, and where the death could take place only upon the coincidence of his stepping on the track and the train passing at the same time, the consequence becomes more remote and more disconnected with the cause alleged. The death need not take place immediately and directly upon the cause; but it must be effected by a chain of natural effects and causes, unchanged by human action, or the party who committed the first act will not be responsible. In this case, the running of the train of cars was the human action which changed the course of natural effects and causes connected with the act alleged against the appellant. As the allegations stand in the complaint, Early was killed by the train of cars and not by the act of the appellant in unlawfully selling him intoxicating liquor."

²⁰ *McCarty v. Wells*, 51 Hun. 171; 4 N. Y. Supp. 672.

²¹ In the case of *Davis v. Standish*, 26 Hun, 608, the following instruction was approved: "If the proof in any case under this law shows that the intoxica-

another intoxicating liquors from the effects of which he becomes helplessly intoxicated and while in that condition wanders upon a railroad track and is killed, the dealer is liable although the intoxication is not the immediate cause of the death and the accident was not or could not have been contemplated by the dealer at the time he sold the decedent the intoxicating liquor which caused or contributed to the intoxication.²² And where a person by reason of his intoxi-

tion was to such an extent as to deprive the man of the normal use of his faculties, either physical or mental, so that he is rendered incapable of caring for himself and of protecting himself from the results of accidents or circumstances to which he was subjected, and by reason of such deprivation of his natural powers of body or mind his death is produced by his inability to protect or defend himself against circumstances which threaten his life, it may be said in those cases, in general terms, that such intoxication is the proximate and direct cause of his death. It is not necessary that the death, or the circumstances which immediately led to or produced it, should have been within the contemplation of the person who sold the liquor. The man who sells liquor to another, whether lawfully or unlawfully, is not protected against the provisions of the statute, because he does not, at the time he sells the liquor, contemplate it will lead the man into circumstances where he is liable to lose his life. It is only necessary that the liquors sold or furnished should have produced either in whole or in part a state of intoxication, and that that state of intoxication should have

been the direct and approximate cause of the death whether the circumstances under which the death occurred were within the possible or impossible contemplation of the party who sold or furnished the liquor."

²² In the case of *Schroder v. Crawford*, 94 Ill. 357; 34 Am. Rep. 236, the court said: "If a person, because of being intoxicated, lies down upon, or falls on a railroad track and is unavoidably run over and killed by a passing train of cars, the result is in consequence of the intoxication. It is said there was here an intervening agency which caused the death, to wit: the train of cars, that was the proximate cause, and the intoxication but the remote cause, and that the proximate cause only is to be looked to. * * * This would be construing away the statute in defeat of its purpose. It was not the intention that the intoxicating liquor alone, of itself, exclusive of other agency, should do the whole injury. That would fall quite short of the measure of remedy intended to be given." See also *People v. Brumback*, 24 Ill. App. 501; *Sellers v. Foster*, 27 Neb. 118; 42 N. W. 907.

cation lost his way and was frozen to death, the dealer who caused or contributed to such intoxication was held liable therefor.²³ And even where a person lost his way because of his intoxication and after he became sober he attempted to regain the road, but, in doing so, drove over a bank and was killed, it was held that the dealer selling or giving the intoxicating liquors to the person killed was liable.²⁴ And where the body of a person was found in a vault twelve days after a drunken spree, it was held that a jury had the right to say that the death occurred by reason of such person's intoxication, and the dealer causing or contributing to such intoxication was held liable.²⁵ Again, where a person, in a state of intoxication, commits suicide, it is for the jury to decide whether the act is the result of the intoxication or otherwise, and if they so find, the dealer who caused or contributed to the intoxication is liable.²⁶ Even where at the time the suicide was committed, the person committing the act was sober, still, if by the continued sales of intoxicating liquors by a dealer to him, the suicide's mind was weakened and he became insane, and while in that state he took his own life, the dealer was held liable.²⁷ But although a dealer is liable for any

²³ Curran v. Percival, 21 Neb 434; 32 N. W. 213.

See also the following cases as illustrative of the general proposition. Scott v. Chop (Neb.), 49 N. W. 940; Davis v. Standish, 26 Hun (N. Y.), 608.

²⁴ In the case of Kerhow v. Bauer, 15 Neb. 150, 18 N. W. 27, the court said: "As to the second above instruction, numbered 4, it is faulty in that it makes necessary in order to show the liability of the defendants, that deceased should have been proved to have been intoxicated at the very moment of the accident. This is not the law. If he was intoxicated when he lost his way, and lost it in consequence of such intoxica-

tion, but afterwards became sober, and in an effort to regain the road drove over the bank to his death, the fatal result was nevertheless caused by his intoxication."

²⁵ McCarty v. State, 162 Ind. 218; 70 N. E. 131.

²⁶ Blatz v. Rohrbach, 42 Hun (N. Y.), 402; Lawson v. Eggleston, 59 N. E. 1124; 164 N. Y. 600; affirming 52 N. Y. Supp. 181.

²⁷ In the case of Garrigan v. Kennedy, 17 So. D. 258; 101 N. W. 1081, the court said: "It is strenuously contended by the appellants that the evidence was insufficient to justify the jury in concluding that the liquor sold to Garrigan by the defendant Ken-

death that is the proximate result of the intoxication of any person which he caused or contributed to, still, if the wrongful or negligent act of a third party or the party himself after he becomes sober intervenes, which breaks the chain of causation, the dealer is relieved from liability. Thus, where a person was injured by reason of his intoxication, and, after he became sober, he exposed himself in a reckless manner, and the exposure resulted in inflammation and gangrene to the injured parts to such an extent that he died, it was held that the dealer was not liable for his death.²⁸ Again, where an intoxicated man quarreled with an old enemy in a saloon, and later picked a quarrel with the father-in-law of such enemy and fought him, and while engaged in this fight the person with whom such intoxicated man originally quarreled intervened and participated in the fight, and while such fight was in progress the cry of police was raised, and the intoxicated person in attempting to escape tumbled down a steep bank into a sewer opening and broke his neck, it was

nedy was the cause of his suicide, and that there was no evidence tending to prove that he had been furnished any intoxicating liquors by the defendant Kennedy for some time prior to his suicide and therefore the intoxicating liquor sold by the defendant Kennedy was not the proximate cause of his suicide. It is quite apparent from the testimony introduced that Garrigan was practically intoxicated the larger portion of his time between December, 1900, and the time of his death, and that during that time the defendant Kennedy furnished him with more or less intoxicating liquors producing his intoxication. The natural result of such continued intoxication would be to weaken and destroy the mind of Garrigan, and

lead him to commit suicide. The jury were authorized, therefore, to draw the inference from the facts proved and admitted that the sale of intoxicating liquor by Kennedy to Garrigan was the proximate cause of his death."

²⁸ In the case of *Schmidt v. Mitchell*, 84 Ill. 195, the court said: "If, therefore, the wound inflicted upon the deceased was in consequence of the intoxication, it was, then, a material question for the jury to determine, from the evidence, whether the wound received was the cause of Mitchell's death, or whether the death was the result of misconduct on his part in using his leg contrary to and in disregard of the advice of the surgeon."

held that the intoxication was not the proximate cause of his death.²⁹

Sec. 1042. Commission of crimes by intoxicated person.

A discussion of this subject will be found more profitable under the following subdivisions: (a) Effect upon those who are injured in their person, property or means of support by reason of the commission of crime by an intoxicated person. (b) Effect upon those who are injured in their means of support by reason of the punishment of the person who committed a crime while in an intoxicated condition, and by reason thereof.

Sec. 1043. Injury to person and property by reason of crime of drunken person.

The general rule seems to be that where any person is injured in person, property or means of support by reason of the commission of a crime by an intoxicated person and such intoxication is the proximate cause of the commission of the crime, such injured party can recover of the dealer

²⁹ In the case of *Roach v. Kelly*, 194 Pa. St. 24; 44 Atl. 1090, the court said: "There are many cases where the question of remote or proximate cause is for the jury, but this is not one of them. The facts are undisputed. Deceased had an old grudge against Atkinson. When heated by liquor he revived the old quarrel. In gratification of his ill will he also picked a quarrel with Pratt, the father-in-law of the man he hated. They proceeded some distance to private property and fought. Roach defeated Pratt, and then attacked Atkinson. While engaged in this second flagrant breach of the peace the cry of 'Police' was raised, and all—

both drunk and sober—fled. Roach by the concurring circumstances of the slip on the bank and the fall into the open sewer, was killed. Admit that his resentment on account of the old grudge, and his quarrelsomeness, were prompted by the liquor, and resulted in the fight. He received no injury in that consequence of defendant's act. The direct effect of the liquor ended with the fight. In a subsequent attempt, however, to escape arrest for a violation of the law, he met his death. This was an intermediate cause, disconnected from the primary one, for which under no view of the facts was defendant responsible."

causing or contributing to such intoxication.³⁰ Thus, where two persons while on a drunken spree quarreled and one of them struck the other with a stone, causing his death, it was held that the widow of the person killed had a cause of action against the dealer causing or contributing to the intoxication of the murderer.³¹ And where an intoxicated person killed plaintiff's wife, who was dependent on plaintiff for support, whereby he permanently lost her society, it was held that the dealer causing or contributing to the intoxication of the murderer was liable to the plaintiff for all damage sustained by him by reason of the act.³² Indeed, in some States the rule is extended farther than above enunciated, some courts saying that proof of the act of the intoxicated person itself, without compelling the injured party to produce proof as to the cause of the act or permitting the jury to speculate upon the probabilities whether the intoxication was the natural cause of the act or not, fixes the liability for damages upon the person selling or furnishing the liquor which caused the intoxication.³³ As was said in a New York case,³⁴ which

³⁰ *Pickard v. Teatro*, 34 Ill. App. 398; *Munz v. People*, 90 Ill. App. 647; *Jackson v. Brooklins*, 5 Hun, 530; *Scott v. Chope*, 33 Neb. 41; 49 N. W. 940; *McClay v. Worrell*, 18 Neb. 52; 24 N. W. 429; *Doty v. Postal*, 87 Mich. 143; 49 N. W. 434.

³¹ *Brockway v. Patterson*, 72 Mich. 122; 40 N. W. 192.

³² *Fortier v. Moore*, 67 N. H. 460; 36 A. 369.

³³ *Brockway v. Patterson*, 72 Mich. 122; 40 N. W. 192.

³⁴ In the case of *Neu v. McKechim*, 95 N. Y. 632, the court said: "The learned counsel for the appellants, however, argues with much earnestness that the act which deprived the plaintiff of his father, and cut off the support which he had before enjoyed was not a natural consequence of

the beer sold by the defendants; that they were not bound to know that Jacob Neu would strike his wife on the head with an axe, and then cut his own throat with a razor. Perhaps not. But a cause of action may exist without such foresight. The statute does not even require that the vendor shall know that drunkenness leads to crime of any degree, nor even that it is the cause of poverty and beggary, and consequent distress to the drunkard's family. It is enough that these results come from intoxication. * * * The cause of action is neither taken away nor mitigated because the cause of injury also constitutes a crime. The jury were not to inquire whether homicide or suicide were the natural, reasonable or probable consequences of the defendant's acts."

was a suit brought by a minor against a dealer for loss of support because of the killing of his mother by his intoxicated father and the father's subsequent suicide, "it is enough if, while intoxicated, in whole or in part, by liquors sold by the defendants, those acts were committed, if by reason of them, or either of them, the plaintiff's means of support was affected to his injury." In a later New York case,³⁵ the court said: "This statute seems to render any person absolutely liable for the wrongs perpetrated by a person while intoxicated, when the intoxication was caused in whole or in part by the defendant, and precludes an examination into the further question whether or not, except for such intoxication, the injuries would have been inflicted." In Illinois, however, the rule has not been extended so far, it being necessary for plaintiff to establish before there can a recovery: *first*, the sale of intoxicating liquor; *second*, that such intoxication caused the crime complained of and from which injury resulted to plaintiff.³⁶ In Minnesota it is held that where an intoxicated minor assaulted plaintiff which resulted in serious injury to him, the persons causing or contributing to the intoxication of the minor were not liable in damages to the person injured for the reason that the voluntary and wrongful act of the intoxicated person in making the assault was not so related to the fact that he drank intoxicating liquors with the defendants or at their expense, as to be considered the natural and proximate result.³⁷ This was a suit, however, which was brought against the persons treating the person committing the assault and not against the dealer and

³⁵ Bacon v. Jacobs, 63 Hun, 51; 17 N. Y. Supp. 323.

³⁶ In case of Baker v. Summers, 201 Ill. 52; 66 N. E. 302, reversing 103 Ill. App. 237, the court said: "The questions in dispute were whether there were sales of intoxicating liquor by defendants to Summers or Marcum, or both; whether Summers or Marcum, or both of them, became intoxicated

as the result, in whole or in part, of the liquor so sold, and whether such intoxication was the effective cause of Summer's death. It was necessary for plaintiff to prove the sale of liquor, consequent intoxication, and that such intoxication caused the death of her husband."

³⁷ Swinford v. Lowry, 37 Minn. 345; 34 N. W. 22.

was a common law action.³⁸ The case is not, therefore, to be taken as an authority in actions under the civil damage statute. So in Georgia, "under a statute allowing a recovery for death caused by crime or criminal or other negligence," it was held that where an intoxicated man killed another in a quarrel, the dealer, although he knew the murderer was drunk at the time he sold him additional intoxicating liquors, was not liable to the widow for the injury she sustained for the loss of her husband, because the damages were too remote.³⁹ This case, also, is not to be taken as an authority under the civil damage statute. In concluding the discussion on the present subject, it may be remarked that the civil damage statute does not include a right of recovery for damages growing out of the disorderly operation of a saloon. Thus, it was held that where plaintiff's husband was killed as a direct result of the failure of the dealer to maintain an orderly house, she could not recover of the dealer on his bond under the civil damage statute.⁴⁰

³⁸ In *Swinford v. Lowry*, 37 Minn. 345; 34 N. W. 22, the court said: "The case is clearly to be distinguished * * * from other cases arising under special statutes allowing actions for damages against liquor sellers for injuries caused by persons while intoxicated to whom they have sold intoxicating liquors."

³⁹ *Belding v. Johnson*, 86 Ga. 177; 12 S. E. 304; 11 L. R. A. 53.

⁴⁰ In *State v. Knotts*, 24 Ind. App. 477; 56 N. E. 941, the court said: "The extent to which it was contemplated by the Legislature to provide a remedy for loss of maintenance and support, through action on the bond, was expressed in the section above quoted, involving an unlawful sale of intoxicating liquor, and injury or damage sustained to person, property,

or means of support on account of the use of such liquor so sold."

Where a parent was given a cause of action for an injury to his minor son, it was held that he was entitled to recover for nursing him, his medical bills and his loss of his services during his illness, besides for loss of service caused by his permanent disability to earn wages. *Rude v. Faker*, 143 Ill. App. 456. See also *Sterling v. Callahan*, 94 Mich. 536; 54 N. W. 495. Where the statute fixed the amount recoverable by the parent at not less than \$450; and where the recovery was only \$50, the defendant could not complain.

Proof must be made of the value of the medical services in order to recover them. *Van Alstine v. Kaniecki*, 109 Mich. 318; 67 N.

Sec. 1044. Injury to means of support by reason of punishment of drunken person.

The weight of authority seems to be that if a person commits a crime while intoxicated, and in consequence thereof such person is convicted and incarcerated in the penitentiary, or is executed, or if he flees the country to escape punishment, any person who is thereby injured in his or her means of support has a cause of action against the dealer who caused or contributed to such intoxication.⁴¹ Thus, where plaintiff's husband while intoxicated and in consequence thereof killed another, and after trial he was convicted and sent to the penitentiary for life, it was held that plaintiff was entitled to recover of the dealer who caused or contributed to the intoxication of her husband damages for injuries to her means of support occasioned by such imprisonment.⁴² The court in this case well said: "The homicide committed by Beers was a crime punishable by imprisonment, and his arrest, conviction and sentence was a result to be anticipated, and, as a matter of course, by the force and operation of the law of the land. The conviction of Beers was not the cause of his imprisonment, but was the result of the crime he perpetrated in killing Banfield, and that act was the direct and only cause in the eye of the law for his incarceration. Under the act it is necessary that two facts should concur besides the sale or gift of the liquor by the defendant to constitute a cause of action, to-wit, intoxication resulting from its use in whole or in part, and the loss of the means of support by the plaintiff in consequence of such intoxication. The statute requires nothing more." This case has been followed in Indiana.⁴² In Michigan ⁴⁴ it was held that an instruction to the jury was not prejudicial to plaintiff which told them in substance that before plaintiff could recover they must find "that

W. 502. Funeral expenses may be recovered. *Kelling v. Palmer* (Neb.), 120 N. W. 155.

⁴¹ *Loftus v. Hamilton*, 105 Ill. App. 72, 75; *Homire v. Halfman*, 156 Ind. 470; 60 N. E. 154; *Beers v. Walhizer*, 43 Hun (N. Y.), 254.

⁴² *Beers v. Walhizer*, 43 Hun, 254.

⁴³ *Homire v. Halfman*, 156 Ind. 470; 60 N. E. 154.

⁴⁴ *Dennison v. Van Wormer*, 107 Mich. 461; 65 N. W. 274.

while intoxicated at such time, and by reason thereof, he (meaning the person convicted) formed the intent of entering the store and committing the offense for which he was convicted, or that, when he entered the store to commit the offense, he was intoxicated to such an extent as to be incapable of forming any intelligent intent, or to realize the true character of the act which he committed, either that by reason of the intoxication he formed the intent to enter the store, or that he was intoxicated to such a degree that he was incapable of forming an intent." The court, however, intimated that the arrest and conviction of plaintiff's husband was the proximate cause of her injury rather than his intoxication, although this case cites *New v. McKechim*⁴⁵ upon which is based *Beers v. Walhizer*.⁴⁶ In Pennsylvania the Supreme Court seems to have held squarely that the imprisonment of a person due to the commission of a crime while in an intoxicated condition, although the crime was occasioned by the intoxication, does not establish a cause of action in favor of those who thereby suffer damage to their means of support against the dealer who caused or contributed to the intoxication.⁴⁷ The Pennsylvania statute, however, under which this action was brought only provided a right of recovery in favor of those who suffered injury to their person or property in consequence of the furnishing of intoxicating liquor to any person in violation of law. The reasoning of the court is in part as follows: "There is another objection to the plaintiff's claim which appears to us to be well taken. It is that the imprisonment of her husband is not the proximate consequence of the unlawful negligence of the defendant. It is the act of the law—the direct result of the intervention of an independent

⁴⁵ *Neu v. McKechim*, 95 N. Y. 632.

⁴⁶ *Beers v. Walhizer*, 43 Hun, 254

In case of *Dennison v. Wormer*, 107 Mich. 461; 65 N. W. 274, the court said: "In the present case, plaintiff's husband was not injured or killed by an intoxicated per-

son, nor did the act done by him cut off her support. The act done was not a direct blow at her person, property, or means of support. It was his arrest, conviction and sentence which deprived her of his aid."

⁴⁷ *Bradford v. Boley*, 167 Pa. 506; 31 A. 751.

agency or force. True, *Beers v. Walhizer*⁴⁸ appears to conflict with this view, and was regarded by the learned court as a sufficient answer to the objection that the furnishing of the liquor was not the proximate cause of the imprisonment. But that case was based on a statute which, in plain terms, gave the wife an action for an injury to her means of support, and was construed as extending to and embracing the remote as well as the direct consequences of the unlawful negligence. The decision in *Beers v. Walhizer* is, therefore, not only opposed to the common law rule on this subject, but to our construction of the act of May 8, 1854.”⁴⁹

ARTICLE III.—DEFENSES.

SECTION.

1045. In general.

1046. License or authority.

SECTION.

1047. Contributory act or negligence.

1048. Release or discharge.

Sec. 1045. In general.

Persons maintaining actions under the civil damage statute must bring themselves within the terms of the statute. So that it is a defense to any action brought to recover damages; (a) That no sales or gifts of intoxicating liquor were made; (b) that there was no intoxication; (c) that the injuries complained of were not the result of the intoxication; (d) that no injuries resulted to plaintiff from the intoxication; (e) that the plaintiff has no right under the statute to sue; (f) and in those States where the right of action is founded upon illegal sales, that no sales or gifts were made contrary to law. It is the settled law, however, that in actions for damages under this class of statutes, it is not material how many others aided in producing the intoxication, but any person engaged in the traffic who sells or gives any intoxi-

⁴⁸ 43 Hun, 254.⁴⁹ *Bradford v. Boley*, 167 Pa. 506; 31 A. 751.

eating liquors to another, the use of which contributes to his intoxication and from which intoxication injury results, is liable for the whole injury.⁵⁰ Nor is it a defense to prove that the party became intoxicated at other places, if during the continuance of the intoxication, the dealer sold or gave him additional intoxicating liquor and injury resulted by reason of such intoxication.⁵¹ Nor is it a defense to an action under the statute for injuries suffered by a plaintiff by reason of the intoxication of another to prove that prior to the time of the alleged sales or gifts of intoxicating liquor which caused or contributed to the intoxication and which resulted in injury to the plaintiff that the intoxicated person was an habitual drunkard, although most certainly the plaintiff is limited in her right of recovery to such injuries as she sustained by reason of the intoxication which defendant caused or contributed to.⁵² Nor is it a defense to an action

⁵⁰ *Emory v. Addis*, 71 Ill. 273; *Hackett v. Linsley*, 77 Ill. 109; *Fountain v. Draper*, 49 Ind. 441; *Smiser v. State*, King, 17 Ind. App. 519; 47 N. E. 227; *Woolheather v. Risley*, 38 Iowa, 486; *Kearney v. Fitzgerald*, 43 Iowa, 580; *Werner v. Edmiston*, 24 Kan. 147; *Bryant v. Tidgewell*, 133 Mass. 86; *Steele v. Thompson*, 42 Mich. 594; 41 N. W. 536; *Roose v. Perkins*, 9 Neb. 304; 31 Am. Rep. 409; 2 N. W. 715; *Kirkow v. Bauer*, 15 Neb. 561; 20 N. W. 29; *Warrick v. Rounds*, 17 Neb. 411; 22 N. W. 785; *Cornelius v. Hultman*, 44 Neb. 441; 62 N. W. 891; *Bodge v. Hughes*, 53 N. H. 614; *Boyd v. Watt*, 27 Ohio St. 259; *Sibila v. Bahney*, 34 Ohio St. 399; *Acher v. Tinglehoff* (Neb.), 119 N. W. 456.

A saloon keeper furnishing a drunken man liquors at the request of one treating him renders himself liable. *Johnson v. Gram*,

72 Ill. App. 676; *Carrier v. Bernstein*, 109 Iowa, 572; 73 N. W. 1076; *Schiek v. Sanders* (Neb.), 74 N. W. 39.

⁵¹ In *Smiser v. State*, 17 Ind. App. 519; 47 N. E. 227, the court said: "The fact that some of the liquor by which the deceased was intoxicated was procured by him at another saloon could not make any difference in favor of appellants. If Smiser sold such liquors to the deceased when he was already intoxicated, the statute was violated; and if the liquor furnished by Smiser caused additional intoxication, and injury resulted proximately to the means of support of relatrix because of the intoxicated condition thus existing, the appellants were liable on the retailer's bond for such result."

⁵² In *Ford v. Cheever*, 105 Mich. 679; 63 N. W. 975, the court held the following instruction good: "It would be true, gentlemen, that

brought by a wife against a dealer, for injuries to her means of support because of the intoxication of her husband which led to his death, that the husband failed to support the wife prior to the intoxication which caused his death,⁵³ for, as remarked by the Iowa court:⁵⁴ "One is not justified in causing loss of human life because that life may not apparently be of much consequence either to his friends or to his family. But for defendant's sales, the husband might have reformed, and returned to his old manner of living. * * * Plaintiff was entitled in law to the support of her husband, and, no matter how worthless that husband may seem to be, neither a saloon keeper nor anyone else is justified in taking his life and then saying that it was of no consequence anyway." And where a person has been an habitual drunkard for ten years and has failed to give anything for the support of his family, such facts were held no defense in a suit brought by the wife against the dealer to recover the money spent by the drunkard in his saloon,⁵⁵ for, as said by the Michigan court,⁵⁶ "it

this defendant could not be held responsible for damages or injury which she may have suffered by reason of the sales of intoxicating liquor to her husband at a time before he had anything to do with it; that is, I mean, prior to the year 1888, when Mr. Cheever went into the business; but if he did sell liquor after that time, from which the plaintiff suffered injury, even though he may have been, at the time when he began the sale of liquor to him, a man who had suffered much from drink, or she may have suffered much by reason of the fact that he had been a hard drinker, still that would not relieve the defendant from responsibility for such damages as she may have suffered by reason of his action, under the instructions I have given you." See also *Lane v. Tip-*

py, 52 Ill. App. 532; *Friend v. Dunks*, 37 Mich. 25.

In an action to recover damages for injury to her feelings because of sales to her son, the defendant may show in mitigation that such son was in the habit of becoming drunk before he sold him liquors. *Liebler v. Carrel*, 155 Mich. 196; 118 N. W. 975; 15 *Detroit L. News*, 976.

⁵³ *Knott v. Peterson*, 125 Iowa 404; 101 N. W. 173; *Rouse v. Melsheimer*, 82 Mich. 172; 46 N. W. 372. See *Friend v. Dunks*, 39 Mich. 733.

⁵⁴ *Knotts v. Peterson*, 125 Iowa, 404; 101 N. W. 173.

⁵⁵ *Rouse v. Melsheimer*, 82 Mich. 172; 46 N. W. 372.

⁵⁶ *Rouse v. Melsheimer*, 82 Mich. 172; 46 N. W. 372. :

must be presumed as a natural and legitimate assumption that the earnings of plaintiff's husband, if not spent for drink, would go toward the support of his wife and family.' It is a defense in an action under the statute to recover damages for injuries suffered at the hands of an intoxicated man and by reason of his intoxication to establish that the person committing the injury had in fact fully recovered from his intoxication at the time the injury was inflicted, although it is not a defense to the action to prove that the person inflicting the injury had time to recover from the effects of his intoxication.⁵⁷ But it is no defense to an action under the statute to establish the fact that at the time of the accident in which plaintiff's husband lost his life that he had recovered from the effects of his intoxication when the intoxication was the cause of putting him in a perilous situation, and it was in attempting to extricate himself from such situation after he became sober that he lost his life.⁵⁸ Nor is it a defense under such a statute in an action brought by a mother against a dealer for selling intoxicating liquors to her minor son to establish that at the time of the sales to such minor the dealer believed and had reason to believe that he was an adult, unless the statute under which the action is brought provides that the selling must be knowingly done in order to create liability.⁵⁹ Nor is it a defense in an action against the surety on a dealer's bond to establish the fact that such surety had removed from the town, and that the dealer had been notified by the county treasurer to file a new bond and close his saloon until he had so done.⁶⁰ It is no defense, after notice not to sell had been given defend-

⁵⁷ In *King v. Haley*, 86 Ill. 106, the court said: "We are not aware that either the court or jury can know, as a matter of law, how long it takes a person to recover from the intoxicating effects of spirituous liquors. The only question proper to be submitted is whether the drunken man had in fact recovered from the effects of

drunkenness, and that is a fact to be proven as any other in the case."

⁵⁸ *Kuhn v. Bauer*, 15 Neb. 150; 18 N. W. 27.

⁵⁹ *McGuire v. Glass* (Tex. App.), 15 S. W. 127.

⁶⁰ *Wright v. Treat*, 83 Mich. 110; 47 N. W. 243.

ant, to prove that he did not know that the person who obtained the intoxicating liquor was the person named in the notice.⁶¹ Neither is it a defense where plaintiff relies upon sales made by the bartender to establish the fact that he had instructed his bartender not to open the saloon on the day in question,⁶² for, as said by the Michigan court, "the sale of intoxicating liquors was a part of the defendant's regular business. His bartender was his agent, intrusted with the care of the business, and defendant is responsible for all sales made by him. The statute creates a liability against saloon keepers, and they cannot avoid this liability by instructions given to those they place in charge of such business."⁶³

Sec. 1046. License or authority.

We have already found that in some States liability attaches under the statute when injury results from intoxication against the dealer who caused or contributed to such intoxication, irrespective of the question whether the sales were in violation of law or not. In other States liability under the statute does not attach unless the sales or gifts of intoxicating liquor made by the dealer and causing the intoxication were contrary to law. In those States holding to the first view, the license is no defense to an action brought on the bond for injuries sustained by a party against a dealer by reason of the intoxication of a third person, even though the sales of intoxicating liquor causing or contributing to the intoxication were not in violation of the law. As was said by the Nebraska court:⁶⁴ "The cause of action, however, arises from an injury suffered in consequence of the furnishing of such liquor. The license is in the nature of a regulation, but is no protection to the person furnishing the liquor

⁶¹ Weber v. Wiggins, 11 Ohio Cir. Ct. R. 18; 1 O. C. D. 84.

⁶² Gullikson v. Gjorud, 82 Mich. 503; 46 N. W. 723.

⁶³ Gullikson v. Gjorud, 82 Mich. 503; 46 N. W. 723.

⁶⁴ Jones v. Bates, 26 Neb. 693; 42 N. W. 751; 4 L. R. A. 495.

See also Roose v. Perkins, 9 Neb. 304; 2 N. W. 715; 31 Am. Rep. 409; Carrier v. Bernstein, 104 Iowa, 592; 73 N. W. 1076.

except as against the State. Notwithstanding the license, the person licensed furnishes liquor at his peril, and if he contributes to the intoxication of an individual, by reason of which an injury results to anyone, he will be liable. The act of furnishing the liquor is regarded in law as a tort, and all who furnish it as wrongdoers." Under the second class of cases above mentioned, it is quite clear that the license is a defense to any action under the statute brought against a dealer for injuries occasioned by the intoxication of any person unless the sales or gifts made by the dealer and causing or contributing to the intoxication were illegally made, as where the sales of intoxicating liquor were made to an intoxicated person, to an habitual drunkard after notice, to a minor, or when the sales were made at prohibited times, or where the sales were made contrary to any other provision of the laws of the State where the action is brought.

Sec. 1047. Contributory act or negligence.

The purpose of the statute being to furnish redress and compensation to innocent sufferers of the effects of intoxication, it is quite clear that there can be no recovery by any person suffering injury in his person, property or means of support by reason of the intoxication of another who knowingly and voluntarily encourages and contributes to such a state of intoxication.⁶⁵ Thus, where a wife requested dealers to sell intoxicating liquors to her husband and where she was in the habit of drinking intoxicating liquors with him until she became intoxicated, it was held that she was not entitled to recover damages for injuries which she sustained by reason of his intoxication, because she had contributed thereto.⁶⁶

⁶⁵ Englekin v. Hilger, 48 Iowa, 563; Rosecrants v. Shoemaker, 60 Mich. 4; 26 N. W. 794; McDonald v. Casey, 84 Mich. 505; 47 N. W. 1104; Elliott v. Barry, 34 Hun, 129 (N. Y.); Huff v. Aultman, 69 Iowa, 71; 28 N. W. 440; 58 Am. Rep. 213; Hackett v. Smelsley, 77 Ill. 109.

⁶⁶ In Englekin v. Hilger, 48 Iowa, 563, the court said: "The question for determination is, can a wife recover damages caused by her intoxicated husband, to whose intoxication she directly contributed? * * * We are of the opinion she cannot. It seems to us no just or legal reason can be

And where a wife knew that her husband had purchased a jug of whisky and put it beside his bed the night of his death, it being established that the husband was not vicious when intoxicated nor that the wife was not actuated by fear in refusing to remove the jug from the reach of the husband or destroy its contents, it was held that she was not entitled to damages under the civil damage statute for injuries to her means of support, because she was guilty of encouraging her husband to drink from the jug by failing to remove it.⁶⁷

And where a wife having served written notice on a dealer **not** to sell her husband intoxicating liquors and thereafter attempted to procure intoxicating liquors of the dealer and others for her husband, in a suit by such wife against the dealer for injuries to her means of support by reason of the intoxication of her husband, it was held that such fact might be considered in defeating her right to recover.⁶⁸ Again, where a person treats another to intoxicating liquors and such liquor causes or contributes to the intoxication of such other, the dealer is not liable to the person so treating for any injuries that he may receive by reason of the intoxication of the person he treated.⁶⁹ But where a wife brought suit under the statute for damages against a dealer for selling her hus-

given for permitting her to so recover. The damages, it will be seen, were caused by the act of the plaintiff. Why should she be permitted to recover from another damages for wrongs and injuries inflicted on herself by her intoxicated husband, when by her own act she caused the intoxication? The mere statement of the proposition is its own refutation."

⁶⁷ In *Regit v. Bell*, 77 Ill. 593, the court said: "'* * * It seems very plain, from the testimony, the plaintiff, now his widow, could have deprived him of the use of this whisky, had she been so inclined, by breaking the jug, or throwing away its contents, whilst

he was in bed. There was nothing to prevent her from so doing, and if she was not willing her husband should drink the contents of the jug, it was very easy to have prevented it. We are bound to consider she was a willing party to the conduct of her husband, and instrumental in bringing the loss upon herself." *Kliment v. Corcoran*, 51 Neb. 142; 70 N. W. 910 (consent of wife given to furnishing liquor no bar to action).

⁶⁸ *Tipton v. Thompson*, 50 S. W. 641; 21 Tex. Civ. App. 143; *Hackett v. Smelsley*, 77 Ill. 109.

⁶⁹ *Hayes v. Waite*, 36 Ill. App. 397.

band intoxicating liquors causing his death, it was held that it was no defense to show on occasions previous to the sales complained of that she had ordered the dealer to sell her husband intoxicating liquor, unless it could be shown that the sales authorized by the wife contributed to the intoxication which caused the injury.⁷⁰ And where the wife has forbidden a dealer to sell intoxicating liquors to her husband, in a suit brought by the wife against such dealer for injuries sustained to her means of support by reason of the intoxication of her husband, it is no defense to establish that subsequent to the time that plaintiff forbid the dealer from selling to her husband, she, in the husband's presence, gave permission for the dealer to sell such husband all he wanted, if, when she gave such permission, she was acting under the coercion of her husband; and the jury, from the fact of the previous notice not to sell and the presence of the husband at the time she countermanded such order, have the right to infer that the dealer knew that the wife was acting under coercion when she gave her permission for him to sell to her husband.⁷¹ Again, it is no defense to an action brought by the wife under the statute to establish that the plaintiff gave the dealer a written order to permit her husband to have

⁷⁰ Rafferty v. Buchman, 46 Iowa, 195; McDonald v. Casey, 84 Mich. 505; 47 N. W. 1104; Earp v. Lilly, 120 Ill. App. 123; affirmed, 217 Ill. 582; 75 N. E. 552.

⁷¹ In the case of Jewett v. Wau-shura, 43 Iowa, 574, the following instruction was held good: "The defendant denies the alleged sales and also insists that for a part of the time the plaintiff herself authorized the sale of liquor to her husband. If the plaintiff did direct the defendant to sell her husband what beer he wanted, and the defendant, in good faith, supposed that such request was made of her own free will, there is no liability for any sales made under

these circumstances. But if you find from the evidence that the defendant knew that Jewett was an habitual drunkard, and knew that the wife only requested the sales to be made under the restraint of her husband and to keep peace with him, then the defendant is not excused if he did sell to the husband and make him drunk."

The fact that the wife had written the defendant requesting his aid to check his drinking habit, in which she said she had no objection to sales to him by the defendant of occasional drinks, is not a defense. Earp v. Lilly, 120 Ill. App. 123; affirmed, 217 Ill. 582; 75 N. E. 552.

intoxicating liquors where the husband procured such order under threats of leaving his wife and in refusing to give her any money unless she did so, and the dealer knew these facts at the time of the sale.⁷² Nor is it a defense to an action brought by a wife against a dealer to establish the fact that the wife purchased intoxicating liquor and took it home if it is shown that the purpose of the wife in so doing was to keep her husband at home and keep him from squandering his time and money in saloons.⁷³ Nor is it a defense to an action under the statute brought by a wife for injuries to her means of support by reason of the intoxication of her husband to prove that on one occasion she drank beer at home with her husband.⁷⁴ And in a suit against a dealer for causing the intoxication of plaintiff's husband, a declaration by plaintiff to the dealer that she did not care if her husband got liquor of him if the husband did not get too much, is not a bar to a recovery by plaintiff of the actual damages suffered by her and caused by the husband's intoxication.⁷⁵ Nor is it a defense in a suit brought on a liquor bond by a father against a dealer for selling intoxicating drinks to his minor son, to prove that plaintiff did not object to others selling his son intoxicating liquors, although such evidence may be permissible to corroborate the dealer's testimony that the father had in fact consented to the sale made by the defendant.⁷⁶ It is no defense to an action under the "civil damage" statute that the plaintiff signed the petition for the defendant to get the license, for by signing his petition the plaintiff did not authorize the defendant to sell in violation of the statute, nor did he thereby consent that the defendant might

⁷² *Thomas v. Dansby*, 74 Mich. 398; 41 N. W. 1088.

⁷³ *Kearney v. Fitzgerald*, 43 Iowa, 580; *Ward v. Thompson*, 48 Iowa, 588.

⁷⁴ In *Radley v. Leider*, 99 Mich. 431; 58 N. W. 366, the court said: "There was some evidence tending to show that on one occasion the plaintiff drank beer at home with her husband, and it is contended

that this deprived her of the right to recover; but we think not, though there are doubtless cases where the consent or participation of a wife in the purchase and use of liquor may preclude recovery or lessen damages."

⁷⁵ *Maloney v. Dailey*, 67 Ill. App. 427.

⁷⁶ *Roach v. Springer*, 75 S. W. 933 (Tex.).

injure him in person or property or means of support by intoxicating another.⁷⁷ It is quite clear that the consent of the father to a sale of intoxicating liquors to his minor son whereby he became intoxicated and while in that state so recklessly drove a team as to cause a collision with another vehicle, by which the occupants of such latter vehicle were injured, is no defense in an action brought by the injured parties against the dealer making the sale to the minor.⁷⁸ In Nebraska it is held that the defense of contributory negligence is not permissible under the "civil damage" act. Thus, it is held that the willing purchaser of intoxicating liquor has a cause of action against the dealer selling him for any injuries that he might sustain by reason of his intoxication.⁷⁹ And the court of that State, therefore, held, that in a suit on the dealer's bond by a wife for injuries caused to her means of support by reason of the intoxication of the husband, it was no defense to show that the wife bought liquors for her husband and drank with him in public.⁸⁰ This position, however, is against the weight of authority. In determining the question of contributory negligence of the intoxicated person, it is necessary to bear in mind the distinction between a suit under the civil damage statute, which can only be brought for injuries sustained by reason of the intoxication of a party occasioned by the sales or gifts of intoxicating liquors made by the defendant, and a suit for damages against the dealer for his alleged tortuous acts committed on the intoxicated person subsequent to the sales which made him intoxicated. In the one case, the plea of contributory negligence as against the intoxicated person is a bar to his recovery; in the other, it is not sufficient to prove that the person injured voluntarily drank to excess.⁸¹ It is need-

⁷⁷ *Jockers v. Borgman*, 29 Kan. 109; 44 Am. Rep. 625.

⁷⁸ *Flower v. Witkovsky*, 69 Mich. 371; 37 N. W. 364.

⁷⁹ *Buckmaster v. McElroy*, 20 Neb. 557; 31 N. W. 76; *Curtin v. Atkinson*, 36 Neb. 110; 54 N. W. 131; *Grau v. Houston*, 45 Neb. 813; 64 N. W. 245.

⁸⁰ *Klimert v. Corcoran* (Neb.), 70 N. W. 910.

⁸¹ In *Weymire v. Wolfe*, 52 Iowa, 533; 3 N. W. 541, the court said: "Whether, if Dunn had died solely from the use of the liquor, he would be deemed as having so far contributed to his death by his voluntary acts as to preclude a re-

less to remark that the contributory negligence of the intoxicated person does not preclude any person injured thereby from bringing a suit under the bond against the dealer to recover damages for his injuries.⁸²

Sec. 1048. Release or discharge.

It is a general rule that under the "civil damage" statute all dealers causing or contributing to the intoxication producing the injury complained of can be joined in an action, or separate actions can be maintained against each dealer. But a settlement made by the party injured with any one of the dealers contributing to such intoxication or a satisfaction of a judgment rendered against any one of them for such injury is a complete settlement and satisfaction as against all of the dealers. This proposition is based upon the well established rule that a release of one of several joint tortfeasors discharges all.⁸³ But this rule is not applicable where

covery, we need not determine. The petition states, and the evidence tended to show that Dunn was expelled from the saloon at a late hour of the night, drunk and unconscious, and died by reason of exposure and cold. If it should be conceded that Dunn contributed to his death by drinking until he became drunk and unconscious, it would not follow that the plaintiff would not be entitled to recover. If a person lies down upon a railroad track in a state of helpless intoxication, the company will not be justified in running a train over him, if it can be avoided in the exercise of reasonable care, after the person is discovered in his exposed condition. If, after the company should be guilty of negligence, whereby the exposed person should be injured, the negligence of the company would be deemed the proximate cause of the

injury. So if the defendant negligently subjected Dunn to exposure to his injury, knowing that he was unconscious or even helpless, the defendant cannot escape liability on account of Dunn's negligence prior to the wrongful acts whereby Dunn was subjected to exposure, however great Dunn's negligence may have been in allowing himself to become intoxicated."

⁸² *Davies v. McKnight*, 146 Pa. 610; 23 Atl. 320.

⁸³ In *Aldrick v. Parnell*, 147 Mass. 409; 10 N. E. 170, the court said: "The principle of the statute is that one suffering injury by reason of the intoxication of another, who stands within the enumerated kinds of relationship, shall have a remedy, either jointly or severally against those who caused or contributed to the intoxication, to recover the amount

separate dealers cause separate and distinct intoxications, each intoxication resulting in a separate and distinct injury. In this event the dealers are not joint tort-feasors and a release or discharge of one is not a release and discharge of the other.⁸⁴ It is well established also that a mother cannot compromise or settle her children's claims for damages growing out of injuries received by reason of the intoxication of their father without the consent of the court, and that an attempted settlement of that kind will not bar an action brought by the children against the dealer making the settlement with the mother.⁸⁵

ARTICLE IV—PERSONS ENTITLED TO SUE.

SECTION.

1049. In general.

1050. Husbands.

1051. Wives—Death of husband
—Divorce.

SECTION.

1052. Parents.

1053. Children.

1054. Posthumous child.

Sec. 1049. In general.

The right to recover damages of a dealer in intoxicating liquors for injuries received by reason of the intoxication of another to which said dealer caused or contributed, being purely statutory in character, the only persons entitled to sue are those who belong to one of the classes enumerated by the statute. Most of the statutes, however, after enumerating

of damages sustained. The statute is a departure from the common law, and gives a remedy which did not exist before. It would require plain words to show that it was intended to allow the recovery of more than the damages actually sustained. We cannot think that the Legislature meant to give to a person injured a right to recover such

damages multiplied by the number of those who contributed to the intoxication." See also *Kearney v. Fitzgerald*, 43 Iowa, 580.

⁸⁴ *Jewell v. Lynch*, 117 Mich. 65; 75 N. W. 283.

⁸⁵ *Zimmerman v. Smiley*, 62 Neb. 204; 86 N. W. 1059; *Johnson v. McCann*, 61 Ill. App. 110; *Keller v. Lincoln*, 67 Ill. App. 404.

the particular classes of persons to be embraced within its provisions, such as wife, child, parent, guardian, husband, sets out the general proviso "or other person who shall be injured in person or property or means of support by such intoxicated person, or by reason of the intoxication of any such person." Under such a general provision it seems to be well settled that any person injured in person or property or means of support by an intoxicated person or by reason of the intoxication of any person shall have a right of action in his or her name against any person or persons who shall, by selling or giving any intoxicating liquor to such person have caused or contributed to the intoxication from which the injury results.⁸⁶ But the intoxicated person cannot maintain the action himself if his negligence contributed to his injuries.⁸⁷ Thus, it was held that an action was maintainable by a person unrelated to the intoxicated person against the dealer when such intoxicated person recklessly drove into plaintiff, injuring him.⁸⁸ So, also, it was held that railroad contractors may maintain an action under the statute against a person who sells intoxicating liquors to their hired hands, whereby they become so intoxicated that they not only do not work, but also prevent the other hired hands from working.⁸⁹ So where dealers sold intoxicating liquor to the son-in-law of the plaintiff, who became intoxicated thereby, and in consequence thereof drove a team, behind which he and

⁸⁶ In *Flower v. Witkovsky*, 69 Mich. 371; 37 N. W. 364, the court said: "The words 'or other person' seem to have been intended by the Legislature to cover all persons injured in person or property by intoxicated persons." See also *Jackson v. Brookins*, 5 Hun 530; *English v. Beard*, 51 Ind. 489; *Bodge v. Hughes*, 53 N. H. 614; *Couchman v. Prather*, 161 Ind. 250; 70 N. E. 240.

⁸⁷ *Brooks v. Cook*, 44 Mich. 617; 7 N. W. 216; *Couchman v. Prather*, 162 Ind. 250; 70 N. E. 240.

⁸⁸ *Flower v. Witkovsky*, 69 Mich. 371; 37 N. W. 364.

⁸⁹ *Duroy v. Blinn*, 11 Ohio St. 331.

In slavery times it was held that independent of any statutory prohibition, the selling or giving of liquors to a slave was so contrary to the rights of the master that the person who does it without excuse subjects himself to an action for damages occasioned by his act. *Harrison v. Berkeley*, 1 Strobh. (S. C.) 525; 47 Am. Dec. 578.

plaintiff's wife were riding, so recklessly as to upset the wagon and break the wife's arm, it was held that he was entitled to recover of the dealer for the loss of his wife's services and the expense of medical attendance, nursing, etc.⁹⁰ But it has been held that the personal representative of a person who fell out of his buggy while intoxicated and broke his neck could not maintain an action against the dealer causing or contributing to the intoxication, under the civil damage statute, because of the contributory negligence of the decedent in voluntarily drinking the liquor which made him intoxicated. As was said by the Indiana court: "We do not believe it was the intention of the Legislature to create a liability in favor of an individual who participates in a wrong committed. * * * Any other interpretation of the statute would place a premium on drunkenness and debauchery which the Legislature did not intend."⁹¹ It has also been held that the civil damage statute is not broad enough to permit a town to recover of the dealer its expense in caring for a person who was injured by reason of his intoxication, the liquor having been procured by him of the defendant.⁹² It is quite clear that when the dealer suffers injury by reason of the intoxication of another, such dealer having caused or contributed to the intoxication, he has no cause of action against the intoxicated person, however broad the terms of the statute may be, because the law makes him a joint tortfeasor with the intoxicated person, and as such jointly liable with the intoxicated person for any injuries sustained by any innocent party by reason of such intoxication.⁹³

⁹⁰ Aldrich v. Sager, 9 Hun 537.

⁹¹ Couchman v. Prather, 162 Ind. 250; 70 N. E. 240.

⁹² Hollis v. Davis, 56 N. H. 74.

⁹³ In Aldrich v. Harvey, 50 Vt. 162, the court said: "* * * Had the same injuries chanced to have fallen upon another person (the dealer) is declared in law, and by relation, the very person

who, jointly with the defendant (the intoxicated person) inflicted them. If the same blow of which plaintiff complains had hit and wounded another, the law declares that this plaintiff jointly with the defendant, dealt the blow, and both or either must answer for it."

Sec. 1050. Husbands.

When the husband has been injured in person, property, or means of support by reason of the intoxication of his wife, it is clear that he can maintain an action under the civil damage statute against the dealer causing or contributing to such intoxication. This is true whether he is specifically named in the statute or is included in the general designation of "or other person." Thus under a statute which provided that "every wife, child, parent, guardian or employe, or other person who shall be injured, etc.," it was held that a husband was entitled to maintain an action against a dealer for causing his wife to fall into a condition of habitual intoxication.⁹⁴ Nor is the husband's right to maintain an action defeated because the wife is under no legal liability to support her husband. As was said by the Massachusetts court:⁹⁵ "That the relation of husband and wife may be such that in fact, as well as in law, the wife be wholly or in part a means of support to her husband, is very clear; and whether such relationship exists, and how far the means of support are injured are purely questions of fact, to be determined by the jury upon proper instructions from the court." In Nebraska, however, where the statute provides that the amount recovered shall be for the exclusive benefit of the widow and next of kin, it has been held that the husband cannot recover for himself from the dealer for the death of his wife, for the reason that under the law of the State, he does not inherit from her and cannot, therefore, be considered as within the term "next of kin." Nor can he bring suit under the statute as executor or administrator unless the deceased wife left legal heirs or "next kin" who would be legally entitled

⁹⁴ In the case of *Laundrum v. Flanigan*, 60 Kan. 436; 56 P. 753, the court said: "A husband falls within the general designation of other persons as used in the statute under consideration. He is *jusdem generic* with 'wife' as specifically enumerated, and entitled

to maintain the action given by statute." See also *Peavy v. Goss* (Tex. Civ. App.), 37 S. W. 317; *Peavy v. Goss* (Tex. Civ. App.), 37 S. W. 990.

⁹⁵ *Moran v. Goodwin*, 130 Mass. 158.

to receive the proceeds of the judgment, and that fact must be set out in the complaint.⁹⁶

Sec. 1051. Wives—Death of husband—Divorce.

It seems needless to remark that a cause of action exists under the statute for any wife who sustains injury to her person, property, or means of support by reason of the intoxication of her husband against the dealer causing or contributing to such intoxication. Indeed, in States which have statutes providing that neither husband nor wife shall be entitled to compensation for services rendered for the other, it is held that such statutes only apply to suits between husband and wife, and that the wife is not barred by them from bringing an action under a statute giving a person compensation for attending and caring for an intoxicated person for services rendered in taking charge of and providing for an intoxicated husband.⁹⁷ It has sometimes been contended that, although a wife may bring suit under the civil damage statute for injuries to her person, property or means of support by reason of the intoxication of her husband, if her husband lives; yet if, by reason of such intoxication, he is killed or dies, the cause of action is lost, because the statute does not in express terms confer upon the widow the right to sue. The doctrine has long since been exploded. As was well

⁹⁶ Warren v. Englehart, 13 Neb. 283; 13 N. W. 401. In this State the action is brought by the party entitled to the damages. Comp. St. §§ 4235-4238, Murphy v. Willow Springs Brewing Co., 81 Neb. 223; 115 N. W. 763.

Where a statute allowed one to recover "all damages or loss sustained in consequence of an injury" inflicted by a drunken person from the person who unlawfully occasioned his drunkenness, a husband may recover damages from a saloon keeper who unlaw-

fully sold liquor to a drunkard where the latter while in that condition and excited by the liquor, killed the plaintiff's wife. Forfeter v. Moore, 67 N. H. 460; 36 Atl. 369.

⁹⁷ McVey v. William, 91 Ill. App. 144. See generally Maloney v. Dailey, 67 Ill. App. 427; Palmer v. Schurz (S. D.), 117 N. W. 150; Kennedy v. Garrigan, 121 N. W. 783; Ridden v. German, 97 Tenn. 220; 36 S. W. 1097; 36 L. R. A. 387.

said in an early Ohio case :⁹⁸ “The term wife is used to designate a class of persons to whom the right of action is given. The plaintiff was the wife of Zimiri Hosier at the time the defendant caused his intoxication, and at the time the injuries complained of were sustained. The right of action then vested in her, and having vested, the statute did not divest it upon the death of her husband; nor does it abate upon common law principles. The husband has no interest in it and no control over it. The right of action vested in her to be prosecuted in her own name and for her sole use. She did not lose her identity by the death of her husband. True, the relation of wife closed, but that relation, although essential by the terms of the statute, to the inception of the right of action, is not necessary in the prosecution of the remedy. The plaintiff does not sue because she is the widow of Zimiri Hosier, but because she was his wife at the time she was injured.⁹⁹ In Michigan it is held that the term “or other person” in the enumeration of the particular classes of persons entitled to sue, is sufficiently comprehensive to include the “widow.”¹ In a late case it has been decided that where a wife has been injured in her means of support by the habitual intoxication of her husband and she secures a divorce from him upon the ground of habitual intoxication, her right

⁹⁸ *Schneider v. Hosier*, 21 Ohio St. 98; *Murphy v. Willow Springs Brewing Co.*, 81 Neb. 223; 115 S. W. 761.

⁹⁹ See *Hackett v. Smelsley*, 77 Ill. 109; *Rafferty v. Buckman*, 46 Iowa 195; *Roose v. Perkins*, 9 Neb. 304; 2 N. W. 715; *Mead v. Stratton*, 87 N. Y. 493; *Jackson v. Brohim*, 5 Hun, 530 (N. Y.).

¹ In *Brockway v. Patterson*, 72 Mich. 122; 40 N. W. 192; 1 L. R. A. 708, the court said: “The statute upon which plaintiff grounds her action does not mention the widow or speak of the death of an intoxicated person, or death resulting from intoxication. It

gives a right of action, however, to the ‘wife’ or other person injured in person or property or means of support by an intoxicated person or by reason of the intoxication of any person. This language is broad enough to include the widow, who must be considered a ‘person,’ and who is certainly injured in her means of support by the death of her husband by intoxication or by reason of the intoxication of himself or any other person.” See also *Peavy v. Goss* (Tex. Civ. App.), 37 S. W. 317; *Peavy v. Goss* (Tex. Civ. App.), 37 S. W. 990.

to maintain an action against the dealer for causing or contributing to such intoxication is not destroyed by reason of such divorce.² The court's reasoning was in part as follows: "Upon principle there can be no distinction, so far as the administration of the statutory remedy is concerned, between women separated from their husbands by death and those who have under circumstances like the present, obtained a divorce. The term 'married women' is used by the Legislature merely to designate a class of persons to whom or for whom the right to maintain the action is given, and, if the injury complained of was sustained while the marriage relation existed, her vested right to sue is not abated by the fact that such relation, essential only to the inception of the right, has since ceased. Being the identical person injured, she may enforce that personal right, which the law gave her, untrammelled by the fact that a court of justice, upon good cause shown, has subsequently annulled the contract which made her a married woman."³ It is hardly necessary to state that the civil damage statute gives the wife the power to sue without joining her husband as plaintiff or getting his consent to institute such suit.

Sec. 1052. Parents.

It seems to be the rule that parents, or either of them, have a cause of action against the dealer under the civil damage statute when injury results to their person, property or means of support by reason of the intoxication of their children, such dealer having caused or contributed to the intoxication. The difficulty, however, has not been so much in determining what the abstract proposition of law is, but what is injury to the parent's property or means of support. The weight

² *Nordin v. Kjos*, 13 S. D. 497; 83 N. W. 573.

³ *Wright v. Tipton*, 46 S. W. 629 (Texas).

Under the act of March 16, 1889, of Tennessee, making it a misdemeanor to sell liquor to husband after his wife has notified a

saloon keeper not to sell to him, a sale in violation of the notice is a negligence rendering the saloon keeper liable for damages suffered by the wife by reason thereof. *Ridden v. German*, 97 Tenn. 220; 36 S. W. 1097; 36 L. R. A. 387.

of authority seems to be, so far as injury to property is concerned, that, aside from the acts of the intoxicated person in destroying or injuring property belonging to the parents which would make the dealer liable to the owner of the property to the extent of the damage sustained, the dealer is liable for the expenses incurred by the parents in caring for the intoxicated child as well as for his board and maintenance during the continuance of his disability, only to the extent that the law would require the parents to support and maintain him. Thus where an adult son became intoxicated and while in that condition had his hands and feet so frozen as to render him a helpless cripple, in a suit by the father against the dealer causing or contributing to the intoxication for damages for injury to his property in maintaining and supporting such son, it was held that the action did not lie simply because of the relation of parent and child, and could not lie unless the son became subject to the conditions of a pauper, and liable to be a public burden, in which event the father could recover, because the law made the parent responsible and legally bound for the son's maintenance and support.¹ But it is not necessary that the parent should be

¹ In the case of *Clinton v. Laming*, 61 Mich. 355; 28 N. W. 125, the court said: "It is not seriously claimed that any action lies in this case out of the mere relation of parent and child. The son was not a minor, and the father was in no way injured by loss of his earnings, or deprived of any reliance for his own support. If an action lies at all, it is upon the ground that the plaintiff has, in some way, been injured in his property by the casualty for which the defendants are sought to be made responsible. The statutes do not make a father liable for his son's support to any extent after majority, unless he has become subject to the condi-

tion of a pauper and liable to be a public burden. In such a case, if able to do so, the law makes him responsible to such an extent as may be determined in a proper investigation. * * * We think that the voluntary assumption of this duty may fairly be regarded as performing a legal obligation, and the expenditures to a proper extent, within the limit which could be laid down by compulsion, are as valid charges as if they had been compelled, and may be considered on a similar footing." See also *Veon v. Creaton*, 130 Pa. St. 48; 20 A. 865.

The loss of services of a son who contributed his earnings to his father to the expense of the fam-

compelled by the proper authorities to support his indigent son before an action under the statutes can be brought; but it is sufficient if he voluntarily assumes to do what the law could otherwise compel him to do.² As to what is injury to the parents' support so as to base an action upon it against the dealer for causing or contributing to a child's intoxication, the authorities are not uniform. The weight of authority would seem to be that the statute gives a remedy to parents injured in their actual means of support by the loss of help from a child, without regard to their having a legal right to the help.³ Thus where an adult son was injured by reason of his intoxication, it was held that the parents could maintain an action under the statute for injury to their means of support against the dealer causing or contributing to the intoxication, although he was not making his home with them, if, in fact, he had contributed, even in part, to their support.⁴ Again, where an adult son was drowned by reason of his intoxication, it was held that the mother had a cause of action against the dealer for injury to her means of support, although the son was under no legal obligation to support her.⁵ It has also been held where a minor son was injured by reason of his intoxication, that the mother might maintain an action under the statute for injuries to her means of support against the dealer causing or contributing to the intoxication, even though the husband was alive and

ily is a damage to the father's means of support, though the earnings of the father may be sufficient to keep the family from becoming dependent. *Reath v. State*, 16 Ind. App. 146; 44 N. E. 808.

² *Clinton v. Laning*, 61 Mich. 355; 28 N. W. 125.

³ *McNary v. Blackburn*, 180 Mass. 141; 61 N. E. 885; *Eddy v. Courtright*, 91 Mich. 264; 51 N. W. 887; *McMaster v. Dyer*, 29 S. E. 1016; 44 W. Va. 644.

⁴ *McNary v. Blackburn*, 180 Mass. 141; 61 N. E. 885.

⁵ In *Eddy v. Courtright*, 91 Mich. 264; 51 N. W. 887, the court said: "Under the averments of this declaration the parent who was in fact injured in her means of support is given a right of action. We do not think the intent was to limit the right to those who were cut off from a means of support which could be legally exacted or enforced, but that the language is sufficiently broad to cover the case of the present plaintiff."

living with his wife, if, in fact, at the time of the injury, the husband was not supporting her and the minor son was.⁶ The case of *Veon v. Creaton*⁷ is not to be taken as an authority against the proposition just enunciated because, as was well said by the Michigan court,⁸ that "case is clearly distinguished, for the reason that the statute of Pennsylvania only gave the right to one injured in person or property, and does not give a right of recovery to one who was injured in his or her means of support." In some States, before a parent can recover for injuries sustained to his or her means of support by reason of the intoxication of a child, it is necessary to establish that the child, before the injury complained of was legally bound to support the parent and did support him.⁹ Thus, in those States which have statutes requiring relatives to support those persons who are unable to earn a livelihood in consequence of any bodily infirmity, idiocy, lunacy or other unavoidable cause, it is held that whenever a child of such indigent person, who has been voluntarily supporting his parent, is injured by reason of his intoxication or the intoxication of another, such dependent relative has a cause of action against the dealer causing or contributing to such intoxication for injury to

⁶ In *McMaster v. Dyer*, 29 S. E. 1016 (W. Va.), the court said: "If the evidence showed that the plaintiff was supported by her husband, she could not maintain the suit, not being injured in her means of support by the unlawful sales of intoxicants to her son. On the other hand, if the evidence shows that she was injured in her means of support, she is entitled to maintain the action, notwithstanding her husband is living." See also *McNeil v. Collinson*, 130 Mass. 167.

⁷ *Veon v. Creaton*, 138 Pa. St. 48; 20 A. 865.

⁸ *Eddy v. Courtright*, 91 Mich. 264; 51 N. W. 887.

⁹ In the case of *Stevens v. Cheney*, 36 Hun (N. Y.), the court said: "The plaintiff, in order to recover for injury to his means of support, must show that he is a poor person unable to maintain himself and that his son owed him the duty of support within the provisions of the statute. That his accustomed means of support have been cut off or curtailed, and that he has no adequate means of maintenance, from accumulated capital or property remaining." See also *Volans v. Owen*, 9 Hun, 55 (N. Y.).

his or her means of support, because such child was legally bound to furnish support to his indigent parent.¹⁰ It is not necessary that such indigent parent should have invoked the law as against the child seeking support, but it is sufficient if the child had voluntarily assumed to do what the law would otherwise have required him to render by compulsion.¹¹ Nor is it a bar to an action under the statute to show that the parent had occasionally worked, if such parent had reached that age in life and condition in health when remunerative employment is not likely to be found. As remarked in a New York case:¹² "The test is not whether the plaintiff possessed sufficient physical strength, if exerted to its utmost limit, to earn her living in case she should be so fortunate as to find employment." Under a statute which required a bond, conditioned that the dealer should keep an orderly house, and among other things, providing that he would not permit a minor to enter or remain in the saloon, and a section of the statute provided that "said bond may be sued on at the instance of any person aggrieved by the violation of its provisions," it was held that a mother who was the only surviving

¹⁰ In the case of *McClay v. Wornell*, 18 Neb. 44; 24 N. W. 429, the court said: "The foundation of the plaintiff's right to damages against the plaintiff in error is that, by means and in consequence of their traffic, she has sustained the loss of that support which the law of the State, as well as the law of nature, gave her a right to, at the hand of her son, *non constat*, that but for his untimely death, in consequence of such traffic, she would never have occasion to invoke the law of the State against him for such support. It may be and is granted that in the action under the proviso above quoted by one relation against another for support, the ability of such relative would have

to be alleged and proved, and it is equally true that in the case at bar the plaintiff must have alleged and proved facts sufficient to establish a legal and reasonable expectancy that but for his death her son would have continued in the future, as in the past, to possess the ability to support her. This she has done, and none the less because his ability as proved consisted less in accumulated property than in strong arms and a willing heart." See also *Fitzgerald v. Donohoe*, 48 Neb. 852; 67 W. 880.

¹¹ *Du Puy v. Cook*, 35 N. Y. Supp. 632; 90 Hun 43.

¹² *Du Puy v. Cook*, 35 N. Y. Supp. 632; 90 Hun 43.

parent was within the purview of the meaning of the term "any person," and that she had the right to sue on the bond for an unlawful sale of liquor to her minor son.¹³ In Illinois, it is held that under the dramshop law, where the husband and wife are divorced and the son is living with the mother, the right to maintain an action under the statute for the sales of intoxicating liquors to the son is alone in the mother, and a joint recovery by the father and mother against the dealer making such sale cannot be sustained.¹⁴

¹³ In the case of *Peavy v. Goss* (Tex. Civ. App.), 37 S. W. 317, the court said: "In a legal sense a person is aggrieved by an act when a legal right is invaded by the act complained of. It is the duty of the parent to look after the moral training of his minor children, and it is the legal right to keep them away from temptation. This legal right of the parent is infringed, when one, in violation of law, sells intoxicating liquor to his minor child, or permits such child to enter or remain upon the premises where such liquor is retailed. In this case the father being dead, the mother had the right to sue upon the bond." See also *Peavy v. Goss* (Tex. Civ. App.), 37 S. W. 990; *Frobese v. Peary* (Tex. Civ. App.), 43 S. W. 900.

¹⁴ *Lossman v. Knights*, 77 Ill. App. 670; *Ellsworth v. Cummins*, 134 Ill. App. 397.

If the parents bring a joint action, and one die, the survivor may continue to prosecute it. *Muroz v. Brassel* (Tex. Civ. App.), 108 S. W. 417.

A statute of Texas gives a right of action upon a liquor dealer's bond to any person *aggrieved* by a

breach of it. Under it an action may be lawfully brought by the sister of a minor brother where the mother of such minor died when he was very young, and he was left with the sister with the mother's request that she take care of and raise him, the father being a drunkard, without a home and disqualified to care for and raise him. The sister assumed the care, custody and support of the child, taking the place of his mother. *Saunders v. Alvido* (Tex. Civ. App.), 113 S. W. 992.

In South Dakota a wife may maintain an action to recover damages sustained by her or her children, and the money thus recovered is paid over to her for herself and children. Rev. Pol. Code, § 2849. Under this statute she may maintain the action even though she has sustained no damages, if her children have. *Palmer v. Schurz* (S. D.), 117 N. W. 150.

In an action to recover damages against a defendant for permitting plaintiff's minor son "entering and remaining" in his saloon, it is a question for the jury whether the minor was allowed to remain long enough to constitute a breach of the saloon keeper's bond, and it

Sec. 1053. Children.

Under the civil damage statute, an action can be maintained by the minor children for damages resulting from loss of means of support, by reason of the intoxication of the parent, against the dealer furnishing such parent the intoxicating liquors, and also against the sureties on his bond.¹⁵ The statute gives a right of action to a child born after the father's death if his death was occasioned by intoxication.¹⁶ Nor is it a bar to an action brought by a minor illegitimate child against a dealer for injury to her means of support by reason of the intoxication of her father that such child was born out of lawful wedlock.¹⁷ In Massachusetts, it is held

was therefore unnecessary to all go how long he remained. *Markus v. Thompson* (Tex. Civ. App.), 111 S. W. 1074. Under the statute there may be several breaches of the bond committed on the same day, and the dealer's good faith in believing the minor to be of age is no defense, nor that the minor's father had authorized other dealers to sell him liquor. The father need not prove he was "aggrieved by the defendant's act," that is presumed from his relationship. *Markus v. Thompson* (Tex. Civ. App.), 111 S. W. 1074; *Carlton v. Krueger* (Tex.), 115 S. W. 619.

As the father is entitled to his minor son's wages, he suffers by their loss a direct pecuniary loss by his death. *Murphy v. Willow Springs Brewing Co.*, 81 Neb. 223; 115 N. W. 763.

¹⁵ *Blordel v. Zimmerman*, 41 Neb. 695; 60 N. W. 6; *Kirkhow v. Bauer*, 15 Neb. 150; 18 N. W. 27.

¹⁶ In the case of *Quinlan v. Welsh*, 23 N. Y. Supp. 963; 69 Hun 584, the court said. "The

statute gives a child the right of action for an injury to its means of support. A child during the year of its infancy before arriving at an age that it can care for and maintain itself, is entitled to receive support from the parent, and if deprived of such parent suffers damage in its means of support. An unborn child, if subsequently born alive, if deprived of a parent, suffers in its means of support equally with the children that were living at the time of the decease of such parent. Such a child is regarded as in being, and is placed upon an even footing with the living children in reference to the distribution of the estate of a deceased parent, and no reason is apparent why the same rights should not be extended to such a child under the action question." 17 Ind. App. 257.

¹⁷ In the case of *Goulding v. Phillips* (Iowa), 100 N. W. 516, the court said: "There can be no question as to the right of action under this statute. It is expressly given to any person who shall

that the civil damage statute is broad enough to permit an adult son not dependent upon his father for support to bring an action against the dealer causing or contributing to the intoxication of his father for damages. The Massachusetts court says:¹⁸ "The statute contemplates that the habitual drunkenness of a husband or wife, parent or child, is a substantial injury to those bound together in domestic relations, and gives such a right to recover damages in the nature of a penalty, not only for any injury to the person or property, but for the shame and disgrace brought upon them. * * *

The right of a son to recover does not depend upon the question whether he is dependent upon and looks to the father for support; it depends solely upon the relation of father and son." In Illinois, however, it is held that under the dramshop act which provides for a recovery of damages against the dealer for every child, etc., injured in person, property or means of support by any intoxicated person or in consequence of the intoxication of any person, a daughter who left home after she became of age because of the mistreatment of her father while he was intoxicated could not maintain an action against the dealer causing or contributing to the intoxication of her father for loss of her means of support.¹⁹

be injured in person, property or means of support; and if it were necessary to hold the ward an illegitimate, the action could still be maintained, because of this express language of the statute. * * *

By the common law it is the duty of parents to support their minor children. This duty is said by Blackstone to be founded upon a principle of natural law; that by begetting them they have entered into a voluntary obligation to endeavor, as far as in them lies, that the life which they have

bestowed shall be supported and preserved, and thus children will have the perfect right of receiving maintenance from the parents. This duty has been held to be a legal as well as moral obligation."

¹⁸ Taylor v. Carroll, 145 Mass. 95; 13 N. E. 348.

¹⁹ Jury v. Ogden, 56 Ill. App. 100.

A posthumous child has maintained an action for the death of its parent. Quinlan v. Welch, 141 N. Y. 158; 36 N. E. 12.

Sec. 1054. Posthumous child—Right of to recover damages.

Under a statute providing that any person sustaining an injury to his means of support in consequence of the use of intoxicating liquors sold may sue the seller of the liquor personally and the sureties on his statutory bond, a child born after his father's death, the death having resulted from the use of the liquor sold, has a right to sue for and recover damages. The personal rights of an infant do not occur until birth. Up to that time such rights are not distinguishable from those of the mother, and she alone is entitled to any damage which is not too remote to be recovered from such an injury. It has been frequently held, however, that under a devise or bequest to children a posthumous child will take.²⁰ And an infant may recover for the loss of support caused by the wrongful killing of its father by another, although the infant was *en ventre sa mere* at the time of the wrongful killing.²¹ Such a statute as that under consideration gives to a child the right of action for an injury to its means of support. A child during its years of infancy, before arriving at an age that it can care for and maintain itself, is entitled to receive support from the parent, and, if deprived of such parent, suffers damage in its means of support. An unborn child, if subsequently born alive, if deprived of a parent, suffers in its means of support equally with the children that were living at the time of the decease of such parent. Such a child, as we have seen, is regarded as in being, and is placed upon an even footing with the living children in reference to the distribution of the estate of the deceased parent, and no reason is apparent why the same rights should not be extended to such a child under a

²⁰ Burdet v. Hopewood, 1 P. Wms. 486; Reeve v. Long, 1 Salk. 227; Clarke v. Blake, 2 Ves. Jr. 473; Wallis v. Hodson, 2 Atk. 115; Branton v. Branton, 23 Ark. 580; Biggs v. McCarty, 56 Ind. 352; Haskins v. Spiller, 1 Dana (Ky.), 172; Harper v. Archer, 4 Smed. and M. (Miss.) 108; Ran-

dolph v. Randolph, 40 N. J. Eg. 74; Bynes v. Stilwell, 103 N. Y. 453; Barker v. Pearce, 30 Pa. St. 173.

²¹ Nelson v. Galveston, etc. R. Co., 78 Tex. 621; 14 S. W. 1021; Texas, etc. R. Co. v. Robertson, 82 Tex. —; 17 S. W. 1041.

statute such as we have been considering. By the weight of the decisions no distinction between the rights of a posthumous child and one born during the lifetime of the parent should be made.²²

ARTICLE V—PERSONS LIABLE.

SECTION.

1055. In general—Sales by servants.

1056. Joint tort-feasors.

SECTION.

1057. Sureties on dealer's bonds.

1058. Owners or lessors of premises.

Sec. 1055. In general—Sales by servant.

A dealer engaged in the sale of intoxicating liquors is held responsible for the acts of his servants in that business, even though in the particular transaction they disobeyed his instructions.²³ Thus a dealer will be liable personally and upon his bond for injuries to the plaintiff's person, property or means of support by reason of the intoxication of another where such intoxication was caused in whole or part by the sales made by a regularly employed bartender or agent, although such particular sales were not authorized by the dealer, and even though specific instructions had been given

²² Quinlan v. Welch, 69 Hun, 584; 23 N. Y. Supp. 963; State v. Seale, 36 Ind. App. 73; 74 N. E. 1111. This is the doctrine of the old and celebrated case of Nelson v. Woodford [1779], 2 Vesey, Jr., 319.

²³ Austin v. Davis, 7 Ont. App. Rep. 478 (overruling Hugil v. Merrifield, 12 C. P. 264); Fowler v. Rome Dispensary, 5 Ga. App. 36; 62 N. E. 660; Cox v. State (Okla.), 104 Pac. 1074; Barnaby v. Wood, 50 Ind. 405; Young v. Beveridge, 81 Neb. 180; 115 N. W. 766; Boos v. State, 11 Ind.

App. 257; 39 N. E. 197; Reath v. State, *ex rel* Johnson, 16 Ind. App. 146; 44 N. E. 808; George v. Gobey, 128 Mass. 289; 35 Am. Rep. 376; Worley v. Spurgeon, 38 Iowa 465; Kreiter v. Nichols, 28 Mich. 496; Kehrig v. Peters, 41 Mich. 475; 2 N. W. 801; Gullickson v. Gjordud, 89 Mich. 8; 50 N. W. 751; Keedy v. Howe, 71 Ill. 133; Bodge v. Hughes, 53 N. H. 614; Smith v. Reynolds, 8 Hun 128; Dice v. Sherberneau, 152 Mich. 601; 116 N. W. 416; 15 Det. L. N. 255; State v. Collins, 68 N. H. 299; 44 Atl. 495.

by the dealer to such bartender not to make any sales to the person who became intoxicated thereby. But the rule is not extended so far as to permit a recovery where the intoxicated person merely took the liquors upon which he became intoxicated without the authority of anyone, and subsequently paid the dealer for them.²⁴ But if a person not in the regular employ of the dealer sells to another, in the absence of the dealer, intoxicating liquors, and such liquors cause or contribute to such other's intoxication from which injury results to a third person, if such sale was made with the knowledge or consent of the dealer, or if he ratifies it after it is made, the dealer is liable to the person injured.²⁵ In Illinois, however, it seems to be the rule that where the sales resulting in or contributing to the intoxication which caused the injury were made by the bartender or agent of the dealer against his express orders, the dealer is liable only for the actual damages sustained by reason of such intoxication, and exemplary damages cannot be assessed.²⁶ As to the agent or bartender making the sale, it would seem unnecessary to add that he would be personally liable to the party injured if the statute in terms held "any person" liable who should cause the intoxication of another.²⁷ But it is also the law that the civil damage statute does not apply to a person not

²⁴ In the case of *Kreiger v. Nichols*, 28 Mich. 496, the court said:

"We do not perceive that any such principle can be applied to the case of a person who goes without the permission of anyone and drinks another's beer, nor how the fact of the owner demanding and receiving pay for the property can make such owner a wrongdoer in the original trespass of his rights."

²⁵ *Kennedy v. Sullivan*, 136 Ill. 94; 26 N. E. 382, affirming 34 Ill. App. 46.

If a saloon keeper sell liquor to a person in excessive amounts, and he thereby becomes intoxicated,

and while in that condition assault a third person and injures him, the wife of such third person may maintain an action against the saloon keeper to recover damages. *McCurdy v. Swift*, 17 C. P. (Can.) 126.

²⁶ *Brantigain v. White*, 73 Ill. 561; *Freese v. Tripp*, 70 Ill. 496; *Keedy v. Howe*, 72 Ill. 133; *Fentz v. Meadows*, 73 Ill. 540. But see now *Layton v. Deck*, 63 Ill. App. 553.

²⁷ *Worley v. Spurgeon*, 38 Iowa 465; *Barnaby v. Wood*, 50 Ind. 405. See *Brandt v. State*, 17 Ind. App. 311; 46 N. E. 682.

engaged in the liquor traffic who treats another to a glass of intoxicating liquor with no purpose of gain or profit. Thus when a person was intoxicated by reason of drinking intoxicating liquors given him by a friend, not engaged in the liquor business, as a mere act of courtesy and politeness and not for pay, profit, benefit, or advantage to him, and while such person was in a state of intoxication, he was thrown from his horse and received a fatal injury, it was held that the friend who gave him the liquors was not liable under the statute to the widow for injury to her means of support occasioned by the death of her husband.²⁸ The reason for the rule is found in the fact that the civil damage statute, being a part of the liquor law and having particular reference to dealers in intoxicating liquors, that the Legislature intended to limit liability to liquor dealers, although the statute itself makes liable "whoever" shall sell or give intoxicating liquors to another which shall cause or contribute to his intoxication to the injury of another. The statute, however, does apply to a brewer who manufactures ale and porter and sells the same by cask and barrel from his place of manufacture.²⁹ An action, under the civil damage act, must be brought against the person by whom the sale of the intoxicating liquors was made, which caused the intoxication from which injury resulted. As was well said by the Maine court: "The causing or contributing to the intoxication of the person by whom an injury has been done refers to the direct and immediate result of the selling or giving the intoxicating liquors by which the intoxication was caused. The liability

²⁸ In the case of *Cruse v. Aden*, 127 Ill. 231; 20 N. E. 73; 3 L. R. A. 327, affirming *Aden v. Cruse*, 21 Ill. App. 391, the court said: "We conceive in the conclusion reached by the appellate court that section 9 of the dramshop act does not apply to persons who are not either directly or indirectly, or in any way, or to any extent engaged in the liquor traffic and that the right of action given by said sec-

tion to one injured in her means of support is not intended to be given against the person who, in his own house or elsewhere, gives a glass of intoxicating liquor to a friend as a mere act of courtesy and politeness, and without any purpose or expectation of pecuniary gain or profit."

²⁹ *Clears v. Stanley*, 34 Ill. App. 338.

attaches to the person selling or giving, and to no one else. The selling or giving must be to the person intoxicated by whom the injury to the person or property was done and must cause his intoxication. If A sells to B and B to C, and so on till Z sells to the person intoxicated, by whom the injury is done, A cannot be regarded as the person selling to the person intoxicated and responsible to one whose person or property has been injured by the individual to whom Z sold the intoxicating liquors causing the intoxication of the person by whom the injury was done.”³⁰ This rule, of course, does not affect the question of a sale made by the servant or agent of the dealer sued who would be liable for sales made by those in his employ.³¹ But the statute does not limit the dealer’s liability to the injured party to cases when the injury to the person making the complaint arises from the intoxication of the person to whom the liquors were sold and delivered. If the dealer had reason to believe at the time he makes the sale that some other person than the person to whom the sale is in form made and the liquor delivered is interested in the purchase and is to drink it, in whole or in part, he exposes himself, in case such person becomes intoxicated by drinking the liquors, to all the pecuniary liability imposed by law.³² It is clear that the dealer causing or contributing to the intoxication of another which results in injury to a third person is personally liable as well as liable on his bond to the person injured. It is no defense, therefore, for such dealer to allege that the sureties on his bond are not joined with him as defendants. As was said by the Nebraska court: ³³ “The cause of action is not the bond. The bond is merely a mode of securing satisfaction for the injury; in other words, the bond is given as a means of indemnifying persons who may be injured by the saloon keeper furnishing intoxicating liquors to another. The cause of action, how-

³⁰ Bush v. Murray, 66 Me. 472.

³¹ Bush v. Murray, 66 Me. 472.

³² Dudley v. Parker, 55 Hun 29;
8 N. Y. Supp. 600.

³³ Jones v. Bates, 26 Neb. 693;
42 N. W. 751; 4 L. R. A. 495. See

also *Roose v. Perkins*, 9 Neb. 304;
2 N. W. 715; *State v. Soale*, 36
Ind. App. 73; 74 N. E. 1111;
Brandt v. State, 17 Ind. App. 311;
46 N. E. 682.

ever, arises from an injury suffered in consequence of the furnishing of such liquor." It is also clear that where a partnership engaged in the business of selling intoxicating liquors is dissolved, one of the partners retiring, and subsequently the remaining partner sells the entire business to another, and the license is surrendered to the proper authorities, the retiring member of the partnership cannot be held for injuries to a wife's means of support caused by the death of her husband resulting from the intoxication of such husband where the sales of intoxicating liquor which caused or contributed to the intoxication were made by the person who had bought the business of the surviving partner.³⁴ Nor is a person liable for the sales of intoxicating liquors made by a dealer which caused the intoxication of another, and results in injury to an innocent party, who is not in fact the partner of the dealer, although he may have permitted himself to be held out as such.³⁵ In South Dakota it is held that under the civil damage statute which provided in substance that a wife may institute and maintain in her own name an action on the bond of a licensed saloon keeper for injury sustained by loss of support, an action could not be maintained against an unlicensed dealer for injuries sustained by a wife by reason of the intoxication of her husband, such intoxication having been caused or contributed to by such unlicensed dealer, because the statute only gave a remedy against licensed dealers, and there was no action at common law for such injuries.³⁶

³⁴ Scott v. Chope, 33 Neb. 41; 49 N. W. 940.

³⁵ 11 Ohio Cir. Ct. R. 18; 1 O. C. D. 84.

³⁶ In the case of Paulson v. Languess, 16 S. D. 471; 93 N. W. 655, the court said: "If the defendants were engaged and interested in unlawfully selling intoxicating liquors as a beverage without first having obtained a license, as required by the act, they are guilty of a misdemeanor, punishable by fine or imprisonment,

but the Legislature has provided no remedy in the nature of an action for damages against illicit dealers for the loss of support caused by a sales made by them. At common law the wife could not recover for the loss of support occasioned by the death of her husband, and to bring an action within the statute creating both the right and the remedy, it must be alleged and proved that the defendants were licensed dealers."

In other States, however, the civil damage statute seems to be broad enough to cover the acts of unlicensed dealers. Thus, in Indiana, where an unlicensed dealer sold intoxicating liquors to an adult son in such quantities as to cause his death, it was held that the mother, who was dependent for support upon the son, could maintain an action against such unlicensed dealer for damages for injury to her means of support.³⁷

Sec. 1056. Joint tort-feasors.

It is well established that when the intoxication of a person is the result of sales of intoxicating liquors made by two or more dealers, and injury results to a third person by reason of such intoxication, all of the dealers contributing to the intoxication are jointly and severally liable to the person injured. In other words, such dealers are joint tort-feasors.³⁸ Thus, as we have already said,³⁹ it is no defense to an action under the statute that the intoxication was caused

³⁷ *Terre Haute Brewing Co. v. Newland*, 33 Ind. App. 544; 70 N. E. 190.

³⁸ *Fountain v. Draper*, 49 Ind. 441; *Emory v. Addis*, 71 Ill. 275; *O'Halloran v. Kingston*, 16 Ill. App. (16 Bradw.) 659; *Mayers v. Smith*, 121 Ill. 442; 13 N. E. 216; *Lane v. Tippy*, 52 Ill. App. 532; *Woolheather v. Risley*, 38 Iowa, 486; *Cox v. Newkirk*, 73 Iowa 42; 34 W. 492; *Arnold v. Barkalow*, 73 Iowa 183; 34 N. W. 807; *O'Leary v. Frisby*, 17 Ill. App. 553; *Buckworth v. Crawford*, 24 Ill. App. 603; *Kearney v. Fitzgerald*, 43 Iowa 580; *Roose v. Perkins*, 9 Neb. 304; 2 N. W. 715; 31 Am. Rep. 409; *Wardell v. McConnell*, 23 Neb. 152; 36 N. W. 278; *Jones v. Bates*, 26 Neb. 693; 42 N. W. 751; *Earp v. Lilly*, 120 Ill. App. 123; affirmed, 217 Ill.

582; 75 N. E. 552; *Bryant v. Tidgwell*, 133 Mass. 86; *Taylor v. Wright*, 126 Pa. St. 617; 17 Atl. 677; *Boyd v. Watt*, 27 Ohio St. 259; *Bantz v. Barnes*, 40 Ohio St. 43; *Horst v. Lewis*, 71 Neb. 365; 98 N. W. 1046; *Merriman v. Miller*, Mich. 118 N. W. 11; *Lorey v. Kelley* (Neb.), 90 N. W. 554; *Coleman v. People*, 76 Ill. App. 210; *Peterson v. Brockey* (Iowa), 119 N. W. 967; *State v. Thompson*, 42 Mich. 594; 4 N. W. 536; *Faivre v. Mander-schied*, 117 Iowa 724; 90 N. W. 76.

³⁹ *Emory v. Addis*, 71 Ill. 273; *Hachett v. Smelsley*, 77 Ill. 109; *O'Halloran v. Kingston*, 16 Ill. App. (16 Bradw.) 659; *Woolheather v. Risley*, 38 Iowa 486; *Boyd v. Watt*, 27 Ohio St. 259.

in part by other dealers not made defendants in the action. If a dealer contributes in any extent to the intoxication of another which results in injury to a third person, he is severally as well as jointly liable to the person injured. Thus, where a dealer sold to another one of two glasses of liquor he drank, upon which the party became intoxicated and injury resulted to a third party, such dealer is severally liable to the party injured as well as jointly liable with the dealer who sold the other glass.⁴⁰ The reason for the rule above announced is well stated by the Kansas court: ⁴¹ "Where the separate acts of two wrongdoers contribute to and jointly cause the wrong, each is responsible as though he were the sole wrongdoer. This is a universal law of torts, and applies in the case of a sale of liquors as in all other cases. Of course, the act must stand in the line of direct causation. If a glass of liquor is sold to-day which simply awakens an appetite which months thereafter causes the party to seek and drink liquor to excess, such sale cannot be said to be in the line of direct causation, but where the liquor sold is part of that which directly produces the intoxication, we suppose the sale is within the statute, although it appears that other parties sold liquor which also contributed to the intoxication." An examination of the authorities upon the

⁴⁰ In the case of *Werner v. Edminston*, 24 Kan. 147, the court said: "Where two glasses of liquor are sold by two different parties and intoxication follows therefrom, no analysis can accurately apportion the cause between the two sales, and the statute holds each responsible for the result caused by the two separate sales. If it be said that this casts large risks on the sale of liquor, for the sale of one drink to a man perfectly sober, may be followed by a second sale to the same party by another person, and so no man be safe against the wrongful act of a second vendor, we reply that

the statute invites no man to engage in the business of selling liquor. It prescribes the conditions, and if they seem hard to any one, he may decline entering into the business. It cannot be disguised that the general judgment is that the sale of liquor carries risks to society, and if, as a protection against such risks the lawmakers attach severe conditions to such sale, the courts have no alternative but to enforce such conditions." See also *Taylor v. Wright*, 126 Pa. St. 617; 17 A. 677.

⁴¹ *Werner v. Edminston*, 24 Kan. 147.

subject leads us to make the three following distinctions: (a) Where two or more dealers contribute to a single fit of intoxication from which an injury results, all of the dealers contributing to such intoxication are joint tort-feasors; (b) Where two or more dealers cause or contribute to separate acts of intoxication and one or more of the acts of intoxication results in injury to a third person, the dealer causing such independent acts of intoxication are not joint tort-feasors, although the habit formed by one drunken spree may have led to the intoxication which resulted in injury; (c) Where two or more dealers contribute in keeping another in an habitual state of intoxication, whether of long or short duration, they are joint tort-feasors. As to the first proposition, the authorities are uniform. As to the second and third there is some little confusion, but we think the preponderance of authority bears out the propositions as above stated. We will, however, set out the various views of the several courts, as we have found them. In Iowa it is held that where the intoxication complained of consisted, not of one simple fit of intoxication contributed to by two or more dealers, but a series of drunken sprees contributed to by two or more dealers, covering a long period of time and resulting in injury to the means of support of a third person, the dealers so contributing to such sprees are not joint tort-feasors, but each dealer is liable for the injuries produced by his own acts.⁴² The reason for this

⁴² In *Jewett v. Wanshura*, 43 Iowa 574, the court said: "When the drunkenness complained of consists not of a mere simple fit of intoxication contributed to by two or more, the action is not joint, but several, and each is only liable for the injury produced by his own acts."

In *Richmond v. Schickler*, 57 Iowa 486; 10 N. W. 882, the court said: "The petition does not allege that there was any specific act or acts of intoxication to which all the persons from whom the plain-

tiff's husband obtained liquor contributed; and the evidence tended to show he was in the habit of becoming intoxicated for a period of seventeen years preceding the trial, and that during the period named in the petition he procured liquor from any person who would let him have it. Under such circumstances the person furnishing the liquor cannot be deemed joint wrongdoers, but each are severally liable for the damages caused by his own acts."

rule, as announced by the Iowa court,⁴³ is as follows: "A joint liability arises when an immediate act is done by the co-operation or joint act of two or more persons. Mere successive wrongs, being the independent acts of the persons doing them, will not create a joint liability, although the wrongs may be committed against the same person. There must be concurrent action, a co-operation or a consent or approval in the accomplishment by the wrongdoers of the particular wrong, in order to make them jointly liable. And it has been held that a joint action may not be brought against a physician who prescribed and an apothecary who put up the noxious medicine. In this case the sale by each to the husband of plaintiff, resulting in her injury, became an independent and complete cause of action, and a sale to him of other intoxicating liquors by another person on the next day, the next week, or the next month, would not give a joint right of action either for the first or last sale. They are manifestly under the statute, each complete in itself." Thus where a person committed suicide while in an intoxicated condition, although the suicide was the result, not alone of the one spree, but from his general besotted condition produced by his previous habits, it was held that the dealers who contributed to the suicide's besotted condition were not jointly liable with those who did contribute to the intoxication resulting in his death.⁴⁴ Indeed, the earlier Iowa cases seem to go so far as to hold that dealers contributing to the habitual intoxication of another which results in injury to a third

⁴³ *La France v. Krayner*, 42 Iowa 143.

This seems to be the rule in Canada. *Crane v. Hunt*, 26 Ont. Rep. 641.

That several saloon keepers cannot be sued jointly on their bonds, see *Kennedy v. Garrigan*, 121 N. W. 783; but it may be against one saloon keeper and all the bondsmen on his several

bonds. *Merriman v. Miller*, Mich. 118 N. W. 11.

Where several saloon keepers have contributed to the intoxication, it would seem that it may be shown the proportionate amount of money the drunkard spent in each keeper's saloon. *Hemmens v. Bentley*, 32 Mich. 89.

⁴⁴ *Hitchner v. Ehlers*, 44 Iowa 40. See also *Tetzner v. Naughton*, 12 Ill. App. 148.

person are not joint tort-feasors.⁴⁵ The later cases, however, distinguish between contributing to the habit of drinking which eventually results in habitual drunkenness and contributing directly to such drunkenness. In the first instance these cases hold the dealers contributing to the habit of drinking are not liable for the injuries resulting from the habitual drunkenness. In the second instance those contributing directly to the habitual intoxication are joint tort-feasors.⁴⁶ In Ohio it is held that where injury results to the means of support of a wife by reason of the habitual intoxication of the husband, all of the dealers who contribute to such intoxication are jointly as well as severally liable for all of the injurious consequences resulting to her by reason of such

⁴⁵ In the case of *Flint v. Ganer*, 66 Iowa 696; 24 N. W. 513, the court said: "The district court in the third instruction directed the jury that for sales of liquors made by defendant to plaintiff's husband, which produced or contributed to his habitual intoxication, the defendant would be liable for all damages sustained therefrom by plaintiff, as well as for exemplary damages. This instruction is erroneous, being in conflict with prior rulings of this court, holding that whoever contributed to the formation of habits of intoxication is liable only for the damages caused by his own acts." See also *Richmond v. Shickler*, 57 Iowa 486; 10 N. W. 882; *Ennis v. Shiley*, 47 Iowa 552.

⁴⁶ In *Cox v. Newkirk*, 73 Iowa 42; 34 N. W. 492, the court said: "The appellant complained of certain instructions given by the court, and among them of instructions in which the jury was told, in substance that if Kearns contributed to Cox's intoxication, ha-

bitual or otherwise, he would be liable for the damages sustained by the plaintiff in her means of support caused by such intoxication. It is contended by the appellant that this instruction is inconsistent with the ruling in *Ennis v. Shiley*, 47 Iowa 552. There is a manifest difference between contributing to the habit of drinking, which eventually results in habitual drunkenness, and contributing directly to such drunkenness. The person who contributes merely to the habit of drinking is not responsible for damages which may accrue from eventual drunkenness, not directly caused thereby. This is the rule contended to be held in *Ennis v. Shiley*, as can be seen from the opinion, though there may be doubt as to whether the facts of the case called for such ruling. The instruction now in question, as we understand it, holds, in substance, that a person who contributes directly to the intoxication, that is, to specific fits of intoxication, becomes liable even

habitual intoxication.⁴⁷ The reason for the rule is thus stated by the Ohio court:⁴⁸ “Why should a defendant be exonerated from the injury he has caused by his habitual wrongs for a series of years by showing that others, without his knowledge, have also contributed by like means to this result. He was using adequate means to produce the result, and may therefore fairly be presumed to have intended it. True, he may not have enjoyed a monopoly in the profits accruing, by reason of the competition of others in a common business, but that certainly is no reason why he should not be liable for the injuries he was intentionally engaged in causing. If such is the law, then he could take advantage of his own wrong by showing that during this four years another or others had also contributed. Such is not the law in criminal cases at common law, * * * and we know no reason for greater strictness under the statute than in cases of the highest crimes known to the law. * * * All joint tort-feasors are jointly or severally liable at the election of the plaintiff.” The Ohio court, however, makes a distinction between an injury resulting from the habitual intoxication of another caused by repeated illegal sales for a series of years and distinct injuries resulting from a series of sprees caused by separate and distinct illegal sales. In the first instance, all dealers contributing to such habitual intoxication are jointly and severally liable. In the second instance, each dealer is only responsible for the specific intoxication which he caused or contributed to and which resulted in injury to a third

though the intoxication has become habitual. We think that the instruction is correct. It is true that in *Flint v. Ganer*, 66 Iowa 696; 24 N. W. Rep. 513, an instruction was condemned which was very much like the one we now sustain. But in that case the court followed *Ennis v. Shiley*, and understood the instruction condemned as holding that a per-

son would be liable who merely contributed to the formation of a habit which eventually resulted in drunkenness.” See also *Arnold v. Barkalow*, 73 Iowa, 183; 34 N. W. 807.

⁴⁷ *Boyd v. Watt*, 27 Ohio St. 259.

⁴⁸ *Boyd v. Watt*, 27 Ohio St. 259.

person.⁴⁹ In Michigan it is held that where a wife suffers injury to her means of support by reason of the frequent intoxication of her husband who purchased his liquors at several places, all persons contributing to such intoxication are joint tort-feasors and liable for the whole injury.⁵⁰ So it is held that all dealers who contributed to an eighteen-day debauch were jointly and severally liable for all of the injurious consequences of such debauch resulting to a third person.⁵¹ In Illinois it is held that when damages for injuries caused by the sale of intoxicating liquors are sought to be recovered under the civil damage statute, all those who have furnished liquors which contributed to create or to strengthen or to

⁴⁹ In *Kirchner v. Myers*, 35 Ohio St. 85, the court said: "No doubt, under this act, if two sellers, though wholly independent of each other, contributed, by their unlawful sales, to the same intoxication, whether of long or short duration, a wife injured thereby in her means of support, could recover damages for the whole injury, in a joint action against them, and she might recover against either or both of them in a separate action or actions, the some amount of damages, though she could have but one satisfaction. But this did not render a party liable for the independent, unlawful act of another seller, having no such connection with any unlawful sale he may have made." See also *Miller v. Patterson*, 31 Ohio St. 419. In *Rantz v. Barnes*, 40 Ohio St. 43, the court said: "The facts found show that the husband of the plaintiff was habitually intoxicated, that the sales of intoxicating liquors to him, by the defendants, was with the knowledge of this fact and contributed to

keep up said habit. This is equivalent to saying that the defendants by the sales of liquors to the husband contributed to keep him in a condition of habitual intoxication. All persons who so contribute are, under this statute, jointly and severally liable."

⁵⁰ In *Bowden v. Voorhis*, 135 Mich. 648; 95 N. W. 406, the court said: "The testimony shows that plaintiff's husband, during a long period, frequented defendant's saloon and bought liquor there at least once a week. Plaintiff does not claim damages resulting from any particular intoxication of her husband. It is her claim that the sales of defendant contributed to her loss of means of support, shame and disgrace. If they did, and whether they did or not, was a question properly submitted to the jury. Defendant was responsible for the whole injury, even though the sales made by others also contributed to produce it." See also *State v. Thompson*, 42 Mich. 594; 4 N. W. 536.

⁵¹ *Johnson v. Johnson*, 100 Mich. 326; 58 N. W. 1115.

keep up the habit of intoxication are jointly and severally liable.⁵² In Massachusetts, however, it is held that a habit of becoming intoxicated is distinguishable from actual intoxication, and that the dealers to be liable must have actually caused the intoxication, and the injuries must have been received in consequence of such intoxication.⁵³ The weight of authority, therefore, seems to be that where injury results to an innocent party by reason of the habitual intoxication of another, all dealers who cause or contribute to this habitual intoxication are jointly and severally liable for the entire injury, but where injuries result from particular fits of intoxication, the dealers causing or contributing to one fit of intoxication resulting in injury are not jointly liable with other dealers who caused or contributed to another fit of intoxication which resulted in a separate and distinct injury. Each set of dealers are liable only for the particular injury occasioned by their own sales. Nor are those dealers who merely contribute to a habit of drinking jointly liable with those whose sales cause or contribute to an intoxication which results in injury. In a recent Indiana case,⁵⁴ a new principle relative to the subject under discussion was evolved, to the effect that a brewing company who, through its agents, colluded, connived and became a party in interest with the dealer by paying for the room in which the saloon business was to be conducted without license and furnishing the liquors, knowing that such liquors were to be sold by the dealer contrary to law, was jointly liable with the dealer in damages to a mother whose adult son, upon whom she was dependent for support, died from the effects of intoxicating liquors illegally sold him by the dealer. The court in part said: "When two or more persons engage in the prosecution of an illegal enterprise, and in violation of the law, it is elemental that each of them becomes responsible for all the consequences resulting therefrom. The gravamen of this action is

⁵² Keller v. Lincoln, 67 Ill. App. 404.

⁵³ Bryant v. Tidgewell, 133 Mass. 86.

⁵⁴ Terre Haute Brewing Co. v. Newland, 33 Ind. App. 544; 70

N. E. 190.

a tort; *i. e.*, the unlawful sale of intoxicating liquor. If the evidence tends to show that the brewing company was a party to such sale, then the verdict against it under the allegation of the complaint as to collusion can be set aside. * * * There is no room for division or responsibility." But in Iowa under a statute prohibiting sale of intoxicating liquors to habitual drunkards, and making a judgment against a dealer making such sales a lien on the land where the saloon is situated, if such sales are made with knowledge and consent of the owner, it is held that the dealer and owner of the premises are not joint tort-feasors.⁵⁵ From all of the foregoing it would seem unnecessary to add that when alleged joint tort-feasors are sued jointly, a recovery may be had against all of the defendants or the recovery may be against a part only, and that, upon appeal, the judgment may be reversed as to some and affirmed as to others.⁵⁶

Sec. 1057. Sureties on dealers' bonds.

It appears to be the law that where the bond given by the dealer is conditioned for the payment of any judgment that may be rendered against him under the civil damage statute, it is not necessary to first obtain a judgment against the dealer before there is liability on the bond, but such liability may be enforced in the first instance against the principal and sureties by a suit against them on such bond. Thus, it is held where the bond provided that the dealer would keep an orderly and peaceable house and pay all judgments for civil damages that might be rendered against him, and the statute gave a right of action against the dealer in favor of any person who should sustain any injury or damage to his person

⁵⁵ In *McVey v. Marrott*, 80 Iowa 132; 45 N. W. 548, the court said: "It is said that the saloon keeper and his landlord are joint tortfeasors, and that as the plaintiff prosecuted her action to judgment and collected a part of it by execution, she has no right to maintain another action against

the landlord. It appears to us that the parties are not joint wrongdoers, as claimed by counsel. There is no liability of the landlord other than the subjection of his property to the payment of the judgment."

⁵⁶ *Bengler v. Lilly*, 26 Ohio St. 48.

or property or means of support on account of the use of intoxicating liquors illegally sold, that the remedy against the dealer and the remedy on the bond were concurrent and not successive, and that the dealer and his bondsmen could be joined in an action without the necessity of the plaintiff first obtaining a judgment against the dealer and then suing the bondsmen upon the bond to obtain satisfaction of the judgment.⁵⁷ And it is clear that where the dealer covenants in his bond not to sell to certain persons, it is not necessary to first obtain a judgment against the dealer where he has violated his bond to the injury of another, but such injured party may sue the dealer and his bondsmen in one action.⁵⁸ It is also true that as all of the dealers who contribute to the intoxication of another which result in injury to a third person are joint tort-feasors, and may all be sued in one action for the entire injury; so can all of the bondsmen of these several dealers be joined in the same action, and each

⁵⁷ In the case of *Brandt v. State*, 17 Ind. App. 311; 46 N. E. 682, the court said: "The intention of the Legislature, which we must carry out, appears to be that the liability of the principal and sureties upon the bond given under the provisions of section 4 of the act shall extend to any injury or damage which any person shall sustain to his person, property or means of support on account of the use of intoxicating liquors sold in violation of any of the provisions of the act of March 17, 1875, and that such liability may be enforced in the first instance against the principal and sureties by a suit against them on the bond."

⁵⁸ In the case of *Anthony v. Krey*, 70 Mich. 629; 38 N. W. 603, the court said: "The Legislature evidently intended that the action might be brought by the

wife, as in the present case, against the principal and sureties jointly in one suit; and it is not necessary that judgment should first be obtained against the principal before the sureties are liable. The condition of the bond is not only that they shall pay any judgment, etc., but that the principal shall also well and truly keep and perform all and singular the foregoing covenants and agreements. If any such covenants and agreements are broken, the bond is in full force and effect; and if the wife is damaged or injured in person or property or means of support, by such broken covenants, or any of them, the right of action at once accrues, and can be maintained against principal and sureties jointly. The sureties cannot well complain of this. It gives them opportunity to contest their lia-

bondsman is liable, not only for his principal's several or separate breaches of his bond, but also for such breaches thereof or liabilities thereunder as such principal may have committed or incurred jointly with other dealers.⁵⁹ And under a statute which forbade a dealer to sell intoxicating liquor to any person after notice given not to do so, it was held that where a wife gave notice to a dealer not to sell intoxicating liquor to her husband, upon violation of this notice by such dealer, the wife could maintain an action against him and his bondsmen, although the bond sued upon was given subsequent to the notice and the dealer at the time of his violation of the notice was not operating under the same license as he was at the time the notice was given.⁶⁰ It is also the law that the sureties on a dealer's bond are not relieved from liability because the dealer failed to do certain things required by the law before he was

bility from the beginning, instead of defending their liability upon a judgment against their principal, which may be taken without notice to them."

One not a party to the bond cannot be joined as a party defendant. *Sullivan v. Radezwirtz*, 82 Neb. 657; 118 N. W. 571.

⁵⁹ *Horst v. Lewis*, 71 Neb. 365; 98 N. W. 1046; 103 N. W. 460; *Wardell v. McConnell*, 23 Neb. 152; 36 N. W. 278. In an action for sales during three years, resulting in making the purchaser an habitual drunkard, an action may be maintained on three bonds with separate sureties given during that period. *Merrimane v. Miller*, Mich. 118 N. W. 11; modified, *Merrimane v. Miller*, (Mich.), 122 N. W. 82.

⁶⁰ In the case of *Rintleman v. Hahn*, 20 Texas Civ. App. 244; 49 S. W. 174, the court said: "Under our law a liquor license

may be transferred and the licensee again take out another license and do business in another place. It is also required that each year he take out a new license, give a new bond, etc., and the statute does not seem to have contemplated that the wife, mother, sister or daughter should be required to renew the notice, if any, given to a liquor dealer every time he should change his business location, or every time a new license was taken out by him in order to avail herself of the protection given by the law. We are of the opinion that the notice given in the case by the wife to Blair Bros. was sufficient as to them to designate Fritz Hahn as one of the prohibited class and that, if they afterward sold him whisky and beer, as alleged, a breach of the obligation of the bond occurred."

legally entitled to sell intoxicating liquors. Thus where a dealer who has given bond to pay all damages that might result from the sale of intoxicating liquors on his premises, but who had failed to file the consent of all property owners within fifty feet of his saloon, as required by the law as precedent to his right to operate, in a suit by a wife against him and his bondsmen for injuries to her means of support by reason of the intoxication of her husband, caused by such dealer, it was held that his bondsmen were not excused from liability by reason of his failure to comply with the statute.⁶¹ It is also held that the sureties on a dealer's bond are responsible not only for the acts of the principal during the existence of the bond, but also for the results of such acts, however long they may continue.⁶² In Illinois it is held that "the obligors on a liquor dealer's bond are bound by a recital in the bond as to the time when the license of their principal expires, and hence are liable for breaches occurring before such time, though after the expiration of the license."⁶³ In those States where exemplary damages are allowed the sureties on a dealer's bond are liable for them as well as compensatory damages to the extent of the bond.⁶⁴ It is quite clear that the sureties on a dealer's bond are liable as well as the dealer where such dealer's clerk, authorized to make sales generally and to conduct the business, makes ille-

⁶¹ In the case of *Breeding v. Jordan*, 115 Iowa 566; 88 N. W. 1090, the court said: "The immunity of the saloon keeper from the penalties of violating the law is one thing, the liabilities of the sureties on his bond, executed for the benefit of any one suffering damages because of his acts, quite another. The invalidity of the election of an officer furnishes no defense to an action on his bond. Neither is proof of non-compliance with other conditions of the mullet law any defense to a suit on such bond for the dam-

ages contemplated in its execution. Having recited therein compliance with all the preliminary provisions of the law and the principal having engaged in the traffic precisely as though this had been done, the sureties are not in a situation to object that he has not done that which they in their obligation have solemnly declared has been performed."

⁶² *Wardell v. McConnell*, 23 Neb. 152; 36 N. W. 278.

⁶⁴ *Coleman v. People*, 78 Ill. App. 210.

gal sales of liquor which result in injury to an innocent party.⁶⁵ In Nebraska it has been held that where a liquor dealer's bond was given in the name of a certain village instead of in the name of the State, as required by law, the bond was not invalid because of such error, for the reason that as the bond was really for the use and benefit of whomsoever was injured in consequence of its breach, and as the obligee was really a nominal party, a trustee, in the absence of an express statutory provision denying the right to name a different nominal party in the bond, it must be held that the bond was available to any person who may have sustained injuries by the sale of liquors by the principal in the bond.⁶⁷

Sec. 1058. Owners or lessors of premises.

The civil damage statutes of many States provide that the owner or lessor of a building who rents or permits its occupation with knowledge that intoxicating liquors are to be sold therein is liable in damages for any injuries to innocent parties caused by the intoxication of any person, produced by intoxicating liquors sold in such building.⁶⁸ The statutes seem to be broad enough to include both the owner of the

⁶⁵ *Breeding v. Jordan*, 115 Iowa 566; 88 N. W. 1090; *Richmond v. Shickler*, 57 Iowa 486; 10 N. W. 882; but no more, *Merrimane v. Miller* (Mich.), 118 N. W. 11.

In the case of *Boos v. State*, 11 Ind. App. 257; 39 N. E. 197, the court said: "If Gauss violated his bond in making the sale, his sureties were also liable on the bond."

⁶⁷ *Thomas v. Hinkley*, 19 Neb. 324; 27 N. W. 231.

New York excise commissioners cannot change the terms of a bond by releasing the sureties. *Clement v. Empire State Surety Co.*, 110 N. Y. S. 418.

The sureties are not bound be-

yond the penalty of the bond. *Merrimane v. Miller* (Mich.), 118 N. W. 11.

The surety is not bound if the principal did not have a license. *Hillman v. Gallagher* (Tex.), 120 S. W. 505.

⁶⁸ *Schroder v. Crawford*, 94 Ill. 357; 34 Am. Rep. 236; *McGee v. McCann*, 69 Me. 79; *McVey v. Marratt*, 80 Iowa 132; 45 N. W. 548; *O'Brien v. Putney*, 55 Iowa 292; 7 N. W. 615; *Mead v. Stratton*, 87 N. Y. 493; 41 Am. Rep. 386; *Hall v. Germain*, 131 N. Y. 536; 30 N. E. 591, affirming 59 Hun 626; 14 N. Y. Supp. 5; *Bennett v. Levi*, 19 N. Y. Supp. 226.

building, although he does not directly rent the building to the person engaged in the business of selling intoxicating liquors, if he has knowledge that such business is being conducted, and the person who is in immediate control of it and who rents it with knowledge that intoxicating liquors are to be sold therein.⁶⁹ Thus where the owner of a building left its entire management to an agent who leased it to another with knowledge that intoxicating liquors were to be sold therein, in an action against such owner for damages growing out of the death of a person caused by his intoxication upon liquors bought in the building, it was held that the owner was liable, although he had no personal knowledge that the building was to be used for such purpose.⁷⁰ As was well said by the New York court: "We think that upon the general doctrine of the law of principal and agent, and especially in view of the character and object of the statute under consideration, the knowledge of the agent in this cause must be held to be the knowledge of the principal; in other words, that in a case like this the owner must be held to have himself permitted within the meaning of the statute, the occupation of the building or premises for the purpose for which he has permitted his agent to rent it." However, the statute is not to be so construed as to make liable those who only have a reversionary and contingent interest in the property used as a saloon and who have no control in the letting.⁷¹ Nor does the provision of the statute under consideration apply where the owner of the property himself sells the liquor therein.⁷² As was said by the Indiana court in construing an act, now repealed: "We think that this part of the section was not intended to apply to the owner of premises who himself sells intoxicating liquors therein; but was intended to apply to the owner of the property for such purpose. * * * Where the owner of the property himself sells, he is liable because he sells, and not on account of his ownership

⁶⁹ Mead v. Stratton, 87 N. Y. 493; 41 Am. Rep. 386.

⁷⁰ Hall v. Germain, 131 N. Y. 536; 30 N. E. 591, affirming 59 Hun 626; 14 N. Y. Supp. 5.

⁷¹ Castle v. Fogerty, 19 Ill. App. 619 (Bradw.) 442.

⁷² Barnaby v. Wood, 50 Ind. 405.

of the premises in which the sale is made." Such a statute can also be said to have a retroactive effect to the extent that an owner of a building who rented it for saloon purposes prior to the passage of the act became subject to its provisions in the same manner and to the same extent as though the owner had accepted the saloon keeper as a tenant subsequent to the enactment of the law.⁷³ In some jurisdictions the statute makes the owner or lessor of the premises on which the intoxicating liquors are sold and the dealer selling the intoxicating liquors jointly and severally liable for the injurious consequences of such sales.⁷⁴ But the weight of authority seems to be that, although a joint action may be maintained against the owner of the building in which the liquors are sold and the dealer selling the liquors,⁷⁵ nevertheless the

⁷³ In the case of *Mead v. Stratton*, 87 N. Y. 493; 41 Am. Rep. 386, the court said: "The claim that Mrs. Stratton, if she was the owner of the premises, does not come within the provisions of the statute so as to render her liable, is based upon the fact that she had the title when she and her husband went into possession, and that the act of the Legislature upon which this action is founded was passed afterward. The position is that the statute was not intended to be retroactive. The statute had been in operation some time when the sale of the liquor was made, and in the absence of direct proof it can hardly be assumed that the original possession was to be, and actually was, continued without regard to any future change of the law or obligations of the parties, and that for this reason they were to be exempted from the operation and effect of all future legislative enactments, and we are unable to discover how the doctrine contended for under the circumstances. Such a rule

would screen a party for an unlimited period of time from the operation of a statutory enactment, and clearly cannot be upheld. The presumption is that the possession originally taken was continued in view of the laws of the State as they were thereafter enacted."

⁷⁴ In the case of *McGee v. McCain*, 69 Me. 79, the court said: "Under these provisions the owner's liability is evidently put upon the same ground as that of the seller, which is that each have caused or contributed to the intoxication, in different ways, perhaps, but each working to the same result. The causing or contributing to the intoxication is the cause, and the only cause, of action provided for, and makes the guilty liable, whatever be the means resorted to."

⁷⁵ In the case of *Bennett v. Levi*, 19 N. Y. App. 226, the court said: "The statute enables the person injured to proceed against the owner or lessor jointly with the lessee or occupant upon proof that

plaintiff, if he do not so join the dealer and the owner of the building is not precluded from bringing a separate suit against the owner of the building after obtaining a judgment against the dealer, to secure a lien upon the saloon premises to the amount of the judgment obtained against the dealer.⁷⁶ It is also the law that where an action is commenced under a provision of a statute, such as is now being discussed, and the owner of the property on which the intoxicating liquor was sold is joined with the dealer making the sale, the complaint averring the owner's consent and knowledge of the unlawful sales, describing the property and praying that the property be subjected to the payment of the claim for damages, the doctrine of *lis pendens* applies; and if such owner transfers the property during the pendency of the action, upon rendition of a judgment against the dealer and owner, the lien of the judgment attaches to the property transferred.⁷⁷ It is held,⁷⁸ however, that a steamboat is not a "building or premises" within the meaning of the act so as to make liable the owner of a steamboat navigating a river where injury resulted to plaintiff from the intoxication of a party upon intoxicating liquors sold in the barroom of the boat. Unless the act so declares, the owner of the premises on which intoxicating liquors are sold which result in injury is not liable to pay exemplary damages, unless he had knowledge of the particular sale which occasioned the intoxication resulting in injury to the plaintiff.⁷⁹ Of course, if the statute merely makes the owner's

the owner or lessor knowingly let or permitted his premises to be occupied for the sale of intoxicating liquors." See also *Loan v. Hiney*, 53 Iowa, 89; 4 N. W. 865; *LaFrance v. Kray*, 42 Iowa, 143; *Buckham v. Grape*, 65 Iowa 535; 17 N. W. 755; *Jackson v. Brookins*, 5 Hun 530.

⁷⁶ *McVey v. Marratt*, 80 Iowa, 132; 45 N. W. 548; *LaFrance v. Kray*, 42 Iowa, 143; *Buckham*

v. Grape, 65 Iowa, 535; 17 N. W. 755.

⁷⁷ *O'Brien v. Putney*, 55 Iowa, 292; 7 N. W. 615.

⁷⁸ *Rouse v. Catskill & N. Y. Steamboat Co.*, 133 N. Y. 679; 31 N. E. 623; affirming 61 Hun, 622; 15 N. Y. Supp. 971.

⁷⁹ *Ketchum v. Fox*, 5 N. Y. Supp. 272; 52 Hun, 284; overruling *Reed v. Terwilliger*, 42 Hun, 310.

property subject to the judgment rendered against the dealer, it makes no difference whether exemplary damages enters into the judgment or not. The judgment is a lien in any event. The question as to what is sufficient knowledge and consent of the owner or lessor as to make him liable under the act in question has been often considered by the courts. The following rules may be gathered from the cases: (a) The liability of an owner or lessor under the statute is to be determined by his knowledge at the time the lease was given. As was said by the New York court:⁸⁰ "If he does not then know that the premises are to be used for the sale of liquor, and does not intentionally shut his eyes, he is not liable under the act, although the tenant does subsequently during the term use the premises for the sale of liquor. It would be most unreasonable to charge a landlord with liability who let his premises, not knowing that they were to be used for the sale of liquor, on the mere ground that the premises were in fact so used by the tenant." (b) If unlawful sales of intoxicating liquor are made by a tenant, such sales *ipso facto*, under certain statutes, work a forfeiture of the lease and if the landlord, after knowledge that the forfeiture had been incurred, fail to enforce the forfeiture and enter upon the premises, he is liable for all subsequent sales of intoxicating liquors resulting in injury to third persons.⁸¹ (c) When an owner entrusts the renting of his property to an agent and such agent, without the knowledge of his principal, rents the property for saloon purposes, the owner of the property is liable to a third person for the injurious results to him of the sales of intoxicating liquor upon such premises. As was said by the New York court:⁸² "The statute in question

⁸⁰ Hall v. Germain, 131 N. Y. 536; 30 N. E. 591.

⁸¹ Hall v. Germain, 131 N. Y. 536; 30 N. E. 591.

⁸² Hall v. Germain, 131 N. Y. 536; 30 N. E. 591. See also Johnson v. Grimminger, 83 Iowa, 10; 48 N. W. 1052.

Exemplary damages may be re-

covered of the lessor where he demises the premises for saloon purposes. Beckerie v. Brandon, 133 Ill. App. 114; affirmed, 229 Ill. 180; 82 N. E. 283.

The lessor and lessee selling the liquors may be joined as defendants in one action. Hedland v. Geyer, 234 Ill. 589; 85 N. E. 203.

simply charges it (traffic) with a liability for its own actual pecuniary loss as a consequence of the traffic in a particular instance. The statute, then, is seen to be not penal, but remedial, and to be so construed as to give effect to the remedy intended to be applied. That intention could be easily defeated if the owner of the property available for the business might put it into the hands of an irresponsible agent, with *carte blanche* to rent it as the latter saw fit, for the benefit of the former, and yet be relieved from the burden which the law casts upon the owner, if the property be used for the purpose specified in the statute.” (d) The permission or knowledge of the owner or lessor that the premises were to be used for the purpose of selling intoxicating liquors is not to be presumed or inferred, but must be established by clear and satisfactory proof.⁸³ (e) In those States where the basis of liability is the illegality of the sale, it is held that “to have had knowledge of and given his consent to the unlawful use of his property, the owner must not only have known that the sales were made therein, but he must also have known the particular fact or circumstance which rendered the sales unlawful. It cannot be said that the premises were occupied and used for that purpose, with his knowledge and consent, by the person selling intoxicating liquors contrary to law, unless he had knowledge of the fact which rendered the sales unlawful.”⁸⁴ (f) But it is also the rule in such States that where the owner or lessor consents to the conduct of an unlawful business such as selling intoxicating liquors without license, he is presumed to consent to every transaction that may occur in the business contemplated and to establish any particular sale, it would only be necessary to establish his original assent to the illegal use of the property.⁸⁵ (g) It is not necessary that the strict relation of landlord and tenant should exist between the owner of the premises and the dealer

There is no contribution between the defendants. *Zigler v. Rammel*, 30 Wkly. L. Bull. 115; 4 Ohio L. D. 472.

⁸³ *Mead v. Stratton*, 8 Hun, 148.

⁸⁴ *Myers v. Kirt*, 64 Iowa, 27; 19 N. W. 846.

⁸⁵ *Wing v. Benham*, 76 Iowa, 17; 39 N. W. 921.

before liability can be fastened upon the owner. It is sufficient if the owner permitted the dealer to occupy the premises with the knowledge that such dealer was to engage in the business of selling intoxicating liquors.⁸⁶ (h) The knowledge and consent of the owner or lessor may be proven by circumstantial evidence. Thus in an action brought against a dealer and the owner of the property in which he was doing business for injuries resulting to plaintiff by reason of the sales of intoxicating liquor to an habitual drunkard, it was held that evidence showing that the owner of the building lived near the property in question and visited the saloon, knew the plaintiff's husband to be an habitual drunkard, and had seen him drunk on the street and in his tenant's saloon was sufficient to establish notice of illegal sales upon the owner of the building.⁸⁷ (i) Before an owner or lessor is liable for the injuries resulting from illegal sales of intoxicating liquors made upon his premises, it must not only be established that such lessor or owner had knowledge of such sales, but also that such lessor or owner consented thereto, and consent is not to be presumed from mere knowledge.⁸⁸ Thus, when it was established that the owner of the premises was in the saloon at the time plaintiff's husband drank and such owner had knowledge of the sale, in the absence of any showing that such owner consented to the sale, it was held that he was not liable.⁸⁹ (j) But, although the consent of the owner

⁸⁶ *Mead v. Stratton*, 87 N. Y. 493; 41 Am. Rep. 386.

⁸⁷ In the case of *McVey v. Marratt*, 80 Iowa, 132; 45 N. W. 548, the court said: "We have carefully examined the evidence on this question, and our conclusion is that the evidence shows, without much doubt, that the plaintiff's husband was a notorious and habitual drunkard. His drunkenness was such as to be observed by all his acquaintances. He was habitually drunk on the streets and in Nilk's saloon, and sometimes visited it.

and it is impossible to believe from the testimony of witnesses that he did not know of the habits of McVey, and of the fact that Nilk was selling intoxicating liquor to him. If he knew it, and made no objection thereto, it is fair to infer that he consented that his property might be used as a place for the unlawful sale of intoxicating liquor."

⁸⁸ *Myers v. Kirt*, 57 Iowa, 421; 10 N. W. 828.

⁸⁹ In the case of *Myers v. Kirt*, 57 Iowa, 421; 10 N. W. 828, the

or lessor must be established before there is liability on his part, nevertheless such consent need not be shown by any positive or affirmative act, but may be inferred from circumstances and knowledge of the illegal sales under such conditions as properly to call forth a protest and a failure to make any objection.⁹⁰ In concluding this section, it is in order to suggest that where a joint action is brought against the dealer and the owner of the building for injuries resulting from the sales of intoxicating liquors, the owner is entitled to a jury to determine the question of his knowledge and consent.⁹¹

ARTICLE VI—ACTIONS.

SECTION.

1059. Time to sue—Statute of limitations.

1060. Parties.

SECTION.

1061. Pleadings.

1062. Issues—Proof—Variance.

Sec. 1059. Time to sue—Statute of limitations.

The statute of limitations commences to run against actions under the civil damage statutes immediately upon the making of the sales or gifts of intoxicating liquor, which cause or contribute to the intoxicating of another and which results in

court said: "But, conceding that there was enough to prove knowledge on the part of Reckermire, it was not sufficient to prove his consent. The burden was upon the plaintiff to prove both. The mere fact that Reckermire had knowledge that the plaintiff's husband had purchased and drank the glass of beer, if such was the fact, had no tendency to show that he consented to the sale. That should have been shown by something which he said or did, or by some-

thing which he omitted to say or do, which he might reasonably have been expected to say or do, if he did not consent. As there was no evidence upon this point, we think the verdict as to him should have been set aside." See also *Cox v. Newkirk*, 73 Iowa, 42; 34 N. W. 492.

⁹⁰ *Losan v. Etzel*, 62 Iowa, 429; 17 N. W. 611; *Putney v. O'Brien*, 53 Iowa, 89, 117; 4 N. W. 891.

⁹¹ *Loan v. Hiney*, 52 Iowa, 89; 4 N. W. 865.

injury to a third person.⁹² The reason for this rule is found in the fact that the wrongful act of the dealer in causing or contributing to the intoxication of another is a personal injury to the intoxicated person, although the right to sue thereon is given by statute to such persons as may suffer injury by reason of such intoxication.⁹³ The action is one created by statute and sounds in tort. Therefore the limit of time to sue is fixed by the statute limiting the time for bringing actions created by statute,⁹⁴ and in the absence of such a statute the time limit is the same as for other classes of personal injuries. In those States where the statute gives the right to certain enumerated classes to recover a certain and fixed amount against dealers who shall make unlawful sales of intoxicating liquors, it is held that such actions are for the purpose of recovering a penalty or forfeiture, and the statute limiting the time for bringing actions for penalties and forfeitures applies.⁹⁵

Sec. 1060. Parties.

The weight of authority is that a joint action in the names of two or more persons cannot be maintained under the civil damage statute unless their joint interest is invaded or they are jointly interested in the damages to be recovered.⁹⁶ Thus where both parents of a boy brought suit against a dealer for selling him whisky by reason whereof he became intoxicated, and, in trying to return home, fell upon a railroad track and was injured by a passing train, thereby depriving his parents of their means of support, it was held that there was a misjoinder of parties plaintiff. As was said by this court in passing judgment:⁹⁷ "In the case at bar the interest as well as the injury is several. The dam-

⁹² Emmert v. Grill, 39 Iowa, 690.

⁹³ Emmert v. Grill, 39 Iowa, 690.

⁹⁴ Durein v. Pontious, 34 Kan. 353; 8 Pac. 428.

⁹⁵ O'Connell v. O'Leary, 145 Mass. 311; 14 N. E. 143; Hillman

v. Gallagher (Tex.), 120 S. W. 505.

⁹⁶ Durein v. Pontious, 34 Kan. 352; 8 Pac. 428; McGee v. McCann, 69 Me. 79; Delfel v. Haugson, 2 Wash. St. 194; 26 Pac. 220.

⁹⁷ McGee v. McCann, 69 Me. 79.

age complained of is not to property, but to support. The support of the one cannot be that of the other. The injury to the one in this respect cannot be a direct injury to that of the other.” Again, it has been held that the children of a person who was rendered incapable of furnishing support to them by reason of the sales and gifts of intoxicating liquors to him by a dealer could not maintain a joint action against such dealer for loss of support.⁹⁸ The Kansas court well said: “The alleged wrongs of the defendants gave each of the plaintiffs a right to an action for the damage he had sustained, but did not give them any right to maintain a joint action. The case is one in which separate actions should have been brought against the defendants; that is, one in which separate actions should have been brought by each of the plaintiffs. Our conclusion, therefore, is that there is a misjoinder appearing in the petition.” Again, where the widow and three minor children joined in an action to recover for the death of the husband and father brought about by his intoxication, caused in part by liquor sold him by the defendant, under a statute which provided in substance that “every husband, wife, child, etc., who shall be injured, etc., shall have a right of action in his or her own name, severally or jointly, against any person or persons who shall, by giving or selling intoxicating liquors, have caused the intoxication in whole or in part of such person,” it was held that the term “severally or jointly” as used in the statute referred to the defendants and not to the plaintiffs, and that there was a misjoinder of parties plaintiff.⁹⁹ The court in part said: “The

⁹⁸ *Durein v. Pontious*, 34 Kan. 353; 8 Pac. 428.

Under the Nebraska statute (Comp. St. 1907, § 4235) the action must be brought by the party or parties entitled to the damages, and is not maintainable by the personal representatives of the deceased. *Murphy v. Willow Springs Brewing Co.*, 81 Neb. 223; 115 N. W. 763.

⁹⁹ *Delfel v. Hauson*, 2 Wash. St. 194; 26 Pac. 220.

To recover damages for an injury to the property or estate of a deceased habitual drunkard, his personal representative brings the action. *Kilburn v. Coe*, 48 How. Pr. 144; and if a person's property has been injured by a drunken person, rendered intoxicated, by the defendant, and the plaintiff

first claim of appellant is that there was a misjoinder of parties plaintiff. That the four plaintiffs who, under our statute, each have a separate cause of action, could not join in an action, unless by statute authorized so to do, is elementary. It is contended, however, that the section under which the action was brought specially authorized them to sue jointly or severally. * * * It is contended, on the one hand, that the words 'jointly and severally' refer to the plaintiffs; and on the other, that they refer to the defendants. We think the latter construction the true one. The other construction would lead to such absurd results that it could not be presumed to have been intended by the Legislature. Under the section thus construed, it would be competent for any number of persons, however differently injured, to join in one action, and we might have a case where one person was seeking to recover for the killing of a horse, and another for the loss of an arm. That causes of action thus distinct and several could not properly be joined in an action is too manifest for argument; and even if the statute had provided, in express terms, for such joinder, there could be no real unity of interests between the plaintiffs, for the reason that, though the remote cause of the loss to each would be the same, the immediate cause might be entirely and widely separated acts of the intoxicated person. Besides, the elements that entered into the question of damages would have nothing in common." In Illinois, however, a somewhat different rule obtains. Thus where a wife and the children of a man were injured in their means of support by reason of his intoxication, it was held that the wife and children might join in a suit against the dealer causing or contributing to the intoxication which occasioned the injury. The court said: "We do not agree, however, that it must necessarily follow that a joint action by persons injured in their means of support can in no case be maintained. Here it is alleged that the children, all of

die, his personal representatives may revive the action. *Morenus v. Crawford*, 51 Hun, 89; 5 N. Y. Supp. 453. But in an action to

enjoin a liquor nuisance, a personal representative cannot be substituted. *Geyer v. Douglass*, 85 Iowa 93; 52 N. W. 111.

tender years, and the wife resided together as one family, and were wholly dependent upon the deceased father and husband for support. It was his duty, under the law, to provide for them, as a family, the necessities of life suitable to their condition, to the extent of his ability. True, they each had a separate right of action for the loss of that sort, but it is impossible to say that they did not suffer a joint loss, and we are unable to see why, in such a case the wife and children may not join in a suit to recover damages for that loss.”¹ And in Indiana, it is held that where a person was killed by reason of his intoxication, the widow and infant children could join in one action against the dealer causing or contributing to such intoxication and his bondsmen.² In Nebraska, under a statute³ which provided, “It shall be lawful for any married woman, or other person at her request, to institute and maintain in her name a suit on any such bond [meaning liquor bond] for all damages sustained by herself and children on account of such traffic, and the money when col-

¹ *Helmuth v. Bell*, 150 Ill. 263; 37 N. E. 230, affirming 49 Ill. App. 626.

² In the case of *Wall v. State, ex rel Kendall*, 10 Ind. App. 530-533; 38 N. E. 190, the court said: “It is alleged in the complaint that his said children, relators herein, at the date of his death, were all infants of tender years and incapable of earning a living for themselves, and said children and his wife were at said defendant's death all dependent upon him for support and living; that he was able-bodied, in good health and capable of earning a living for his family. It is clear, under the statute, that any person who shall sustain any injury or damage on account of the violation of any of the provisions of the act in relation to the sale of intoxicating li-

quors by retail, may maintain such action. Section 5323, *supra*. The entire liability on the bond is limited to two thousand dollars. Section 5315, *supra*. We are therefore not able to see any reason why all the persons interested in recovering damages growing out of one and the same unlawful act should not join as relators in an action in the name of the State on the bond. It is perhaps true that each person interested might act as a relator in the institution of a separate action, but the recovery on the bond in all of them could not in any event exceed two thousand dollars. The policy of the law, however, should be to encourage the adjudication of the entire liability in one action where it can be done without prejudice to the rights of any one.”

lected shall be paid over for the use of herself and children,"³ it was held that a wife and children constituting one family may join in one action for an injury to the husband and father occasioned by his intoxication upon intoxicating liquors sold or given him by the defendant.⁴ It is clear that where the wife has been injured in person, property or means of support by reason of the intoxication of her husband she may maintain the action against the dealer causing or contributing to the intoxication without joining her husband as a party plaintiff.⁵

Sec. 1061. Pleadings.

The following points of pleading are deducible from the decisions with reference to the declaration or complaint in a suit under the "Civil Damage Statute:" (a) The declaration or complaint must state that the injury complained of was in consequence of the intoxication.⁶ (b) The declaration or complaint must state that the intoxication resulted in whole or in part from intoxicating liquors, sold or given by the defendant to the person becoming thereby intoxicated, and that he drank the same.⁷ Thus it was held where the complaint charged the defendant that "he sold, bartered, or gave, or permitted to be sold, bartered

³ Laws of 1873 (Nebraska), § 577, p. 853.

⁴ *Roose v. Perkins*, 9 Neb. 304; 2 N. W. 715; 31 Am. Rep. 409; *Jones v. Bates*, 26 Neb. 693; 42 N. W. 751; 4 L. R. A. 495

⁵ *Mitchell v. Ratts*, 57 Ind. 259.

⁶ In the case of *Schwarm v. Osborn*, 59 Ind. 245, the court said: "We do not think the complaint is sufficient. The allegation is, that while in a state of intoxication, so that he was incapable of knowing what he was about, or taking care of himself, he fell into an open cellar in the city of Lafayette, etc. This is not equivalent

to an averment that in consequence of the intoxication, he fell, etc., as the statute requires."

⁷ In the case of *Ford v. Ames*, 36 Hun 571, the court said: "The demurrer admits that by reason of the intoxication of Amos Ford, caused as stated in the complaint, the plaintiff has been injured in her property and means of support, that said intoxication was caused in whole or in part by intoxicating liquors sold or given away by the defendant. This admits all the facts which the statute says give a right of action."

or given to the said Daniel O., in his said saloon, a quantity of intoxicating liquor, which the said Daniel O. then and there, in and upon said premises, drank;" that the averment as to sales being in the alternative, it was no better than if it had been simply alleged that the defendant permitted the liquor to be sold, bartered or given to Daniel O. in the defendant's saloon, and such allegation would be fatally defective.⁸ In Nebraska, however, due to the peculiar wording of the statute, it is not necessary to allege that the injury resulted from or was in consequence of the intoxication, it being sufficient to allege the intoxication and negligence of the person to whom the defendant sold the intoxicating liquor and the injury to plaintiff.^{8*} (c) It is not necessary, however, to allege the particular kind of liquor sold, bartered or given away, the quantity sold or the price paid.⁹ (d) Nor is it necessary to allege, when a sale or gift to an intoxicated person is counted on, that the defendant knew that the person to whom he sold or gave the intoxicating liquor was intoxicated at the time of such sale or gift, for the reason that this fact will be presumed from the very nature of the case.¹⁰ (e) But in an action counting on the illegal sales of intoxicating liquors to an habitual drunkard

⁸ *Ditton v. Morgan*, 56 Ind. 60.

^{8*} *Nowotny v. Blair*, 32 Neb. 175; 49 N. W. 357.

⁹ *Walser v. Kerrigan*, 56 Ind. 301; *Edwards v. Brown*, 67 Mo. 377. It is usually sufficient to allege it was intoxicating, and adding after that allegation that it was whisky, does not confine the proof to whisky. *Flower v. Witkovsky*, 69 Mich. 371; 37 N. W. 304.

¹⁰ In *Fletcher v. Fowler*, 83 Mich. 52; 46 N. W. 1023; 10 I. R. A. 80, the court said: "In this statutory action, counting upon a sale to an intoxicated person, it is not necessary to allege that the

saloon keeper knew he was intoxicated. That will be presumed from the very nature of the case." See also *Wright v. Treat*, 83 Mich. 110; 47 N. W. 243; *Berkemeir v. State* (Ind.), 88 N. E. 634; *Greener v. Nilehaus* (Ind.), 89 N. E. 377.

An allegation that defendant sold liquor to plaintiff's husband while he was in an intoxicated condition is not open to the objection of averring the intoxication by way of recital, "while" having the meaning "at the same time." *Greener v. Nilehaus* (Ind.), 89 N. E. 377.

to the injury of plaintiff, it is usually necessary for the declaration or complaint to allege that the defendant knew that the person to whom he sold was an habitual drunkard.¹¹

(f) In a suit under the statute brought by a wife against a dealer for causing her husband's intoxication, the declaration or complaint need only allege generally that the plaintiff was injured in her means of support in consequence of her husband's intoxication, but thereunder plaintiff can prove only the extent of the injury to her means of support sustained as the necessary consequence of her husband's intoxication, as that resulting from his inability to labor while intoxicated; but when plaintiff wishes to prove that she has suffered damages in her means of support, the natural, but not the necessary, result of her husband's intoxication, she must allege such damages in her complaint or declaration.¹²

(g) The complaint or declaration need not allege that the plaintiff was free from fault contributing to the injury.¹³

(h) The declaration or complaint need not refer to the law authorizing plaintiff to sue, for the reason that the statute is a public act of which the courts take judicial notice.¹⁴

(i) In an action brought by the administrator of a person who met his death by reason of his intoxication, it is necessary

¹¹ *Market v. Hoffner*, 5 Ohio Dec. 335. This, however, usually depends upon the exact wording of the statute. It has been held not necessary to aver knowledge. *Berkemeir v. State* (Ind.), 88 N. E. 634.

¹² *Pegram v. Stortz*, 31 W. Va. 220; 6 S. E. 485.

¹³ In the case of *Beem v. Chestnut*, 120 Ind. 290; 22 N. E. 303, the court said: "This was not an action based upon the mere negligence or non-feasance of the defendant, in failing to do that which the law required of him, or made it his duty to do, but upon an actual aggressive wrong, constitut-

ing the violation of a positive law, in knowingly selling intoxicating liquors to the plaintiff's husband while he was in a state of intoxication. Where one merely neglects a duty which the law imposes upon him, his act may be one of mere neglect or non-feasance, but where, in violation of a positive statute, he does an act to the injury of a third person, he thereby invades the rights of the other, and his act is one of actual aggressive wrong. The rule applicable in cases of assault, or assault and battery, govern in such cases."

¹⁴ *Lucas v. Johnson* (Texas), 64 S. W. 823.

for the complaint or declaration to allege that the intoxicating liquors were furnished decedent at a time when he was incapable of consenting, and an allegation that the decedent was furnished liquors "at times when he was totally incapable of transacting ordinary business, and at times when he was so dazed with liquor that he had no self-control or judgment, and when he was intoxicated" is not sufficient.¹⁵ This rule applies, of course, only in those cases where a recovery is sought by the intoxicated person himself or his personal representative. (j) Where plaintiff counts upon a number of sales or gifts of intoxicating liquors for recovery, an allegation that such sales and gifts were made during the spring and summer of a given year is sufficient to withstand a motion to make more specific.¹⁶ (k) In an action by a wife to recover damages for furnishing her husband with intoxicating liquors, it is proper to allege the cause of action as a continuing one.¹⁷ (l) Where the action is based upon the illegal sales of intoxicating liquors after written notice has been served upon the dealer not to sell, the complaint or declaration need not set out the notice or the return thereon. An averment that defendants were duly and lawfully served with a written notice not to sell is sufficient.¹⁸ (m) Where the allegations in a complaint or declaration are that the intoxicating liquors sold

¹⁵ Bissell v. Starzinger, 112 Iowa 266; 83 N. W. 1065; see also McCue v. Klein, 60 Tex. 168. But here the language of the statute may vary the rule. Palmer v. Schurz (S. D.), 117 S. W. 150.

¹⁶ Carrier v. Bernstein, 104 Iowa, 592; 73 N. W. 1076.

¹⁷ Wood v. Lentz, 116 Mich. 275; 74 N. W. 462; Sackett v. Rudder, 152 Mass. 397; 25 N. E. 736; 9 L. R. A. 391.

¹⁸ In the case of Riden v. Gremm, 97 Tenn. 220; 36 S. W. 1097; 35 L. R. A. 587, the court said: "It is insisted that the plaintiff's declaration does not

sufficiently allege a compliance with the requirement of the statute, because it does not set out the notice and sheriff's return of the same to the county court, as the act prescribes. The declaration alleges that defendants were duly and lawfully served with a written notice not to sell to plaintiff's husband. This is sufficient. The wording of the notice, the manner in which the legal service was made, and what return was made and indorsed, are matters to be shown in proof so far as they are material."

to the husband of plaintiff were in sufficient quantities to produce intoxication, that plaintiff's husband drank them, thereby became intoxicated, and that while in such drunken state the defendant continued to furnish him intoxicating liquors, an allegation thereafter made that by reason of the use thereof said plaintiff's husband "has become an habitual drunkard" is not irrelevant.¹⁹ (n) In an action for partial loss of support, the term "in a great measure," qualifying the allegations of the loss of labor and support by the intoxicated person who was rendered so by the liquors furnished by the defendant, is sufficiently definite as to the amount of loss.²⁰ (o) Under a statute which provides that a judgment rendered shall be a lien on the premises whereon the intoxicating liquors were illegally sold which caused the injury, if the owner of the premises had knowledge of the sale, the complaint or declaration need not allege that such sale was made with the consent of such owner.²¹ An allegation of the use of the building for the selling of intoxicating liquors in violation of law, with the knowledge of the owner, is sufficient.²² (p) In an action in which it is not sought to establish a lien on the premises whereon the intoxicating liquors were sold which caused the injury, a description of the particular place of sale in the complaint or declaration is surplusage and does not prevent proof of sales at other places.²³ (q) In those States where exemplary damages are recoverable it is not necessary to make a claim for such

¹⁹ *Roberts v. Taylor*, 19 Neb. 184; 27 N. W. 87.

²⁰ In the case of *Roberts v. Taylor*, 19 Neb. 184; 27 N. W. 87, the court said: "The sale of liquor and intoxication of the husband are the cause of the injury and the loss of the means of support the consequence. If the loss is not entire, it may be stated in such words as to show that fact Where it is alleged that the intoxication is continuous, it would be

impossible to state definitely the number of hours the party was partially sober so as to be able to perform some work. A general allegation therefore is sufficient."

²¹ *Judge v. Flourney*, 74 Iowa 164; 37 N. W. 130; *Judge v. O'Conner*, 74 Iowa 166; 37 N. W. 131.

²² *McGee v. McCann*, 69 Me. 79.

²³ *Gustafson v. Wind*, 62 Iowa 281; 17 N. W. 523.

damages in the declaration or complaint, but the jury in the proper case can allow such damages without such a claim.²⁴

²⁴ *Gustafson v. Wind*, 62 Iowa 281; 18 N. W. 523.

Where the action was brought by the wife in her name, and it should have been brought in the name of the State on her relation, it was held not to be error to permit the plaintiff to amend her complaint at the close of her evidence in chief, by inserting before her name the words "State of Indiana, on the relation of." *Brandt v. State*, 17 Ind. App. 311; 46 N. E. 682.

In an action to recover damages because of the death of plaintiff's husband, an allegation that by reason of the intoxicated condition of certain person, including her husband, he was thrown on the floor and was mortally wounded, is sufficiently definite, in the absence of an application to make more definite. *Smiser v. State*, 17 Ind. App. 519; 47 N. E. 229.

Facts must be alleged sufficient to show that the sale or gift is one forbidden by statute, or an illegal sale. But a complaint for wrongful sales to plaintiff's husband, whereby she lost his support, need not aver the quantity sold, on the theory that a sale over a certain amount is not made a criminal offense. *Berkemeir v. State* (Ind.), 88 N. E. 634.

The complaint must show a casual connection between the intoxication and the injury. But one which charges a sale to an intoxicated man, thereby increasing his intoxication, by reason of which he was rendered insane and incapable of taking care of himself,

and while in that condition, by reason of such sale, he attempted to pass up a flight of stairs and was injured, does sufficiently show such casual connection. *Berkemeir v. State* (Ind.), 88 N. E. 377.

Under a statute allowing a recovery of damages from one person causing another's injury, a declaration averring that the defendant unlawfully sold liquor to one who became intoxicated and killed plaintiff's wife who was dependent on plaintiff for support, whereby he lost her society, etc., states a cause of action. *Forfeter v. Moore*, 67 N. H. 460; 36 Atl. 369.

Where the action is brought upon the defendant's bond, it must be averred and proven that the bond had been approved by the proper officer or board and filed. *Hillman v. Gallagher* (Tex.), 120 S. W. 505. But an allegation that the bond was duly delivered to the county treasurer, at the time having upon it the endorsement of the approval of the proper village board, and was by the treasurer duly filed in his office, is a sufficient allegation of approval and filing. *Anthony v. Krey*, 70 Mich. 629; 38 N. W. 603.

It has also been held that an allegation of approval and filing is not necessary where the endorsement on the bond, signed by the county auditor and forming part of the complaint, showed that the bond had been approved by the county board. *Palmer v. Schurz* (S. D.), 117 N. W. 150.

In Canada it has been held suffi-

Sec. 1062. Issues—Proof—Variance.

It is a general rule that the proof must substantially correspond with the allegations of the declaration or complaint. Thus, where the complaint or declaration counts for recovery because of injury to plaintiff's means of support, evidence as to injury to plaintiff's person is not admissible.²⁵ But where the declaration or complaint alleges that intoxication was caused in whole by the defendant, it is no variance where the evidence established that the intoxication was caused in part by the defendant, because torts are divisible, and in them the plaintiff may prove a part of his charge and recover if there be enough proved to support the tort.²⁶ And where the com-

plaintiff averred that the defendant was a hotel keeper, without averring he had a license to sell. *Cayionette v. Girard*, 1 Mon. S. C. 182; 28 Low. Can. Jr. 177.

Where the statute gave the right to any citizen of the county to bring an action for a forfeiture to the school fund, against any person selling liquors to an habitual drunkard, a failure to aver the citizenship cannot be objected to for the first time in the Supreme Court. *Church v. Higham*, 49 Iowa 482.

Where a statute gave a right of action to a parent against a saloon keeper for permitting the former's son to enter his place of business and remain therein, a complaint alleging that the defendant was engaged in the business of selling intoxicating liquors, had obtained a license and had given a liquor dealer's bond, and that he permitted plaintiff's minor son to enter and remain in his "place of business" is sufficient; and there was not a fatal variance on proof that the defendant had two places of business in the town, in one of

which he did not sell liquors. So an allegation that in April or May, 1906, and particularly on or about May 10, 1906, he permitted the minor to enter and remain in his saloon two different times, is sufficient. Each entry and remaining is a separate cause of action. *Markus v. Thompson* (Tex. Civ. App.), 111 S. W. 1074.

²⁵ In the case of *Hackett v. Smelsley*, 77 Ill. 109, the court said: "As the declaration in this case counted only upon an injury in means of support, the evidence should have been confined to such injury, and it was error to admit this evidence of personal injury and ill treatment, and it was such evidence as was highly calculated to operate injuriously to the defendant."

²⁶ In the case of *Roth v. Eppy*, 80 Ill. 283, the court said: "The averment in the declaration is that the defendant sold and gave to Eppy intoxicating liquors, and thereby caused him, the said Geo. Eppy, to become, and he was during that time (before named), habitually intoxicated. It is

plaint or declaration alleges immaterial matter, it is not necessary to prove such immaterial allegations to recover upon the complaint or declaration. Thus, "where a declaration in a suit by a widow to recover damages for the death of her husband by the sale of intoxicating liquor to him, alleged that he was killed by a train of cars in consequence of his intoxication, without any fault on the part of the railway company, it was held that in the absence of proof of fault on the part of the company it would be presumed there was none, and that the allegation not being material, was not necessary to be proved."²⁷ Again, it has been held that there was no variance where the complaint or declaration alleged injuries resulting from sales of intoxicating liquors made from February 1st to September 1st, 1885, and the proof showed that no sales were made earlier than the middle of March of that year.²⁸ In those cases where the proof is not justified by the allegations in the declaration or complaint, it is sometimes permissible to amend the declaration or complaint to correspond with the proof where no new cause of action is introduced. Thus, in an action for damages for injuries to means of support by reason of the intoxication of plaintiff's husband, she was allowed to amend her petition to the extent of showing that her husband had committed an assault upon her while in such state of intoxication, causing injury to her

claimed this is an averment that the intoxication was caused in whole by the defendant, and that such must be proof; that it is not sufficient that the intoxication was caused in part by the defendant, and that the most which the proof shows is, that defendant caused the intoxication in part. The statute gives the right of action where the defendant shall have caused the intoxication, in whole or in part. Contracts are entire, and must be proved substantially as alleged, but torts

are divisible, and in them the plaintiff may prove a part of his charge and recover if there be enough proved to support the tort. This objection we regard as without force." See also *Brannon v. Silvernail*, 81 Ill. 434; *Edwards v. Woodbury*, 156 Mass. 21; 30 N. E. 175.

²⁷ *Schrader v. Crawford*, 94 Ill. 357; 34 Am. Rep. 236; see also *Gustafson v. Wind*, 62 Iowa 281; 17 N. W. 523.

²⁸ *Arnold v. Barkalow*, 73 Iowa 183; 34 N. W. 807.

person.²⁹ Again, in an action by a wife on a liquor dealer's bond for injury caused by sale of liquors to her husband, it was held not error to allow plaintiff, at the close of her evidence in chief, to amend her complaint by inserting in the first line thereof, and in the title before her name, the words "State of Indiana on the relation of," so as to make the action one in the name of the State on the relation of the injured party, nor was it error to refuse a continuance to the adverse party by reason of such amendment, for, as said by the Indiana court: "The amendment did not affect the issue on trial. The nature of the action was not changed. * * * The amendment was in furtherance of justice and was within the letter as well as the spirit of the statute."³⁰ Again, where the declaration or complaint counted upon sales of intoxicating liquors to a person in the habit of becoming intoxicated and failed to allege knowledge on the part of the defendant of such fact, where the question was raised for the

²⁹ In the case of *Chase v. Ken-
inston*, 76 Me. 209, the court said:
"It is insisted by the counsel for
the defendants that this amend-
ment was not legally allowable,
because it introduced a new cause
of action and new elements of
damage. We think it does not
introduce a new cause of action,
and that it was legally allowable
under the statute upon which the
action is based, the cause of action
against the defendants is, that
they caused or contributed to the
intoxication of the plaintiff's hus-
band, by selling him the intoxi-
cating liquor, by reason of which
the plaintiff was damaged. She
set out in her declaration the dam-
age to her means of support, and
that she 'was thereby otherwise
injured.' This last allegation is
too general to authorize proof of
her damages by the assault. The
amendment is limited to the same

specific tort of the defendants, set
out in the original count, and
authorized no proof of an assault
by her husband, except for the
same intoxication, and at the same
time alleged. It introduced no
new cause of action, but was mere-
ly a more specific allegation of
the damages resulting from the
cause alleged, which were not suf-
ficiently specified. * * *

"There are strong reasons for the
allowance of an amendment in
cases like this. This plaintiff can
maintain but one action for the
same tort, unless it be a contin-
uing tort, and if the court has no
power to allow the amendment,
the plaintiff must become non-suit
and commence anew, or prosecute
the action to judgment, losing a
part of the damages sustained."

³⁰ *Brandt v. State*, 17 Ind. App.
311; 46 N. E. 682.

first time at the trial, it was held proper for the trial court to permit the necessary amendment.³¹ It has been held that there is no variance in the proof, where the declaration or complaint charged a conspiracy between two liquor dealers to sell plaintiff's husband intoxicating liquors, which they did, causing injury to plaintiff, where plaintiff dismissed as to one and relied upon the sales of liquor made by the other to recover, for, after the discontinuance as to one defendant, the action became as if originally brought against such one, and the complaint was sustained by evidence of damage sustained by the acts of that one.³² Where, in an action under the civil damage statute, the defendant desires to set up new matter constituting a defense, it must be pleaded in an answer and cannot be introduced under a general denial. Thus, where it is sought to be shown that plaintiff consented to the sale of intoxicating liquor to her husband, it must be specially pleaded.³³

³¹ In *Fletcher v. Forler*, 83 Mich. 52; 46 N. W. 1083, the court said: "The only objection, in substance, that can be raised to it (the complaint) is the failure to allege that the defendant, William S. Forler, had knowledge that plaintiff's husband was in the habit of getting intoxicated, so as to make the sale clearly unlawful, within the contention of defendant's counsel and the ruling of the circuit judge. The plaintiff having asked leave to

amend, the court should have allowed the amendment. A special demurrer would have raised the question and secured its early determination. Where such questions are raised for the first time upon the trial, the furtherance of justice requires that trial courts shall allow amendments."

³² *Morenns v. Crawford*, 51 Hun 89; 5 N. Y. Supp. 453.

³³ *Grau v. Houston*, 45 Neb. 813; 64 N. W. 245.

ARTICLE VII.—EVIDENCE.

SECTION.

1062a. Presumption and burden of proof.

1062b. Admissibility in general.

1062c. Sale or participation therein by defendant.

1063. Nature and extent of injury.

1064. Character and habits of plaintiff.

SECTION.

1065. Character and habits of intoxicated person — Mortality tables.

1066. Pecuniary conditions of persons or parties.

1067. Weight and sufficiency of evidence.

1068. Nature and properties of liquors.

Sec. 1062a. Presumptions and burden of proof.

In actions under the civil damage statute the burden of proof is upon the plaintiff to prove a sale or gift of intoxicating liquor, that such intoxicating liquor caused or contributed to the intoxication complained of, and that plaintiff was injured in person, property or means of support thereby. The burden of proof never shifts upon these propositions.³⁴

³⁴ In the case of *Macleod v. Gerger*, 53 Iowa 615; 6 N. W. 21, the court said: "Error is assigned upon certain of the instructions given, and it is urged in argument that the last part of the twelfth instruction is erroneous. It is in these words: 'You will determine this case upon the weight of the evidence, of which you are the sole judges, and every disputed fact of plaintiff's case must be established by a fair preponderance of testimony.' It is urged that this instruction is erroneous, because there was evidence showing that plaintiff's husband, in the day and evening before he was frozen, purchased and drank intoxicating liquors at defendant's saloon, and was intoxicated; and that upon such show-

ing being made the burden of proof was shifted, and it was incumbent on the defendant to show that this liquor did not cause or contribute to the drunkenness.

"Plaintiff cites *Cramer v. City of Burlington*, 42 Iowa 315. A very casual examination of that case will show that it is not in point. The intoxication of plaintiff was merely a collateral question in that case. In the case at bar the very question at issue was whether the defendant sold intoxicating liquors to the plaintiff's husband, and whether such liquors produced or contributed to produce the intoxication complained of. It was necessary for the plaintiff to establish both of the foregoing propositions by a preponderance of evidence or fail in

But in Illinois it has been held that where the evidence established the first two above noted propositions, and there was no proof as to injury, the jury might infer an injury to plaintiff, at least to the extent of assessing nominal damages.³⁵ In New York, however, it is held that where the gravamen of the action is injury to means of support, the plaintiff, in order to support the action must prove by a preponderance of the evidence that by or in consequence of the intoxication or the acts of the intoxicated person, his or her means of maintenance have been cut off or curtailed.³⁶ It has been

the action, and we can conceive of no state of the case which would shift the burden of proof upon defendant." See also *Murphy v. Curran*, 24 Ill. App. 475.

³⁵ In the case of *Flynn v. Forgarty*, 106 Ill. 263, the court said: "On the trial of the cause, the court, at the instance of the plaintiff, gave to the jury, among others, the following instruction, to the giving of which the defendants at the time excepted: 'The court instructs the jury, for plaintiff, that if they believe, from the evidence, that John Forgarty, the husband of the plaintiff, came to his death on account of his intoxication, and that said intoxication was caused wholly or in part by intoxicating liquor sold or given to the said John Forgarty by the defendants, then the verdict of the jury should be for the plaintiff, with such damages as in the judgment of the jury, from the evidence, the plaintiff is entitled to recover, not exceeding in the aggregate the sum of \$10,000.' It is objected that this instruction wholly dispenses with all proof showing the plaintiff had been injured in her means of support by

reason of the death of her husband, and that it, in effect, told the jury they might infer such injury from the mere fact of Forgarty's death, and such, it must be conceded, is the purport of the instruction. Nevertheless, we think there was no substantial error in giving it. In the absence of any proof to the contrary, we think the jury were warranted in inferring an injury to the plaintiff's means of support by showing Forgarty's death, and that it was occasioned by intoxication produced by liquors sold or given to him by defendants. This was sufficient to shift the burden of proof, and entitled plaintiff to at least nominal damages."

³⁶ In the case of *Volans v. Owen*, 74 N. Y. 526; 30 Am. Rep. 337, the court said: "But we think the exception was well taken, for the reason that there was no evidence that the plaintiff was injured in his means of 'support,' by or in consequence of the intoxication of his son, within the meaning of the statute. The words are new in legal enactments, and have no settled legal meaning. We shall not undertake

held that the fact of drinking liquors in defendant's saloon creates no presumption that the liquors so drunk were intoxicating.³⁷ And in those States where the right of recovery depends upon the relationship of the plaintiff to the intoxicated party, no presumption arises as to such relationship, but plaintiff must prove such fact. Thus, in Vermont, where the statute provides a right of recovery for those who are in any manner dependent upon the person injured in consequence of his intoxication, it has been held that a plaintiff claiming to be a widow of the intoxicated person must prove

to define the cases to which they apply. Their scope can best be determined as the cases arise. But we are of the opinion that where injury to 'means of support' is the gravamen of the action, the plaintiff, in order to maintain the action, must show that, by or in consequence of the intoxication or the acts of the intoxicated person his accustomed means of maintenance have been cut off or curtailed, or that he has been reduced to a state of dependence by being deprived of the support which he had before enjoyed, and that, in this case, the plaintiff cannot recover for loss of service or the expenses of his son's illness, under the words 'means of support' without proof that the services were necessary to his support, or that the charge brought upon him by his son's illness diminished his means, so as to render them inadequate therefor."

³⁷ In the case of Kuhlman (Neb.), 98 N. W. 419, the court said: "Complaint is also made because by instruction numbered 6 the court told the jury: 'If from the evidence you believe that James A. Cole, the husband of the

plaintiff, drank liquors in the saloons of the defendants, you may presume in the absence of evidence to the contrary, that such liquors were intoxicating liquors.' It is claimed that this instruction was approved in *Curran v. Percival*, 21 Neb. 434; 32 N. W. 213; but we think there is quite a distinction between the instructions approved in that case and in the one given here. A much more similar instruction was disapproved and led to a reversal in *Dolan v. McLaughlin*, 48 Neb. 844; 67 N. W. 943. In the last named case, however, there was evidence tending to show the liquor drank was not intoxicating. It was for the jury to say what conclusions should be drawn from the facts in evidence as to the character of the liquors, and it was for them to judge whether or not the proof justified the assuming that all the liquors sold in that place were intoxicating. The burden of proof was on the plaintiff to show a sale of intoxicating liquors. She could do this by sufficient circumstantial evidence, but whether the circumstances were sufficient was for the jury."

that she was lawfully married, and in case of a child, proof must be adduced showing that it is legitimate.³⁸ And in those States where the law makes liable the landlord of premises upon which intoxicating liquors are sold for the injurious consequences of such sales where he has knowledge thereof and consents thereto, neither the permission nor the knowledge are to be presumed or inferred but must be established by a preponderance of the evidence.³⁹ Nor can it be presumed that defendant had notice of the intoxicated person's previous habits of intoxication, so as to make him liable for exemplary damages, but such notice must be affirmatively proved.⁴⁰ In Texas, however, it is held that the burden of proof is upon the defendant to show that he did not know that the intoxicated person was an habitual drunkard or in the habit of becoming intoxicated.⁴¹ And in an action where the complaint or declaration is grounded upon illegal sales of intoxicating liquors, and the defendant, in answer, pleads compliance with the law, the burden of proving compliance with the law is upon such defendant.⁴² Thus, where the

³⁸ *Good v. Towns*, 56 Vt. 410; 48 Am. Rep. 799. But is there not a presumption, on proof that the child of the intoxicated person was legitimate?

³⁹ In the case of *Mead v. Stratton*, 8 Hun 148, the court said: "The permission to occupy, with knowledge that intoxicating liquors are to be sold therein constitutes the basis of the liability imposed by the act. Neither the permission nor the knowledge are to be presumed or inferred, but should be established by clear and satisfactory proof."

⁴⁰ *Larzelere v. Kirchgessner*, 73 Mich. 276; 41 N. W. 488.

⁴¹ In the case of *Haney v. Mann* (Tex.), 81 S. W. 66, the court said: "Appellant asked a special charge, which was refused by the court, to the effect that the

burden of proof was on the defendants to show that defendant Mann sold said liquor to said J. W. Haney in good faith, believing that said Haney was not an habitual drunkard, and that he had good grounds for such belief. The evidence showing that Haney was an habitual drunkard, and that sales of intoxicating liquors had been made to said J. W. Haney by the said Mann, the burden of proof was on Mann to show that he sold in good faith, believing said Haney was not an habitual drunkard, and that he had good grounds for so believing, and it was error in the court to refuse said requested instruction."

⁴² In the case of *Jaroszewski v. Allen*, 117 Iowa 632; 91 N. W. 942, the court said: "The burden was upon the defendants to

statute exempts from the term "intoxicating liquors" wine manufactured from grapes or fruit grown in the State, a defendant in an action under the civil damage statute, to avail himself of this proviso, must allege and prove that the intoxicating liquors sold the intoxicated person were wines manufactured from fruits grown in the State.⁴³

Sec. 1062b. Admissibility—In general.

The general rules of evidence, of course, apply to trials under the civil damage statute. It is not, therefore, necessary to recapitulate those rules but rather to state concrete examples of the application of them in trials under the civil damage statutes. It has been held that the statements of a person injured by an intoxicated person as to how he received the injury is not competent although the injured party, prior to the trial, dies from the effects of such injuries.⁴⁴ Nor are the statements made by the husband admissible against the wife who, as plaintiff, has brought suit against a dealer for selling her husband liquor, where the wife did not call the husband as a witness.⁴⁵ Nor is it admissible evidence in an

prove, if they so claimed, that the sale of liquor to plaintiff's son was under the protection of the mulct law. In the absence of such showing, the sales were presumptively unlawful, and it was for defendants to plead and prove the facts which would serve to show their exemption from liability." See also *League v. Ehmke*, 120 Iowa, 464; 94 N. W. 938; *McQuade v. Hatch*, 65 Vt. 482; 27 A. 136.

⁴³ *Worley v. Spurgeon*, 38 Iowa 465.

⁴⁴ *Brockway v. Patterson*, 72 Mich. 122; 40 N. W. 192; 1 L. R. A. 708.

⁴⁵ In the case of *Judge v. Jordan*, 81 Iowa, 519; 46 N. W. 1077, the court said: "Appellants, having shown that plaintiff's husband

was examined as a witness upon the trial of the case against Brook, offered to prove what he testified to as to having got liquor on the day of the fire at Jordan's saloon. Appellee objected as immaterial, irrelevant and incompetent, and the objection was sustained. Appellants claimed this testimony to be admissible on the grounds that the husband was in some sense acting as agent of his wife. They fail to point out, and we to observe, wherein the relation of principal and agent existed in the transaction under consideration. He was not acting for her in procuring the liquors and becoming intoxicated. If it be true, as stated, that she called him as a witness in the former trial, that did

action by a father for the sales of intoxicating liquors to a minor son for the defendant to show that the minor while purchasing the liquor said that his father consented to the sale.⁴⁶ Again, where plaintiff's husband while intoxicated drove into a rut in a highway and was thrown to the ground, thereby suffering injuries from which he died, evidence as to the experience of others at the place where the accident occurred is not admissible.⁴⁷ And where plaintiff's husband, while drunk, lost his way and drove over a bluff in the nighttime, evidence that on a former occasion plaintiff's husband, when not intoxicated, lost his way on a bright moonlight night was held not admissible.⁴⁸ In those States where the liability is not contingent upon the illegality of the sale or gift of intoxicating liquor, the license of the defendant is not admissible in evidence in defense.⁴⁹ And where defendant in an action under the statute offered to prove that the commissioners on granting him the license told him that he could sell whisky under it, as tending to show his good faith in making the sales complained of, it was held that in the absence of any claim of exemplary damages on the part of the plaintiff, such evidence was not admissible.⁵⁰ But as evidence tending to show that defendant in a suit under the statute is a dealer in intoxicating liquors

not obligate her to call him in this, nor commit her to the statements in his former testimony. It is a matter of common observation that husbands are not always favorable to the prosecution of cases like this by their wives. The testimony offered was incompetent, and therefore properly excluded." *Berkheimer v. State* (Ind.), 89 N. E. 377.

⁴⁶ *Roach v. Springer* (Tex. Civ. App.), 75 S. W. 933.

⁴⁷ In the case of *Wall v. State, ex rel Kendall*, 10 Ind. App. 530; 38 N. E. 190, the court said: "The 18th, 19th, 20th, 21st, 22d,

23d and 24th reasons for a new trial go to the rulings of the court in not permitting the appellants to prove the experiences of others at the point in the highway where Kendall received his injury. *Railway Co. v. Wyant*, 114 Ind. 525; 17 N. E. 118. The opinion just cited, written by Judge Mitchell, is decisive of this question against appellants."

⁴⁸ *Kerkow v. Bauer*, 15 Neb. 150; 18 N. W. 27.

⁴⁹ *Roth v. Eppy*, 80 Ill. 283.

⁵⁰ *McCarthy v. Wells*, 51 Hun 171; 4 N. Y. Supp. 672.

and subject to the conditions and restrictions of the license law, the village record, or minute book of the trustees, showing the proceedings of the board in relation to granting liquor licenses, and the approval of the bonds of liquor sellers, is admissible in evidence.⁵¹ The question as to whether the intoxicated person drank at other places than that of the defendant often arises. It has been held that such evidence is inadmissible on the ground that though other dealers may have contributed to the intoxication, liability cannot be apportioned, and each is liable for the whole injury.⁵² Thus, it was held in an action under the statute where a minor, without objection, testified that he had procured all of the liquor upon which he became intoxicated of defendant, that such defendant could not impeach him by showing that he had in fact procured liquor at other places.⁵³ It is clear that where a mother for the benefit of her minor son brings an action under the statute against a dealer who caused or contributed to her husband's intoxication resulting in his death, evidence of the recovery of a former judgment by the

⁵¹ *Scott v. Chope*, 33 Neb. 41; 49 N. W. 940; see also *Smith v. Anderson*, 82 Mich. 492; 45 N. W. 729.

⁵² *Theisen v. Johns*, 72 Mich. 285; 40 N. W. 727.

⁵³ In the case of *Theisen v. Johns*, 72 Mich. 285; 40 N. W. 727, the court said: "Testimony was given on behalf of the plaintiff tending to prove the facts alleged in the declaration. The defendant controverted these facts, and the whole case was submitted to the jury under a very fair charge from the court. The minors were examined as witnesses by plaintiff, and on direct examination by plaintiff's counsel, testified that they had not drunk at any other place than that of defendant. Testimony was offered by de-

fendant and received by the court under objection of plaintiff's counsel, tending to show that they had drunk at other places. This testimony was incompetent, and should have been excluded. It was not competent for plaintiff to prove that these minors had not drunk at other places. That was wholly immaterial, and, had defendant made objection to its introduction, it should have been excluded.

"We do not think that damages under this statute can be lessened or enhanced from the fact that a minor may have drunk at other places, nor can the liability be apportioned merely because the injury was due in part to the acts of others than the defendant."

wife for injury to her means of support is not admissible in evidence, unless exemplary damages are sought.⁵⁴ It is competent for the plaintiff in an action under the statute to prove that the intoxicated person was arrested and convicted on the charge of drunkenness caused by the sales or gifts of intoxicating liquors made by the defendant, as well as the fact of the publication in a newspaper of such conviction, not, indeed, to prove the fact of drunkenness but to prove damages to plaintiff, even though the prosecution for drunkenness was commenced subsequent to the civil suit.⁵⁵ It is competent evidence also to show that in an action by the wife for selling intoxicating liquors to her husband after notice not to do so had been given defendant, the plaintiff sought through third persons to obtain intoxicating liquor for the husband from the defendant and from others.⁵⁶ It is not admissible evidence to show that other suits have been brought against other saloon keepers by the same plaintiff, even for injuries resulting from the same intoxication, for the plaintiff has the right to sue all who participated in the intoxication.⁵⁷ It is not competent to prove that the defendant, in connection with his saloon, ran some illegal business, such as a gambling house or bawdy house, and it is reversible error if the trial

⁵⁴ *Secor v. Taylor*, 41 Hun 421.

⁵⁵ *Lucker v. Liske*, 111 Mich. 683; 70 N. W. 421.

This is true of a conviction after plaintiff has commenced her action.

⁵⁶ In the case of *Tipton v. Thompson*, 21 Tex. Civ. App. 143; 50 S. W. 641, the court said: "The first three assignments of error complain of the ruling of the court in admitting the testimony of certain witnesses which had a tendency to show that the plaintiff, Mrs. Tipton, sought, through them, to procure whisky for her husband from the defendant's saloon, and that of others. From the manner in which the

question is presented, we apprehend that the trial court permitted this evidence to be introduced for the purpose of showing that Mrs. Tipton was not aggrieved by the sale of liquor to her husband. This effort upon her part to have liquor sold to her husband, it seems, was made after the defendant had been notified not to sell whisky to him. The testimony was admissible for the purpose of showing that she consented to the sale, and, if it is true that she did consent after she gave notice not to sell, it might be considered in defeating her right to recover."

⁵⁷ *Tarkington v. Bennett* (Tex. Civ. App.), 51 S. W. 274.

court admits evidence of that fact.⁵⁸ It is competent in an action brought by the wife for damage to her means of support for causing her husband to become an habitual drunkard, to show sales of intoxicating liquors made by the defendant after notice, although the time for bringing an action for such sales has expired, on the ground that such facts are proper to be considered in determining the question of punitive or vindictive damages.⁵⁹ In an action against a dealer for selling intoxicating liquors to a husband which resulted in his death, evidence as to sales of intoxicating liquors made at other times to different persons in the same room, where it was alleged decedent drank, is competent, as tending to show that such room was a part of the saloon.⁶⁰ In an action under the statute for selling intoxicating liquors to a man who became so crazed and delirious that he killed his wife, evidence that the murderer had on former occasions drunk at the defendant's place and had had protracted sprees, to the knowledge of the defendant, was competent as bearing on the question of damages.⁶¹

⁵⁸ In the case of *Baker v. Summers*, 201 Ill. 52; 66 N. E. 302, reversing 103 Ill. App. 237, the court said: "The fact that Baker, who owned the building, knew that there was a gambling room run by Greenwood upstairs, neither tended to prove the alleged sale or intoxication, nor that such intoxication was the cause of Summer's death. It could have had no other purpose or effect than to raise a prejudice in the minds of the jury against the defendant concerning a separate and distinct matter, on the ground that one of them assented to the use of his property for the unlawful purpose. The ruling was wrong."

⁵⁹ *Siegle v. Rush*, 173 Ill. 559; 50 N. E. 1008, affirming 72 Ill. App. 485

⁶⁰ *Moreland v. Durocher*, 121 Mich. 398; 80 N. W. 284.

⁶¹ *Lawson v. Eggleston*, 52 N. Y. Supp. 181, affirmed in 164 N. Y. 600; 59 N. E. 1124. See also *Wilber v. Dwyer*, 69 Hun 507; 23 N. Y. Supp. 395; *Reed v. Terwilliger*, 116 N. Y. 530; 22 N. E. 1091.

Evidence that the drunkard attempted to procure liquors from the defendant through others and statements made through furtherance of such attempts out of his hearing are inadmissible. *McNelson v. Herb* (Mich.), 123 N. W. 17.

If it is charged the sales took place "on or about" certain dates, proof of sales at any time on or about such dates are admissible. *Munoz v. Brassel* (Tex. Civ. App.),

Sec. 1062c. Sale or participation therein by defendant.

In actions under the "civil damage act," it sometimes becomes a difficult matter to prove the sale of intoxicating

108 S. W. 417. See *Sackett v. Rudder*, 152 Mass. 1, 397; 25 N. E. 736; 9 L. R. A. 391; *Davis v. Borland* (Neb.), 119 N. W. 454; *Bryant v. Tydgewell*, 133 Mass. 86. Plaintiff's proof of sales is not confined to the dates alleged. *Birkman v. Fahrenthold* (Tex. Civ. App.), 114 S. W. 428.

In an action by the wife to recover damages for sales to her husband, the latter is a competent witness, although there are other competent witnesses to the same facts he can testify to. *Pettis County v. Debold* (Mo.), 117 S. W. 88; *Hemmens v. Bentley*, 32 Mich. 89.

Under an allegation of sales on divers days, and on times between the dates specified, more than one sale may be shown. *Bryant v. Tydgewell*, 133 Mass. 86.

The influence of the defendant threw around the drunkard or had over him may be shown. *Ford v. Cheever*, 105 Mich. 679; 63 N. W. 975.

The drunkard, where it is shown he visited several saloons, may be asked what proportion of the general sum he spent in the defendant's saloon. *Hemmens v. Bentley*, 32 Mich. 89.

But the amount of money spent generally in the defendant's saloon cannot be shown. *Friend v. Dunks*, 39 Mich. 753.

In an action by a mother to recover damages for sales to her son, it cannot be shown that her hus-

band also drank, that he rented a building for saloon purposes, and that he was a surety on a liquor dealer's bond, it not being shown she had any connection therewith. *Liebler v. Carrel*, 155 Mich. 196; 118 N. W. 975; 15 Det. Leg. N. 976.

Where the action is by a mother for sales to her son, she may show the amount he used to earn and what he had had on deposit in a bank; his failure to get employment, if traceable to his drinking habit, and that he had been seen in the street during the time it is claimed the defendant sold him liquor. *Weiser v. Welch*, 112 Mich. 134; 70 N. W. 438.

In a suit by the wife, she may show the value of the family homestead and the amount of encumbrance thereon at the time of her husband's death. *Kliment v. Corcoran*, 51 Neb. 152; 70 N. W. 910.

The fact that the act sought to be proven by the plaintiff may have been collusively brought about by her and her husband, will not bar its admission. *Lucker v. Liske*, 111 Mich. 683; 70 N. W. 421.

Where the charge is non-support of the wife, evidence that necessities were furnished the family by the county and by charitable institutions, and its sufferings, are admissible. *Allen v. Tinglehoff* (Neb.), 119 N. W. 495; and in a suit by a minor because of the

liquor or participation therein by the defendant, because of the fact that the witnesses to the transaction are generally friendly to the dealer. The sale of intoxicating liquor, therefore, in such actions, like any other fact, may be proved by circumstantial evidence.⁶² Thus, in an action under the

drunkenness of his father, that he did not have the necessary school books. *Strattman v. Moore*, 134 Ill. App. 275.

Where the habitual intoxication must have existed a year to render one selling to such a person liable, proof of habitual drunkenness of the person prior to the year for which damages are claimed, and its continuance to the time of the sales, may be shown, to establish notice to the seller of the drunkard's habits at the time of the sales. *Pennington v. Gillespie*, 63 W. Va. 541; 61 S. E. 416.

Evidence of the frequency of abusive conduct toward the wife is admissible upon the issue of her husband being an habitual drunkard. *Birkman v. Fahrenheit* (Tex. Civ. App.), 114 S. W. 428.

On a charge of sales "on or about" certain dates, the evidence of sales need not be confined to the dates specified. *Munoz v. Brassel* (Tex. Civ. App.), 108 S. W. 417. See *Sackett v. Rudder*, 152 Mass. 1; 25 N. E. 736; 9 L. R. A. 391.

⁶² In *McDougall v. Gracomini*, 13 Neb. 435; 14 N. W. 150, the court said: "Suppose it is shown that a place is a licensed saloon, and that persons go in there sober and come out under the influence of liquor. These facts raise a pre-

sumption that such persons obtained intoxicating liquor in the saloon. The business of a saloon keeper is to sell intoxicating drinks by the glass. If, therefore, the proof shows that he has sold or furnished liquor at his place of business, the presumption would seem to be that such liquor was such as his business required him to keep and furnish to his customers — intoxicating liquors. The fact of intoxicating liquors being furnished by a saloon keeper may be proved like any other fact. Suppose a murder was committed in a saloon and no one present to witness the deed, could the murderer not, therefore, be proved guilty because there was no direct evidence that he committed the crime? In such case, where the fact of murder was proved, all the facts and circumstances which tended to show that the person accused committed the crime would be competent evidence, and if this proof reached that degree of certainty required by the criminal law, would justify the conviction and execution of the accused, although no one had seen him commit the offense. If such testimony is sufficient to authorize a conviction for offenses where the punishment involves the life or liberty of the accused, and where the proof must establish the guilt beyond a reasonable doubt, the same

statute by a wife for injury to her means of support caused by the sale of intoxicants to her husband by defendant, where defendant, his bartender and the husband testified that the latter never obtained liquor from defendant, but it appeared that the husband frequently went into defendant's saloon sober and came out drunk, and that he was seen at the bar with glasses in front of him, the question whether he obtained liquor of the defendant was for the jury.⁶³ Again, in a suit under the statute, where it is shown that the deceased went into defendant's saloon sober and came out intoxicated, although there was no evidence of sales made by defendant, it was held that these facts raised a presumption that such deceased person obtained intoxicating liquor in such saloon and that although there was evidence produced by defendant showing that such deceased person did not obtain intoxicating liquors in his saloon, nevertheless it was a question for the jury.⁶⁴ Indeed, in some cases it has been held that the circumstantial evidence was so strong that although there was evidence produced on the part of the defendant denying any sale, and the jury so found, yet the court granted a new trial on the ground that the presumption of sale raised by the

kind of proof certainly is sufficient to establish the sale of intoxicating liquors, where the punishment is merely pecuniary compensation, and a degree of proof required merely a preponderance of the evidence."

See also the following cases: *Sullivan v. Radzuweit* (Neb.), 118 N. W. 571; *McManigal v. Seaton*, 23 Neb. 549; 37 N. W. 271; *Curran v. Percival*, 21 Neb. 434; 32 N. W. 213; *Hanewacker v. Ferman*, 47 Ill. App. 17.

⁶³ *Hanewacker v. Ferman*, 47 Ill. App. 17.

⁶⁴ In the case of *Curran v. Percival*, 21 Neb. 434; 32 N. W. 213, the court held the following instruction good: "If you shall find

from the evidence that the deceased went into the saloon of the defendant, and that the business of the defendant was to sell intoxicating drinks, and that deceased was sober when he went into the saloon, and that he came out of the saloon intoxicated, these facts raise a presumption that such person obtained intoxicating liquor in such saloon; but such presumption may be overcome by the proofs and circumstances, and if you shall find from the evidence that deceased did not procure liquor from the defendant that caused him to be intoxicated or that contributed thereto, you should find for the defendant."

circumstantial evidence was not overcome by the positive evidence of defendant.⁶⁵ On the other hand, circumstantial evidence as to sales by a dealer to establish even a *prima facie* case must be something more than mere conjecture. Thus, where the only evidence as to sales was the fact that defendant kept a saloon and that plaintiff's husband had been in the saloon and that he was seen coming therefrom in an intoxicated condition, it was held that there was no evidence that he had procured intoxicating liquor in defendant's saloon.⁶⁶ In those States where the land upon which the saloon is located may be subjected specially to the lien of a judgment obtained under the "civil damage act" where the sales were made with the knowledge and consent of the owner of the land, it has been held that such knowledge and consent may be proved by circumstantial evidence. Thus, where it

⁶⁵ In the case of *McManigal v. Seaton*, 23 Neb. 549; 37 N. W. 271, the court said: "In addition to this, the fact that McManigal was seen in the defendant's saloon under the influence of intoxicating liquor is a strong circumstance tending to show that he procured the liquor in such saloons. If the defendants are to be believed, McManigal procured intoxicating drinks from none of them, and yet he was constantly around their places of business, and continuously under the influence of liquor. These circumstances cannot be overcome by a mere denial of the sale of liquor. The sale of intoxicating liquor, like any other fact, may be proved by circumstantial evidence, and it is the duty of the jury in making up the verdict to weigh all the evidence in the case. That the jury did not weigh all of such evidence is very clear, or they would have reached a different conclusion as

to some of the defendants at least. The verdict is against the clear weight of evidence, and the judgment is reversed and the cause remanded for further proceedings."

⁶⁶ In the case of *Lovelan v. Briggs*, 32 Hun (N. Y.) 477, 478, the court said: "There must be evidence, and not mere conjecture, which shall show that acts of the defendant have caused, in whole or in part, the injury which the plaintiff sustained. The mere fact that the defendant sells spirituous liquors, and that the deceased had been seen in defendant's store, or even had been seen coming from the store in an intoxicated condition, should not make the defendant liable. For a man may keep a liquor store and yet may refuse to sell liquors to an intoxicated man. And unless the man was seen to go in sober and come out drunk, the condition in which he came out would not show where he obtained the liquor."

was shown that complainant's husband was a notorious drunkard and was habitually drunk on the streets and in the saloon, and that the owner of the land on which the saloon was located lived near thereto and occasionally visited it, it was held that the evidence was sufficient to establish knowledge and consent. But it must be understood in this connection that knowledge and consent cannot be inferred from a mere showing of knowledge. As was well said by the Iowa court: "Consent cannot be inferred from knowledge alone. There might be knowledge and dissent, or knowledge and a *bona fide* effort to prevent the premises from being used for the illegal sale of liquor. Consent might doubtless be inferred from acquiescence, but that is quite different from knowledge alone."⁶⁷ In many cases it is sought to corroborate the dealer's evidence to the effect that no sales were made in the manner charged in the declaration or complaint by proof that on other occasions the dealer or his agents had refused to sell the intoxicated person intoxicating liquors. Such testimony has uniformly been held to be inadmissible. The Vermont Supreme Court puts it very clearly: "If the fact that a man refuses to sell liquor to A yesterday is any evidence of a refusal to-day, it follows that proof of a sale yesterday tends to prove a sale to-day. It is hardly probable that counsel would contend that a sale to-day could be established in such manner. There is no logical relation or dependence existing between an innocent or guilty act of this kind done on a previous occasion and a later one."⁶⁸ Nor is evidence admissible tending to show that the defendant prior to the sales complained of in the declaration or complaint had instructed his servants not to sell intoxicating liquors to the person who became intoxicated, for the reason that such evidence does not tend in the least to show that the sales charged in the complaint were not in fact made.⁶⁹ This rule, however, is subject to the exception that in those States where ex-

⁶⁷ *McVey v. Manatt*, 80 Iowa 132; 45 N. W. 548.

⁶⁹ *Houston v. Gran*, 38 Neb. 687; 57 N. W. 403.

⁶⁸ *Richards v. Moore*, 62 Vt. 217; 19 Atl. 390.

emplary damages are allowed and where they are sought in an action under the statute, testimony tending to show that defendant had given instructions to his bartenders not to sell to the person whom he is charged with selling to, is competent, but solely upon the question of exemplary damages.⁷⁰ The question of exemplary damages, however, must be an issue in the case before such evidence is admissible.⁷¹ Nor is it competent evidence in an action under the statute for damages for the sale of liquor to plaintiff's husband, where it is admitted that defendant, contrary to plaintiff's repeated requests and warnings, sold to plaintiff's husband the liquor which made him drunk and rendered him unable to work, to show that defendant refused to sell him liquor when actually drunk.⁷² And it is not competent, in actions under the statute brought by the wife against a dealer for causing the intoxication of her husband, to show the record of an indictment and conviction of the dealer for unlawful sales where it is not shown that such sales were made to the husband.⁷³ Nor in such an action is evidence admissible showing the intoxication of plaintiff's husband after defendant went out of business.⁷⁴ But sales made by the defendant to the husband after commencement of the wife's action for damages for the intoxication of her husband may be proved and considered by the jury on the question of exemplary damages where such question is an issue in the case.⁷⁵ It is not competent evidence in an action under the statute brought by a wife for the intoxication of her husband to prove that the defendant's saloon was open at the time of the alleged sales, nor can the defendant show that the saloon was open for a particular purpose.⁷⁶ The reason for this rule is found in the fact that the open saloon, though open contrary to law, does not create

⁷⁰ *Largelere v. Kerchegessner*, 73 Mich. 276; 41 N. W. 488.

⁷¹ *Meyers v. Smith*, 121 Ill. 442; 13 N. E. 216, affirming 25 Ill. App. 67.

⁷² *Wolfe v. Johnson*, 152 Ill. 280; 38 N. E. 886.

⁷³ *Applegate v. Winebrenner*, 67 Iowa 235; 25 N. W. 148.

⁷⁴ *Peacock v. Oaks*, 85 Mich. 578; 48 N. W. 1082.

⁷⁵ *Bean v. Green*, 33 Ohio St. 444.

⁷⁶ *Judge v. Jordan*, 81 Iowa 519; 46 N. W. 1077.

any liability on the defendant so far as the plaintiff is concerned. It has also been held in an action under a statute which gave a right of action against the person selling or giving away the intoxicating liquor causing the intoxication and also against the owner of the premises who knowingly permitted liquor to be sold thereon, that proof that the lessee's bartender gave intoxicating liquors to plaintiff's husband which caused his intoxication was not a showing that the lessee gave the liquors, for the reason that such a gift by the bartender was beyond the scope of his authority.⁷⁷ It has been held also under the same statute that where the owner of the premises knew that his lessee was conducting a saloon thereon that evidence as to an understanding between the lessor and lessee to the effect that intoxicating liquors were not to be sold thereon, was immaterial.⁷⁸

⁷⁷ In the case of *Campbell v. Schlesinger*, 48 Hun 428; 1 N. Y. Supp. 220, the court said:

"But he (meaning the bartender) has no authority to give away his employer's liquor any more than to give away any other property of his employer. When he does give away his employer's property, be it liquor or anything else, he is acting beyond the scope of his authority, and his act is not the act of his employer. The clerk in a store who gives away his employer's goods is not (unless special authority be shown) acting within his duty, and his act is not that of his employer. Perhaps, to prevent any misapprehension, we should say that there may be cases in which, upon the grounds of negligence, an employer might be liable for injury caused by the gift of property entrusted to a clerk; but this is not one of those cases. * * * We are dealing with a statute, harsh and penal, which makes one liable to

damages for lawful acts committed by another who is not his agent. When the innocent owner of the premises is made liable in damages for acts of his tenant which are lawful and licensed by law, the proof of such facts should be distinct. It should be shown that the tenant sold or gave, not that he did not stop the pilfering of his employes. Of course, there may be cases where a gift of liquor, as of any other property, might be inferred from circumstances, without any direct words of gift."

⁷⁸ *Hall v. Germain*, 131 N. Y. 536; 30 N. E. 591, affirming 14 N. Y. Supp. 5.

In an action on the defendant's bond, proof of ten sales between a time antedating the date of the bond and the bringing of the suit does not show a sale during the life of the bond. *Birkman v. Fahrenthold* (Tex. Civ. App.), 114 S. W. 428.

If specific acts of intoxication be

Sec. 1063. Nature and extent of injury.

Evidence upon the question as to the nature and extent of the injury, to be competent, must tend to support the theory of the injury as set out in the complaint or declaration. In other words, where the suit has been brought on the theory of injury to the means of support, evidence as to injury to the person or property would not be admissible. Thus, it was held that where plaintiff brought her suit under the statute for injury to her means of support because of the

shown, the defendant may show that the intoxication was caused by liquor sold by another; but otherwise prior or contemporaneous sales by others cannot be shown as a defense. *Liebler v. Carrel*, 155 Mich. 196; 118 N. W. 975; 15 Det. L. News, 976.

To prove the sale, evidence of an interview between the wife and defendant, the husband participating therein, in which the defendant insisted on a settlement and offered \$25 for that purpose, accompanied by a threat to kill her if she did not take it, was held admissible. *Montross v. Alexander*, 152 Mich. 513; 116 N. W. 190; *Radley v. Seider*, 99 Mich. 431; 58 N. W. 366.

On a charge of a sale by the defendant, evidence of a sale by his bartender is admissible. *Pennington v. Gillespie*, 63 W. Va. 541; 61 S. E. 416, or by any one else he permits to run the saloon. *Cortright v. McElden* (Ky.), 116 S. W. 257; *Pennington v. Gillespie*, 63 W. Va. 541; 61 S. E. 416.

The action is transitory, and evidence that the sale took place in another county is admissible. *Pennington v. Gillespie*, 63 W. Va. 541; 61 S. E. 416.

The burden is on the plaintiff to prove the sale alleged. *Farenthold v. Tell* (Tex. Civ. App.), 113 S. W. 635; *Berkeheimer v. State* (Ind.), 88 N. E. 634.

In an action on the liquor dealer's bond, his admission he sold the liquor is not evidence of the sale against his sureties. *Birkenman v. Fahrenthold* (Tex. Civ. App.), 114 S. W. 428.

Where it is shown that the drunkard spent so much money within a given time for liquor, it is permissible to ask him what proportion of it he spent with the defendant. *Hemmens v. Bentley*, 32 Mich. 89.

If no evidence be given on a particular count, it is error to give an instruction authorizing a recovery under it. *Lartz v. Gibson*, 13 Bradw. (Ill.), 487.

It is for the jury to determine if the defendant made the sale. *Brown v. Butler*, 66 Ill. App. 86.

As tending to show the defendant sold the liquors, it may be shown that the person in question was seen drunk upon the streets. *Weiser v. Welch*, 112 Mich. 134; 70 N. W. 438.

death of her husband caused by liquor sold her husband by defendant, evidence of certain inconveniences plaintiff had labored under since her husband's death, of the mangled condition in which she found deceased after the accident, and how she fainted away when she discovered the body, was inadmissible as having no bearing on the issue as to the extent of injury to plaintiff's means of support and calculated to arouse the sympathies of the jury, to defendant's prejudice.⁷⁹ Says the Illinois court upon the proposition as to what would be relevant testimony in such a case: "It was highly proper to show what the deceased himself had done in his lifetime, the character of his business, his habits of industry and thrift, income, and all that sort of thing, with a view of determining what he probably would have done in the future had he not been killed."⁸⁰ It has been held, however, that if there was evidence tending to show that where plaintiff's husband, prior to the sales complained of in the complaint, supported his family, the plaintiff may testify as to the amount necessary to support the family in circumstances suitable to its condition, upon the ground that such testimony tends to show the value of the support of which the family had been deprived.⁸¹ It is also competent evidence in a suit brought for injury to

⁷⁹ In the case of *Flynn v. Fogarty*, 106 Ill. 263-268, the court said: "The plaintiff was also permitted to go on and detail to the jury the inconveniences she has labored under since her husband's death; how she had to go to town on cold days, and the fact of one of her girls having to work out, and also to speak of the mangled condition in which she found the deceased shortly after the injury; how she fainted away, and his dying remark to her, 'Mary, I can't see you any longer; I am getting blind.' All this had not the slightest legitimate bearing upon the vital issue in the case, namely, the extent to which the plaintiff had

been injured in her means of support by the death of her husband. Its obvious effect was to unduly arouse the sympathies of the jury in favor of the plaintiff, and create a corresponding prejudice against the defendants. The calling out of such recitals before the jury is often but an artful device of ingenious counsel to divert the attention of the jury from the real issue and increase the damages to an extent not warranted by the facts. In such cases it is the duty of the court, on its own motion, to interpose."

⁸⁰ *Flynn v. Fogarty*, 106 Ill. 263.

⁸¹ *Warrick v. Rounds*, 17 Neb. 411; 22 N. W. 785.

her means of support to show that the money earned by the husband while living was devoted to the wife's support,⁸² and also to show that he was unable to obtain employment in consequence of the habits of intoxication caused by defendant's acts.⁸³ She may also show how much her husband paid the defendant for liquors during the time for which damages were sought to be recovered, as a fact tending to show injury to the means of support of the plaintiff.⁸⁴ She cannot prove, however, that because of her husband's unfortunate habits due to the sales of intoxicating liquors made by the defendant, that she has suffered in her standing in society.⁸⁵ In Michi-

⁸² *Gran v. Houston*, 45 Neb. 813; 64 N. W. 245; *Brandt v. McEntree*, 53 Ill. App. 467.

⁸³ *Roth v. Eppy*, 80 Ill. 283.

⁸⁴ *Ward v. Thompson*, 48 Iowa 588.

⁸⁵ In the case of *Jackson v. Noble*, 54 Iowa 641; 7 N. W. 88, the court said: "The plaintiff and her husband removed from Cedar Rapids to Marshalltown in 1874. This action was commenced in 1878, and the alleged cause of action arose by the sale of intoxicating liquors at the latter place for two years next preceding the commencement of the action. N. M. Hubbard, a witness for the plaintiff and a resident of Cedar Rapids, was asked this question: 'State to the jury in what circle of society Mrs. Jackson moved in Cedar Rapids; what kind of people they were.' The question was objected to. The objection was overruled, and among other things the witness stated in substance that the plaintiff and her husband were as well dressed and well behaved people as there were in Cedar Rapids, and moved in as good society as there was there,

and that the plaintiff had the respect and confidence of everybody as long as she lived there. This evidence was not admissible, and should have been excluded. The plaintiff, in actions of this character, is entitled to recover for injuries to her personal property and means of support. Damages are not allowed on account of wounded feelings or disgrace. *Kearney v. Fitzgerald*, 43 Iowa 580. If, by her husband's unfortunate habits, the plaintiff suffered in her standing in society, while it may have been humiliating, yet it could not be made the foundation of a claim to enhance the damages. It was doubtless competent to show the occupation and business capacity of the husband and the manner in which he supported the plaintiff while residing at Cedar Rapids, as showing what she was afterwards deprived of in her property or means of support by reason of his drunkenness, but her standing in society and her wounded feelings by reason of the change consequent upon her husband's habits, is quite another thing."

gan, however, a somewhat different rule is announced. It is there held that evidence as to loss of social standing and mental suffering is competent in an action under the statute brought by the wife for injury to her person, property and means of support.⁸⁶ It seems, however, that this rule is based partly upon the idea of exemplary or punitive damages. In a suit under the statute brought by the wife for the death of the husband, evidence is inadmissible upon the question of damages to show what deceased would have done as to any particular business transaction had he lived.⁸⁷ Nor is evidence admissible which would show that defendant owed deceased for work at the time of his death and subsequently refused to pay plaintiff the full amount claimed.⁸⁸ The question as to whether evidence is admissible as to the age, sex and number of the children of a plaintiff who has brought suit under the statute for injury to her means of support has been frequently passed upon. The prevailing rule seems to be that such evidence is wholly immaterial and its admission

⁸⁶ In the case of *Friend v. Dunks*, 37 Mich. 25-30, the court said: "A jury might measure, if they could, and allow the wife every dollar of loss she could prove she had sustained for the injuries to her person, her property and means of support, and then would fall far short of compensating her for the shame and mental anxiety which she suffered daily in seeing her husband becoming a common drunkard, the finger of scorn pointed at him, his business neglected and going to ruin, his property melting away, himself and wife excluded from respectable society, the means which should be used in support of his family squandered in strong drink, and his once happy home broken up and destroyed; if these facts could not be proven and considered by them. These are but some of the

natural results of drunkenness, and the better sense of all good people recognize the mental suffering thus caused as constituting a real injury to the person; and although not capable of an actual money measurement, yet that it should be taken into consideration by a jury, who could, from all facts in the case and their own sense of justice, award such damages as would at least compensate in part for the great wrong done her, and at the same time punish the defendant for the gross, willful and deliberate wrong which he, for mere gain, had wantonly perpetrated." See also *Cramer v. Danielson*, 99 Mich. 531; 58 N. W. 476.

⁸⁷ *Karan v. Pease*, 45 Ill. App. 382.

⁸⁸ *Karan v. Pease*, 45 Ill. 382.

reversible error, for the reason that the statute gives each child a right of action and the wife's right to recover is based on the loss of means for her support, and not for the support of her children.⁸⁹ Nor is such testimony admissible even where it is sought to be introduced merely to show the situation of plaintiff with reference to her own right and under positive instructions from the court that the evidence is not to be considered as affecting the question of damages. Says the Michigan court: "Such testimony does not tend to prove that the husband was in the habit of becoming intoxicated. It does not tend to prove that he was intoxicated at the time of his death. It does not tend to prove that defendant caused or contributed to his intoxication. It does not tend to prove that the wife is injured in her means of support. These are the facts in issue which entitle plaintiff to recover, and the only other question is the amount of damages to which she is entitled. If it is not admissible as bearing upon the amount of damages, it is wholly irrelevant."⁹⁰ Nor is such evidence admissible to establish exemplary or punitive damages.⁹¹ In Iowa, however, it is held that in a suit brought by the wife for injury to her means of support, she may show, to sustain a claim for exemplary damages, the number and age of her children, if she also shows that the defendant, prior to selling the liquor to her husband, had knowledge that she had such children, and that they were in danger of being injured or compelled to leave home because of the intoxication of the husband and father.⁹² Admission of evidence of the char-

⁸⁹ Higgins v. Kavanaugh, 52 Iowa 368; 3 N. W. 409; Welch v. Jugenheimer, 56 Iowa 11; 8 N. W. 673; 41 Am. Rep. 77; Larzelere v. Kirchgessner, 73 Mich. 276; 41 N. W. 488; Thomas v. Dansby, 74 Mich. 398; 41 N. W. 1088; Montross v. Alexander (Mich.), 116 N. W. 190.

⁹⁰ Larzelere v. Kirchgessner, 73 Mich. 276; 41 N. W. 488.

⁹¹ Johnson v. Schultz, 74 Mich. 75; 41 N. W. 865; Larzelere v.

Kirchgessner, 73 Mich. 276; 41 N. W. 488.

⁹² In the case of Ward v. Thompson, 48 Iowa 588, the court said: "The plaintiff was examined as a witness in her own behalf, and was permitted to state, against the objection of the defendant, that her family besides herself and husband, consisted of two children, a son eighteen years old and a daughter thirteen. The defendant claims that the court erred in ad-

acter above described is not reversible error, if the judgment for plaintiff is less than the actual damages shown.⁹³ Evidence of abusive language or conduct on the part of the intoxicated person toward plaintiff is not admissible unless such conduct tended to impair plaintiff's health.⁹⁴ Nor is evidence of an assault committed on plaintiff by the husband while under the influence of liquor admissible where it was not shown that the liquor causing the intoxication was sold by defendant and when such assault was made prior to the time when it is alleged defendant sold liquor to the hus-

mitting this evidence, because it was well calculated to influence the jury in regard to the amount of their verdict, and that the verdict should not be greater by reason of the fact that the plaintiff's family included minor children, because the plaintiff can recover only the damage which she has sustained individually in her person and means of support, and that, if the children have sustained damage, they can maintain their separate actions therefor. It must, we think, be conceded that the actual damages which the plaintiff is entitled to recover are no greater by reason of her children. But it appears that she forbade the defendant to sell her husband liquor; that she spoke to him of her husband's habits, and informed him that she could not stay in the house, and that she must leave, or at least send the children away; that her husband continued to frequent the defendant's saloon, and came from there intoxicated; that when intoxicated he was abusive, and that she had to send her daughter away. Now if the defendant continued to furnish the plaintiff's husband liquor upon

which he became intoxicated, after he had been informed by plaintiff in regard to her children, and the necessity that there would be of their removal if her husband's intemperate habits continued, it was an aggravating circumstance, tending to show a recklessness of consequences which the jury was entitled to consider upon the question of exemplary damages. In our opinion, then, where a married woman brings an action like the present, she may show the number and ages of her children belonging to her family, if she also shows that the defendant has knowledge that she has such children, and that they are in danger of being injured or compelled to leave home, and the defendant, after such knowledge, wantonly continues to sell plaintiff's husband liquor, by reason of which she acquires a right of action. The evidence is pertinent to the question of exemplary, but not actual, damages."

⁹³ *Thoma v. Dansby*, 74 Mich. 398; 41 N. W. 1088.

⁹⁴ *Welch v. Jugenheimer*, 56 Iowa, 11; 8 N. W. 673; 41 Am. Rep. 77.

band.⁹⁵ It has been held, on the question as to whether a woman has been injured in her means of support by reason of defendant's sales of intoxicating liquors to her husband, that it may be shown she has since married again. Says the New York court: "To illustrate, let us suppose that the husband had not died, but had only been disabled from working by his intoxication, and that plaintiff had sued for loss of means of support. Would it not be material, on the question of damages, to show that she had left her husband and was living with, and was supported by, another man? So in the present case, she (but lawfully) is living with, and entitled to the support of, another man, her present husband. Does not this condition affect the extent of injury to means of support which she suffers by the former husband's death?"⁹⁶ On the other hand, evidence is not relevant or material which would show that decedent's widow refused to allow his body to be brought home, that she would not attend the funeral nor allow any of her children to attend, and that prior to his death she had said that she wished he would die, for, says the Nebraska court:⁹⁷ "The right of action in this class of cases depends in no degree upon sentiment. Affection for the deceased on the part of one or all of the plaintiffs could neither add to nor the want of it take from the amount of the verdict, if they are entitled to one." It has been held that a judgment obtained by the wife for injury to her means of support by the sale of intoxicating liquors is admissible in an action against another party for injuries accruing during the same period, for the purpose of showing the actual extent of the wrong done by defendant, but not in mitigation of damages.⁹⁸

⁹⁵ Applegate v. Winebrenner, 67 Iowa, 235; 25 N. W. 148.

⁹⁶ Sharpley v. Brown, 43 Hun (N. Y.), 374.

⁹⁷ Kerkow v. Bauer, 15 Neb. 150; 18 N. W. 27.

⁹⁸ Engleken v. Webber, 47 Iowa, 552; Ennis v. Staley, *Id.* 552.

The plaintiff may show the sufferings to which the family had

been subjected through the husband's neglect. Aken v. Tinglehoff (Neb.), 119 N. W. 456.

It is not permissible to show how plaintiff's husband acted toward her and her son after notice served on the defendant not to sell him liquor. Farenthold v. Tell (Tex. Civ. App.), 113 S. W. 635.

The wife may show she suffered

Sec. 1064. Character and habits of the plaintiff.

It is always competent to show where plaintiff stands in the relation of parent or wife or husband or child to the intoxicated person, and that plaintiff had consented to the intoxicated person drinking or had encouraged him in the habit. Thus, it was held competent evidence in a suit under the statute by a father against a dealer for causing the intoxication of his minor son for the defendant to show that the father had frequented saloons with such minor son and drank with him. As was said by the Texas court: "Its tendency was to establish the fact that he had no objection to his son's doing the acts that he now complains of, and might be considered for what it is worth, as tending to establish a tacit consent for him to frequent saloons, and for liquor dealers to sell him intoxicating drinks. It may not be entitled to much force as tending to establish his consent to the acts complained of, but it is admissible for what it may be worth on that subject."⁹⁹ It is also competent to show that plaintiff, the wife, had consented to the husband having intoxicating liquors in their own home for the use of the husband and his friends as tending to show the good faith of the wife in bringing the suit.¹ On the other hand, it is competent

a stroke of paralysis, and put in evidence of experts as to its connection with her troubles due to her husband's drunkenness. *Montross v. Alexander*, 155 Mich. 513; 116 N. W. 190.

Frequency of abuse may be shown on the husband's part, to show he is an habitual drunkard. *Birkman v. Farenthold* (Tex. Civ. App.), 114 S. W. 428.

Where the defendant pleaded a conspiracy between the plaintiff and her husband to mulct him in damages, it was held permissible for her to show that she followed her husband to the defendant's saloon and saw him drink; and that he did not then go home, but when

he did, he cursed and threatened to kill her, to refute the plea of conspiracy, although the defendant had offered no evidence on such plea, the court treating the plea as seriously imposed. *Birkman v. Farenthold* (Tex. Civ. App.), 114 S. W. 428. See also *Lieber v. Carrel*, 155 Mich. 196; 118 N. W. 975; 15 Det. L. N. 976.

Evidence of motive in bringing the suit is not admissible, either for the plaintiff or defendant. *Farenthold v. Tell* (Tex. Civ. App.), 113 S. W. 635.

⁹⁹ *Kruger v. Spachek*, 22 Tex. App. 307; 54 S. W. 295.

¹ *Bellison v. Apland*, 115 Iowa, 599; 89 N. W. 22.

for her to give evidence to the effect that her husband wished to bring intoxicating liquor into the house and drink it there and that she objected.² Evidence that the reputation of plaintiff for chastity is bad is wholly incompetent and immaterial, for the reason that good or bad moral character does not affect the right of recovery under the statute.³

**Sec. 1065. Character and habit of the intoxicated person
—Mortality tables.**

It is a general rule that in actions under the statute it is competent to prove the age and condition in life of the intoxicated person, his circumstances, his habits of industry and ability to support his wife or those dependent upon him before the acts complained of, and subsequent thereto. Thus, in an action by a wife under the statute for the death of her husband who was killed in a drunken spree, it was held that evidence concerning the husband's previous habits was pertinent, as bearing upon the question of damages, for, says the Michigan court: "In cases of this kind it must be conceded that

² Lloyd v. Kelly, 48 Ill. App. 554. She may show the reason for her stating to a saloon keeper other than the defendant that he might sell him liquors on certain nights. Montross v. Alexander, 152 Mich. 513; 116 N. W. 190.

³ In the case of Tipton v. Thompson (Tex. Civ. App.), 50 S. W. 641, the court said: "The court admitted the evidence of a number of witnesses to the effect that the reputation of the plaintiff for chastity was bad, and that it was generally reputed that she kept a house of prostitution. There is also evidence in the record which shows that she kept a boarding house. The court admitted this testimony evidently for the purpose of, and so instructed the jury that they might consider it in, determining

whether or not Mrs. Tipton was in fact aggrieved by the sale of liquor to her husband. The testimony, in our opinion, was not admissible for any purpose in this controversy. Mrs. Tipton's reputation for chastity was not an issue in the case. It would have been proper to inquire into her general reputation for truth and veracity, as she had testified in her own behalf, but we do not understand that, in order to defeat or affect a plaintiff's right to recover, it is permissible to prove his good or bad moral character. In some instances there are exceptions to this rule, where character may be necessarily involved in the subject of the controversy, but this does not fall within that class of cases."

the loss to the wife of a sober and industrious husband must necessarily be greater, in a pecuniary sense, than the loss of one who is the opposite.”⁴ A somewhat different doctrine, however, has been announced by the Iowa court where in an action by a widow to recover damages for the death of her husband while in a condition of intoxication, produced through defendant’s wrongdoing, it was held that the fact that deceased had been an habitual drunkard for twenty years preceding his death should not be received in evidence to affect the measure of damages.⁵ The holding in this case was based upon an earlier case in that State where damages were sought for causing or contributing to the habitual intoxication of the husband.⁶ The court in refusing to sanction an instruction to the effect that if the plaintiff was in no worse condition after the sales of intoxicating liquors complained of than she was before, has not suffered in her means of support, said: “It is quite clear that if the defendant deprived the plaintiff of the assistance of her husband in the support of herself and family, by causing his frequent intoxication, her means of support would be thereby injured to that extent, without reference to her condition before and after such injury.” This same doctrine is upheld in the same State in a late case.⁷ The court puts its reasons in the following language: “It does not follow, because the husband was a hard drinker at a previous time, that he would have continued to be a hard drinker at the time covered by this action if defendant had not sold him liquor. And the fact that by reason of habitual intoxication he had failed in former years to furnish support to the plaintiff would not defeat recovery by plaintiff for his failure to furnish support by reason of

⁴ Brockway v. Patterson, 72 Mich. 122; 40 N. W. 192; 1 L. R. A. 708.

⁵ Huff v. Aultman, 69 Iowa, 71; 28 N. W. 440; 58 Am. Rep. 213; Buck v. Maddock, 167 Ill. 219; 47 N. E. 208; affirming 67 Ill. App. 466.

from further degrading a man who was not temperate at the outset may be shown. Friend v. Dunks, 39 Mich. 733.

⁶ Dunlevey v. Watson, 38 Iowa, 398.

⁷ Woolheather v. Risley, 38 Iowa, 486-492.

habitual intoxication induced by defendant's sales." ⁸ In actions based upon sales of intoxicating liquors to habitual drunkards, it is always competent to show the habits of the person alleged to be a drunkard prior to the sales complained of. ⁹ It was also held competent evidence in such a case, as tending to show the habits of the person alleged to be an habitual drunkard, to show that prior to the sales complained of he had promised his partner to quit drinking. ¹⁰ It has been held that it is competent evidence to show that the intoxicated person was quiet when sober and quarrelsome when drunk, as tending to show that such person was intoxicated at the time of the injury. ¹¹ Where, as alleged in the complaint, the husband committed suicide by reason of continued intoxication, in a suit against the dealer by the wife for causing the intoxication, it was held that evidence to the effect that defendant, on the day of the suicide, was charged with embezzlement was incompetent and immaterial, for, said the court: "The only effect of the testimony, if admitted, would have been to divert the attention of the jury from the main question at issue." ¹² In case of the death of the drunkard, life or mortality tables are admissible to show the expectancy of his life, though it be shown he was in the habit of becoming intoxicated, to be considered by the jury in connection with evidence of his physical condition, vocation and habits, ¹³ or even where the husband's earning capacity has been permanently impaired by the use of liquor sold by the defend-

⁸ *League v. Ehmke*, 120 Iowa, 464; 94 N. W. 938.

The wife need not be reduced to the bare necessities of life to enable her to maintain her action because of loss of support. It is sufficient if she has been injured in her means of support. *Maloney v. Dalley*, 67 Ill. App. 427.

⁹ *Smith v. People*, 141 Ill. 447; 31 N. E. 425; affirming 38 Ill. App. 638; *Lloyd v. Kelly*, 48 Ill. App. 554; *Huff v. Aultman*, 69

Iowa, 71; 28 N. W. 440; 58 Am. Rep. 213; *Doty v. Postal*, 87 Mich. 143; 49 N. W. 534.

¹⁰ *Friend v. Dunks*, 39 Mich. 733.

¹¹ *Brockway v. Patterson*, 72 Mich. 122; 40 N. W. 192; 1 L. R. A. 708.

¹² *Poffenbarger v. Smith*, 27 Neb. 788; 43 N. W. 1150.

¹³ *Peterson v. Brackey* (Iowa), 119 N. W. 967.

ant,¹⁴ and even where the wife has obtained a divorce during the pendency of the suit.¹⁵

Sec. 1066. Pecuniary conditions of persons or parties.

It is always competent in actions under the "civil damage" statute for injury to means of support to show the pecuniary condition of the intoxicated person at the time of the alleged sales, the wages he is earning, the income he is receiving, the property he owns and to further show that the plaintiff was without property and has no other income save that of the intoxicated person and was wholly dependent upon him for support.¹⁶ As was well said by the Michigan court¹⁷ in an action brought by a mother against a dealer for causing the intoxication of her minor son: "It was competent for the plaintiff to introduce evidence showing her situation and condition, her dependence upon her son, the amount he earned before he became addicted to the use of intoxicating liquors, his failure to obtain employment afterwards, if traceable to his drinking habit, the amount he had in bank and had earned at various times." In Illinois, however, in an early case, it was held that evidence of the value of the estate of the intoxicated persons prior to the sales complained of and the reduced condition of his pecuniary affairs at the time of the trial was inadmissible.¹⁸ It is also competent for the plaintiff to show that as a result of the sales of intoxicating liquor to the one owing her support she was compelled to support

¹⁴ Acken v. Tinglehoff (Neb.), 119 N. W. 456; Davis v. Borland (Neb.), 119 N. W. 454.

¹⁵ Merimane v. Miller (Mich.), 118 N. W. 11. As to measure of damages, see Davis v. Borland (Neb.), 119 N. W. 454.

¹⁶ Manzer v. Phillips, 139 Mich. 61; 102 N. W. 292; 11 Detroit Leg. N. 748; Horst v. Lewis (Neb.), 103 N. W. 460; Weiser v. Welch, 112 Mich. 134; 70 N. W. 438; Meyers v. Smith, 121 Ill. 442; 13 N. E. 216; affirming 25

Ill. App. 67; Clear v. Stanley, 34 Ill. App. 338; Friend v. Dunks, 37 Mich. 25; Kerkow v. Bauer, 15 Neb. 150; 18 N. W. 27; Murphy v. Willow Springs, etc., Co., 81 Neb. 223; 115 N. W. 763.

The sufferings of the family caused by the husband's neglect may be shown. Acken v. Tinglehoff (Neb.), 119 N. W. 456.

¹⁷ Weiser v. Welch, 112 Mich. 134; 70 N. W. 438.

¹⁸ McCam v. Roach, 81 Ill. 213.

herself and seek support from the county. As said by the Iowa court:¹⁹ "One of the material facts which plaintiff was required to establish is that during the period in question she was not supported by her husband, and the evidence objected to tended to establish this fact by showing the sources from which her support came."

Sec. 1067. Weight and sufficiency, in general.

The right of action created by the "civil damage" statute is not one to recover a fine or penalty but is one to recover damages for personal injury. The judgment involves neither the life nor liberty of the defendant, so that, while it is true that the action is *quasi* penal and the material allegations in the declaration or complaint must be fully proved, it is not necessary that the evidence should exclude all reasonable doubt. It is sufficient if there is a preponderance of evidence, and this may result from circumstantial as well as direct evidence.²⁰ Thus, it has been held that, where the evidence showed that plaintiff's husband walked in an intoxicated condition from defendant's saloon to a railroad station, that he purchased a ticket but failed to catch the train, left the station at the advice of the station agent going toward the track, that plaintiff's husband testified he did not remember leaving the saloon, or anything that happened afterwards until he was sitting on the track, with both feet crushed, it was held sufficient to prove that the accident was due to the intoxication.²¹ Again, where the evidence showed that a saloon began business without a license, the owner having made a note to a brewing company in payment for a license,

¹⁹ Fox v. Wunderlich, 64 Iowa, 187; 20 N. W. 7.

²⁰ Woods v. Dailey, 211 Ill. 495; 71 N. E. 1068; citing Crabtree v. Reed, 50 Ill. 206; Miller v. Belthasser, 78 Ill. 302; Mitchell v. Hindman, 150 Ill. 538; 37 N. E. 916; Taylor v. Felsing, 164 Ill. 331; 45 N. E. 161. See also Hall v. Barnes, 82 Ill. 228; Robinson

v. Randall, 82 Ill. 521; Chase v. Kenniston, 76 Me. 209; McDougall v. Giacomini, 13 Neb. 431; 14 N. W. 150; Kolling v. Bennett, 18 Ohio Cir. Ct. R. 425; 10 O. C. D. 81; Coleman v. People, 78 Ill. 210; Brown v. Butler, 66 Ill. App. 66.

²¹ Colburn v. Spencer, 177 Mass. 743; 59 N. E. 78.

which the company was to get for him, that the note was not paid, and the brewing company made no attempt to secure a license, though its agent telephoned the saloon keeper that a license had been granted, that the saloon keeper leased a building for the business and the brewing company paid the rent and furnished the liquor, that the saloon was run without license and kept open on Sunday, it was held that this evidence was sufficient to establish collusion between the saloon keeper and the brewery and to make the brewery liable to a widow whose son, on whom she was dependent, died from acute alcoholism after spending the greater part of Sunday in the saloon where he purchased intoxicants.²²

Sec. 1068. Nature and properties of liquor.

In actions under the statute it is generally a question for the jury as to whether the particular beverage proved to have been drunk by the intoxicated person was or was not intoxicating. Thus, in an action by a wife for the sale of intoxicating liquor to her husband where it was established that the husband entered a saloon, was furnished a glass of liquor which looked like beer, and paid for it, and that he was very much intoxicated, it was held that there was evidence from which the jury might find that the liquor drunk by plaintiff's husband was intoxicating.²³ Says the Michigan court: "It would be very difficult for one who did not himself taste the liquor to prove such an offense in any other way." In Massachusetts it has been held that a jury was warranted in finding ale to be intoxicating merely on the testimony of a witness who saw and smelled but did not taste it.²⁴ Again, where the evidence showed that the person, on account of whose

²² *Terre Haute Brewing Co. v. Newland*, 33 Ind. App. 544; 70 N. E. 190. For other cases illustrative of the above proposition, see the following: *McMahon v. Dumas*, 96 Mich. 467; 56 N. W. 13; *McDougall v. Giacomini*, 13 Neb. 431; 14 N. W. 150; *O'Connor v. Congen*, 102 N. Y. 702; 7

N. E. 369; *Lawson v. Eggleston*, 52 N. Y. 181; 28 App. Div. 52; affirmed in 164 N. Y. 600; 59 N. E. 1124.

²³ *Wilson v. Booth*, 57 Mich. 249; 23 N. W. 799.

²⁴ *Haines v. Hanrahan*, 105 Mass. 480.

death the action was brought, drank beer many times during the afternoon in the saloon of the principal defendant and became intoxicated, it was held not error to submit to the jury the question whether the beer which decedent then drank was an intoxicating liquor, although there was no positive evidence that such beer was intoxicating.²⁵ In an early Indiana case it was held, in an action under the civil damage statute, that where the evidence was that the defendant sold plaintiff's husband in his saloon a liquid which looked like beer and that the husband drank it, it was not sufficient to establish the fact of the intoxicating quality of the liquor drank. Said the court:²⁷ "There is no evidence that it was intoxicating, and, as some kinds of beer are not intoxicating, and the character of this beer was not given, the jury could not know, without evidence, that it was intoxicating." This case, however, has been impliedly overruled by the later doctrine in Indiana to the effect that when a witness testifies to the sale or giving away of beer the *prima facie* inference is that the beer was of that malted and fermented quality declared by the statute to be an intoxicating liquor, and the court trying the cause ought to take judicial notice of the inference which thus arises from the use of the word "beer" in its general and primary sense.²⁸

²⁵ In the case of *Smith v. People*, 141 Ill. 447; 31 N. E. 425, affirming 38 Ill. App. 638, the court said: "It may be that no witness testified in positive terms that the beer that Williamson drank on the 12th day of August was an intoxicating liquor, but that fact, like most other facts, may be established by other than direct and positive proof, and here the proof was ample that Williamson drank beer very many times during the afternoon, and until about 9 o'clock at night, in the

saloon of Smith, and became intoxicated, and left there with a bottle of whisky in his pocket. If the direct result of drinking Smith's beer was intoxication, it may be reasonably presumed that Smith's beer was an intoxicating liquor." See also the following cases: *Kennedy v. Sullivan*, 34 Ill. App. 46.

²⁷ *Schlosser v. State*, 55 Ind. 82-86.

²⁸ *Myers v. The State*, 93 Ind. 251-253.

ARTICLE VIII.—DAMAGES.

SECTION.

1069. General rule—Cost of medical services.

1070. Injury to means of support.

1071. Mental suffering.

SECTION.

1072. Exemplary damages.

1073. Excessive damages.

1074. Mitigation of damages.

Sec. 1069. General rule—Cost of medical services.

The award of damages in actions under the “civil damage” statute is limited strictly to the issues in the case. Thus, where the only charge in the declaration in an action by a married woman against a dealer for selling intoxicating liquors to her husband is that of injury to her means of support, it has been held error to admit evidence of the husband’s ill treatment of her when intoxicated.²⁹ But within the issues marked out by the pleadings the amount of damages to be awarded plaintiff must be determined by the jury under proper instructions of the court.³⁰ In a general way, it may be said, as to the extent of recovery under the statute, whatever personal injuries the aggrieved party sustained by the intoxicated person’s violence as the direct and natural consequence of the intoxication, whatever injuries or loss were necessarily occasioned the aggrieved person’s property as the result of such intoxication, whatever injury the aggrieved party sustained to his or her means of support by reason of such intoxication; such may be the basis for damages under proper allegations in the complaint or declaration.³¹ Thus, it has been held competent to prove as elements of damage that plaintiff took care of her husband, watched and nursed him while he was suffering from injuries which he received upon falling from a wagon when in a state of intoxication, caused by liquors sold him by the defendant, that she injured her health by this care and watching, so as to require medical treatment, that she employed nurses to help her take care

²⁹ *McLees v. Niles*, 93 Ill. App. 442.

³¹ *Wightman v. Devere*, 33 Wis. 570.

³⁰ *Miller v. Gleason*, 18 Ohio Cir. Ct. R. 425; 10 O. C. D. 81.

of her husband, that she employed a physician and paid his bill for attendance upon him, and that she had to hire a man to do work upon her farm, which her husband would have done if he had not been disabled by the injuries above noted.³² Where the basis for damages is injury to property it must not be understood that recovery is limited to the physical acts of the intoxicated person in injuring, mutilating or destroying property, but wherever the plaintiff has been legally bound to expend money for medical attention and nurse hire for the intoxicated person as a result of the intoxication, and whenever it has been the legal duty of the plaintiff to maintain the intoxicated person when he is unable to maintain himself by reason of the intoxication, then, as an element of the charge of injury to property, plaintiff may recover such amounts, so expended, of the person causing the intoxication.³³ But recovery in such a case is limited strictly to the necessary support of such intoxicated person;³⁴ nor where such support is continuing in its nature can recovery be had for more than it would amount to during the lifetime of the plaintiff, for the legal duty of support can not fall upon his estate upon the death of plaintiff.³⁵ In such a suit, also, where the claim for damages is based solely on the ground of injury to property, the mental or physical suffering of the plaintiff is no element of damages.³⁶ Nor can the damages be increased because of the expenditures of plaintiff in procuring a lawyer to prosecute the claim for damages.³⁷

Sec. 1070. Injury to means of support.

In a previous part of this chapter we have already considered the subject "means of support,"³⁸ and it is only our

³² *Wightman v. Devere*, 33 Wis. 570; *Thomas v. Dansby*, 74 Mich. 398; 41 N. W. 1088.

³³ *Clinton v. Laning*, 61 Mich. 355; 28 N. W. 125; *Van Alstine v. Kaniecki*, 109 Mich. 318; 6 N. W. 502.

³⁴ *Clinton v. Laning*, 61 Mich. 355; 28 N. W. 125.

³⁵ *Clinton v. Laning*, 61 Mich. 355; 27 N. W. 125.

³⁶ *Clinton v. Laning*, 61 Mich. 355; 28 N. W. 125.

³⁷ *Clinton v. Laning*, 61 Mich. 355; 28 N. W. 125. Funeral expenses may be recovered. *Kelling v. Palmer* (Neb.), 119 N. W. 155.

³⁸ *Supra*, § 1037.

present purpose to state the extent of the recovery in actions where the basis of recovery is injury to means of support. Questions as to the extent of liability on the part of the dealer where he has sold or given intoxicating liquors to another, thus causing or contributing to his death, or permanently incapacitating him from labor, or causing him to abandon his family and become a common vagabond, are of frequent recurrence. It has been contended that the dealer would be liable in damages to those dependent upon such persons for support only during the period he continued to furnish him liquor and those dependent upon him failed to receive support, and not for the permanent results that the liquor may have upon him so far as his ability to support those dependent upon him is concerned. The rule, however, seems to be that where proper allegations have been made in the declaration or complaint the dealer causing or contributing to a permanent disability to another by sales or gifts of intoxicating liquor is liable in damages to those dependent upon him for support, not only for the actual results of such sales or gifts, but also for all damages growing out of his disqualification, without reference to the length of time through which it may continue.³⁹ As was said by the Nebraska court in a late case:⁴⁰ "One who has converted another from a sober and industrious life into an habitual drunkard is responsible for all the financial losses due to his act, including those caused by the subsequent thriftless and dissipated career of his victim directly resulting therefrom." Thus, where a dealer caused or contributed to the habitual intoxication of a previously sober and industrious man, he is liable in damages for a consequent thriftless and dissipated career followed by such person after he has ceased to furnish him with liquors.⁴¹ It is, therefore, proper in a case where the claim is for a total loss of means of support, in estimating damages, for the jury to take into consideration the occupa-

³⁹ *Jessen v. Wilhite*, 74 Neb. 608; 104 N. W. 1064; *Garrigan v. Kennedy* (So. D.), 101 N. W. 1081.

⁴⁰ *Stahuka v. Kreith*, 66 Neb. 829; 92 N. W. 1042.

⁴¹ *Stahuka v. Kreith*, 66 Neb. 829; 92 N. W. 1042.

tion of the intoxicated person, his annual earnings, his health, his age, his habits, and the probable length of his life.⁴² As was well said in an early Ohio case where a suit was brought under the statute against a dealer by a wife for causing or contributing to the habitual intoxication of her husband which rendered him wholly incompetent to work: ⁴³ "The health of the husband, and his ability to labor are often, to a greater or less extent, the means of the wife's support. In many cases, to destroy these is to destroy her means of support. To take away the husband's power to accumulate means of future support for his wife is within the meaning of the law, to injure her in her means of support." It has been held that as an element of injury to means of support, the wife may recover of a dealer causing or contributing to her husband's intoxication, the expenses of medicine and medical attendance paid from her own earnings.⁴⁴ Where the means of support have been impaired but not wholly destroyed by the acts complained of, then it is proper for the jury to consider the difference between the intoxicated person's actual earnings after the acts complained of and the amount he would otherwise have earned but for the intoxication, together with the other elements above noted.⁴⁵ In other words, in estimating the damages for injury to means of support it is largely a question as to what plaintiff has lost by the wrongful acts of defendant.⁴⁶ Thus, in an action under the statute

⁴² *Sellars v. Foster*, 27 Neb. 118; 42 N. W. 907.

⁴³ *Mulford v. Clewell*, 21 Ohio St. 191.

⁴⁴ *Coleman v. People*, 78 Ill. App. 210.

⁴⁵ *Thomas v. Dansby*, 74 Mich. 398; 41 N. W. 1088.

⁴⁶ In the case of *Bellison v. Ap-land*, 115 Iowa, 599; 89 N. W. 22, the court said: "The seventh paragraph of the court's charge told the jury that it was the husband's duty to furnish the wife the comforts and surroundings reason-

able and necessary for the position in society in which she lived, and that if her husband had failed to so provide for her, and that such failure resulted from his intoxication, caused or contributed to by the defendant, she was entitled to recover. It is manifest that the question for the jury on this branch of the case was not what the husband ought to have done in the way of support of the wife, but what he had in fact done prior to the alleged tort of the defendant. There is nothing in the

where the testimony showed that plaintiff's husband had provided for her as well after the debauch complained of as before, and that the only real difference that the loss of the money spent on the debauch made was that plaintiff would have that much less money if her husband should die before she, it was held that no injury to her means of support had been established and the court should have so instructed the jury.⁴⁷ It is also true that in an action by a wife for injury to her means of support by reason of the intoxication of her husband, although the previous intemperate habits of the husband not caused by the acts of the defendant will not justify a recovery, yet they may be considered by the jury as affecting the measure of damages.⁴⁸ It is also true that the right of recovery is not defeated because the intoxicated person only rendered partial support prior to the acts complained of. Thus, in an action brought by a child whose father died

record tending to show the station in society occupied by the plaintiff, or that she had in the past been provided for in the manner indicated by the instruction. It was simply a question of what she had lost by the defendant's wrongful acts, and the instruction was not confined to this, as it should have been." But see *Maloney v. Dailey*, 67 Ill. App. 427.

⁴⁷ *Manger v. Phillips*, 139 Mich. 61; 102 N. W. 292; 11 Detroit Leg. N. 748.

Damages may be recovered for lack of support, though the deceased did not wholly support the plaintiff. *Buck v. Maddock*, 167 Ill. 219; 47 N. E. 208; affirming 67 Ill. App. 466.

It has been held that proof of damages should be made in order to recover. *Sauvage v. Trouillet*, 3 Man. S. C. (Canada) 276.

And also that a verdict in favor of a wife will be sustained, al-

though the evidence fails to show the cost of her support. *Olmstead v. Noll*, 82 Neb. 147; 117 N. W. 102.

Many statutes allow the wife to bring the action for support of herself and children, in which event she can recover full support. *Rosecrantz v. Showmaker*, 60 Mich. 4; 26 N. W. 794; *Eastwood v. Klann* (Neb.), 120 N. W. 149.

⁴⁸ In the case of *Uldrich v. Gilmore*, 35 Neb. 288, 53 N. W. 135, the court said: "Under the statute, every person who furnishes intoxicating liquors to another, although he may be a drunkard, is liable for all the damages which result therefrom. While the fact of the intemperate habits of Mr. Gilmore prior to and at the time of the sales in controversy, does not relieve the saloon keepers from responsibility, yet such fact may properly be considered as affecting the measure of damages."

from the effects of intoxicating liquors sold by the defendant, it was held that the plaintiff could recover for whatever loss of support he had sustained, although his father did not wholly support him prior to his death.⁴⁹

Sec. 1071. Mental suffering.

It seems to be quite firmly established that in actions under the "civil damage" statute there can be no recovery for, nor can the jury take into consideration in determining the question of damages, anxiety, mortification, disgrace, mental anguish or suffering, wounded feelings and sorrow, or the loss of society or companionship suffered by the plaintiff by reason of the acts of the defendant.⁵⁰ As was said by the Illinois court:⁵¹ "The statute contemplates injury in person or property or means of support, and not mental anguish." But in Iowa it is held that where the mental suffering results from an injury to plaintiff's person due to an act of violence on the part of the intoxicated person, then the jury are permitted to take such mental suffering into consideration in assessing the damages.⁵² And in Michigan under a statute

⁴⁹ Buck v. Maddock, 67 Ill. App. 466; affirmed in 167 Ill. 219; 47 N. E. 208; Maloney v. Dailey, 67 Ill. App. 427.

Her measure of damages is the present value of the sum the deceased husband would probably have contributed to her support during their joint expectancy of life, and the amount he probably would have contributed to their children during their dependency, the same being less than the deceased's expectancy. Young v. Beveridge, 81 Neb. 180; 115 N. W. 766.

The wife may recover damages resulting subsequent to the bringing of the action, where they are the result of the illegal sales. Lucker v. Liske, 111 Mich. 683; 70 N. W. 421.

If she consent to the sales, that will bar her cause of action. Earp v. Lilly, 120 Ill. App. 123; affirmed, 217 Ill. 582; 75 N. E. 552; McDonald v. Casey, 84 Mich. 505; 47 N. W. 1104.

⁵⁰ Freese v. Tripp, 70 Ill. 496; Meidel v. Anthis, 71 Ill. 241; Brantigan v. While, 73 Ill. 561; Koerner v. Oberly, 56 Ind. 284; 26 Am. Rep. 34; Kearny v. Fitzgerald, 43 Iowa, 580; Mulford v. Clewell, 21 Ohio St. 191.

⁵¹ Freese v. Tripp, 70 Ill. 496.

⁵² In the case of Ward v. Thompson, 48 Iowa, 588-592, the following instruction was held good: "If you find the plaintiff entitled to recover for violence to her person, in measuring such damage, it is proper for you to consider any physical pain caused

which authorizes a recovery by a wife who is injured in person or property or means of support or otherwise, it is held that with the phrase "or otherwise" added to the statute is broad enough to permit a recovery of damages for mental suffering caused by the disgrace and discomfort attendant upon the besotted condition of a husband.⁵³ But the same court holds that a plaintiff cannot recover for injury to her feelings on account of an injury her father or husband may have received because of his intoxication.⁵⁴ The court in making the distinction says: "The injury to the feelings, contemplated by the statute, is the shame, mortification or disgrace arising from the fact of intoxication, and it does not include, as an element of actual damages, the mental anguish because of the injury received by the person so intoxicated."

Sec. 1072. Exemplary damages.

Exemplary damages, so far as that term is used in construing civil damage statutes, are punitive in their character and designed to punish the defendant for some positive wrong he has willfully inflicted upon or caused the plaintiff, or for some very gross neglect of plaintiff's rights in furnishing another intoxicating liquors at the time alleged in the declaration.⁵⁵ Where the statute permits a recovery of ex-

thereby, together with any mental anguish, blame or suffering resulting from such treatment," says the court: "Any violent interference with one's person is in law an injury, and mental suffering resulting therefrom is a ground for damages." *Kear v. Garrison*, 13 Ohio Cir. Ct. 447.

In Texas, a statute allows a recovery of \$500 damages, where a sale was made after notice not to sell, as liquidated damages. *Fay v. Williams* (Tex. Civ. App.), 41 S. W. 497.

⁵³ *Radley v. Leider*, 99 Mich. 431; 58 N. W. 366.

⁵⁴ *Lissing v. Beach*, 99 Mich. 431; 58 N. W. 366.

⁵⁵ *Larzelere v. Kirchgessner*, 73 Mich. 276; 41 N. W. 488; *Peacock v. Oaks*, 85 Mich. 578; 48 N. W. 1082; *Campbell v. Harmon*, 96 Me. 87; 51 A. 801; *Buck v. Mad-dock*, 167 Ill. 219; 47 N. E. 208; affirming 67 Ill. App. 466; *Earp v. Lilly*, 217 Ill. 522; 75 N. E. 552; *Kadgin v. Miller*, 13 Ill. App. 474; *Murphy v. Curran*, 24 Ill. App. 475; *Kennedy v. Sullivan*, 34 Ill. App. 46; *McMahon v. Sankey*, 133 Ill. 636; 24 N. E. 1027; *England v. Cox*, 89 Ill. App. 551; *Hanewacker v. Ferman*, 47

emplary damages it cannot be said that it permits a recovery of such damages in all actions, without regard to the circumstances attending and accompanying the wrongful act of the defendant, but simply to place this new class of wrongs, created and defined by the statute, upon the same footing, and subject to the same rules of damages as other actionable torts. Thus, says the Maine Supreme Court,⁵⁶ in a case where a wife was seeking damages against a dealer for causing the intoxication of her husband and where the sales were a willful violation of the law: "Applying this construction of the statute to the case at bar, we find such circumstances of aggravation, showing a willful and wanton violation of the law by the defendants without regard to the rights of others, or the consequences which might follow their illegal acts, as would justify the jury, in the exercise of a sound discretion, in awarding exemplary damages." A few illustrations will make the rule clear. Thus, proof that defendant with knowledge of the drunken and helpless condition of deceased, placed him in his buggy, alone, at night, will justify a verdict for exemplary damages.⁵⁷ Again, in an action under the statute brought by a wife for injury to her means of support against a dealer for causing his intoxication, where the evidence showed that defendant after repeated warnings and protests had been made to him by plaintiff, surreptitiously sold intoxicating liquor to her husband after he had acquired the habit of drinking to excess, and under circumstances which advised defendant of the impoverished condition of plaintiff's family, it was held that exemplary damages were properly awarded.⁵⁸ Again, in an action under the statute for selling

Ill. App. 17; *Wolf v. Johnson*, 152 Ill. 280; 38 N. E. 886; *Kreiter v. Nichols*, 28 Mich. 496; *Ganssly v. Perkins*, 30 Mich. 492; *Davis v. Standish*, 26 Hun. 608; *Neu v. McKechnie*, 95 N. Y. 632; 47 Am. Rep. 89; *Wilber v. Dwyer*, 69 Hun. 507; 23 N. Y. Supp. 395; *Pegram v. Stortz*, 31 W. Va. 220; 6 S. E. 485.

⁵⁶ *Campbell v. Harmon*, 96 Me.

87; 51 A. 801; citing *Reid v. Terwilliger*, 116 N. Y. 530; 22 N. E. 1091.

⁵⁷ *Kennedy v. Sullivan*, 34 Ill. App. 46; affirmed in 136 Ill. 94; 26 N. E. 382.

⁵⁸ *Hamwacker v. Ferman*, 47 Ill. App. 17. See also *Wolfe v. Johnson*, 152 Ill. 280; 38 N. E. 886; *Rouse v. Melsheimer*, 82 Mich. 172; 46 N. W. 372.

intoxicating liquors to the husband of plaintiff in consequence of which he so lost control of himself that he was drowned, it was held that the fact that defendant sold without a license was a ground for giving exemplary damages.⁵⁹ But in Michigan the rule above announced, which was followed in the earlier cases,⁶⁰ has been greatly modified by the later decisions of this court. Thus, says the Michigan court:⁶¹ "While

⁵⁹ In the case of *Davis v. Standish*, 26 Hun, 608, the court said: "The court charged that the fact that the defendant was selling liquor without a license might be considered as a basis for exemplary damages, and it was excepted to. It is true the statute, in giving a right of action, makes no distinction between the licensed and the unlawful selling of liquor. But it is also true that it authorizes the recovery of exemplary as well as compensatory damages. The statute has not said in what cases punitive damages may be given, and we must therefore look to the common law. It is argued by the appellant's counsel that it is illogical and unjust to allow the plaintiff, in an action of this kind, to recover damages by way of punishment to the defendant for the violation of a public statute, for which he is liable to be proceeded against criminally. But in many cases of willful wrong the evil effect of the act upon the public has been treated as an element of punitive damages. And in vindictive actions it is every day practice to charge the jury that they are to inflict damages for example's sake and by way of punishing the defendant. In view of these rules of the common law, we are inclined to be opinion that

the Legislature intended them to apply to actions brought under the statute, and that the circumstance that the defendant, in selling the liquor which produced the intoxication and the resultant injury, was acting in open violation and defiance of law, may be considered as a basis of exemplary damages." See also *Neu v. McKechnie*, 95 N. Y. 632; 47 Am. Rep. 89.

⁶⁰ *Kreiter v. Nichols*, 28 Mich. 496; *Larzelere v. Kirchgessner*, 73 Mich. 276; 41 N. W. 488; *Peacock v. Oaks*, 85 Mich. 578; 48 N. W. 1082; *Gauslay v. Perkins*, 30 Mich. 492; *Kehrig v. Peters*, 41 Mich. 475; 2 N. W. 801 (sale by barkeeper).

⁶¹ *Bowden v. Voorhies*, 135 Mich. 648; 98 N. W. 406; 10 Detroit Leg. N. 908, citing *Ford v. Cheever*, 105 Mich. 685; 63 N. W. 975; *Haviland v. Chase*, 116 Mich. 214; 74 N. W. 477; 72 Am. St. Rep. 519; *Boyden v. Haberstumpf*, 129 Mich. 138; 88 N. W. 386. In this latter case the court said: "As was said in *Ford v. Cheever*, 105 Mich. 685; 63 N. W. 976: 'It has never been the policy of the court to permit juries to award capiously any sum which may appear just to them, by way of punishment to the offender, but rather to award a sum in addition to the actual damages proven, as

some of the earlier decisions of this court sustain the view that exemplary damages under this statute may be given to punish the defendant * * * later decisions distinctly repudiate that view, and it is now settled that exemplary damages under this statute, like exemplary damages under the common law in this State, may be given only to compensate injury to feelings caused by the wanton or reckless act of the defendant." Where the statute, it has been held, does not expressly provide for the recovery of exemplary or punitive damages, none can be recovered.⁶² Nor can ex-

that, in their judgment, constitutes a just measure of compensation for injury to the feelings in view of the circumstances of each particular case.' We think it should not be permitted that a jury be given leave to award damages as 'smart money' or in the way of punishment to make an example for the public good." See also *Ford v. Cheever*, 105 Mich. 679; 63 N. W. 975, as to duty of court in its instructions.

⁶² In the case of *Garrigan v. Thompson*, 17 S. D. 132; 95 N. W. 294, the court said: "We are of the opinion that the appellants are right in their contention, and that the court committed error in instructing the jury that they might find not only for actual, but for exemplary and punitive damages. The clause in § 16, chapter 72, Laws 1897, giving to a married woman a right to maintain an action for damages sustained by her and her children on account of the traffic in intoxicating liquors, does not in terms confer upon her a right to recover for exemplary or punitive damages. The section provides, 'She may recover for all damages sustained

by her or by her children on account of such traffic.' This does not include exemplary or punitive damages, but only such damages as she and her children actually sustain by reason of the sale of intoxicating liquors to her husband. It is true that in the sixth section the form of the bond required of the person engaging in the sale of intoxicating liquors is given. It is provided that the person so selling 'shall also pay all damages, actual and exemplary, that may be adjudged to any person or persons for injuries inflicted upon him or them either in person or property or in means of support or otherwise, by reason of the selling, furnishing or delivering such liquors.' But, in the section of the law giving to married women a right of action, it will be noticed that exemplary and punitive damages are omitted. It would seem, therefore, notwithstanding the form of the bond prescribed, the Legislature did not confer upon married women the right to a judgment for such exemplary and punitive damages, and hence a judgment containing such damages cannot be sustained."

emplary damages be recovered unless some actual damages are proven, such as actual injury to the person, property or means of support of plaintiff.⁶³ However, in New York, in an action under the statute brought by a wife against the lessor and lessee of a saloon, it was held proper for the trial court to exclude an instruction which charged the jury that "for the plaintiff to recover exemplary damages against the defendant, the lessor, she must *prima facie* make out a case against him." Said the court: "As the charge as made plainly limited plaintiff's recovery to compensatory damages only and excluded from the jury's consideration any element of exemplary damages, the request to charge presented a mere abstraction which was properly refused."⁶⁴ It is also held that where the statute makes the vendor and his lessor jointly liable for injuries sustained by reason of the sales of intoxicating liquors and permits the award of exemplary damages, before exemplary damages can be awarded in any action under such statute, evidence of aggravating circumstances with which both defendants are connected must be received.⁶⁵ And if aggravating circumstances are proved

⁶³ Freese v. Tripp, 70 Ill. 496; Meidel v. Anthiss, 71 Ill. 241; Fentz v. Meadows, 72 Ill. 540; Keedy v. Howe, 72 Ill. 133; Thill v. Pohlman, 76 Iowa, 638; 41 N. W. 385; Miller v. Hammers, 93 Iowa, 746; 61 N. W. 1087; Gilmore v. Mathews, 67 Me. 517.

⁶⁴ Bennett v. Levi, 19 N. Y. Supp. 226.

⁶⁵ In the case of Reed v. Terwiliger, 116 N. Y. 530; 22 N. E. 1091, the court said: "The substance of the statute is that, whenever the person, property or means of support of certain classes of persons shall be injured by any intoxicated person, or in consequence of the intoxication of any person, they shall have a right of action, and the person who shall

have sold or given the liquors causing the intoxication in any degree, and any person owning, renting or permitting the occupancy of the premises having knowledge that the liquors were to be sold therein, shall be liable, severally and jointly, for the injury, for all damages sustained, and for exemplary damages. The Legislature has in this statute defined the elements of a new cause of action, and who may be liable for it. The Legislature, however, made no change in the rules of ascertaining and determining the damages, or the limits of liability in the newly created causes of action, but left them subject to the existing rules of damages, and to the facts established upon the

against the vendor but not against the lessor, the plaintiff is limited in his recovery to compensatory damages.⁶⁶ It is also

trial. The damages recoverable in actions for torts or wrongs have long since been classified into 'compensatory' and 'punitive' or 'exemplary.' Compensatory damages were not recoverable without proof of facts additional to the facts required to recover compensatory damages. The distinction between the two kinds was quite as well defined and as essential as the distinction between different causes of action. 'Compensatory' damages, as indicated by the word employed to characterize them, simply make good or replace the loss caused by the wrong. 'Exemplary' damages, as also indicated by the word employed to characterize them, besides making good the loss, serve to punish and make an example of the wrongdoer. Compensatory damages proceed from a sense of natural justice, and are designed to repair that of which one has been deprived by the wrong of another. To this species of damages the Legislature or the courts have, from time to time, in certain classes of wrong, added another kind of damage, when their commission was prompted or characterized by motives of malice, cruelty, oppression, wantonness or recklessness. It may be reasonably presumed that the Legislature, knowing that was giving a cause of action for a new additional wrong, and wishing to stamp this wrong with the same character as other wrongs, declared from the outset and with-

out waiting the doubtful or dilatory action of the courts, that exemplary damages might be recovered in this class of actions.

"It cannot be supposed the Legislature intended to go farther than to place this wrong upon the same plane with other wrongs where exemplary damages may be recovered, when the evidence upon the trial will justify such damages in accordance with well-established and recognized rules. A contrary conclusion would make one who rents a building or permits it to be occupied without reward, knowing that liquors are to be sold therein under a license from the public authorities, and with no other connection with the statutory wrongdoers, and without other personal fault or misconduct, liable, at least in part, to the punishment inflicted for a violation of the criminal laws. I am not willing to give such construction to the statute in question. Neither its language nor its purpose require or would justify it," citing *Rawlins v. Vidvard*, 34 Hun, 205; *Davis v. Standish*, 26 Hun, 608-615; *Jackson v. Brookins*, 5 Hun, 530-535; *Ketchum v. Fox*, 5 N. P. Supp. 272, and reversing *Reed v. Terwilliger*, 42 Hun, 310.

⁶⁶ In the case of *Reid v. Terwilliger*, 116 N. Y. 530; 22 N. E. 1091, the court said: "I do not think the fact that the Legislature has enabled the injured party to bring a joint action against the vendor of the liquor and the owner of the premises affects the decis-

the rule that in all actions in which exemplary damages are allowed, the allowance thereof rests in the sound discretion of the jury and they should not be instructed that any fact should go in aggravation of exemplary damages.⁶⁷ It has also been held in an action brought by the wife for causing or contributing to the habitual intoxication of the husband that it was error for the court to instruct the jury that for sales of liquor made by defendant to plaintiff's husband, which produced or contributed to his habitual intoxication, the defendant would be liable for all damages sustained therefrom by plaintiff, as well as for exemplary damages, for the reason that whoever contributes to the formation of habits of intoxication is liable only for the damages caused by his own act.⁶⁸ In some States exemplary or punitive damages are not allowable where the sales counted upon in the complaint constitute a penal offense, even though the statute permits it.⁶⁹ Says the Indiana court:⁷⁰ "We are of the opinion that the provision of the statute allowing exemplary damages, as applied to cases like the present, violates the fundamental principles embodied in the bill of rights, that no person shall be put in jeopardy twice for the same offense, and that, as applied to such cases, it is inoperative and void." In the

ion of the question under consideration. Joint actions may be brought against joint wrongdoers, and a joint judgment be obtained. Not, however, for the highest sum that either defendant may be liable for, but for the lowest. The plaintiff has an election in an action for tort to sue joint wrongdoers severally or jointly. If he sues them jointly, he will be limited to the lowest amount of damages which either defendant may be severally liable for upon the facts established."

⁶⁷ *Goodenough v. McGrew*, 44 Iowa, 670.

⁶⁸ *Flint v. Gauer*, 66 Iowa, 696; 24 N. W. 513, citing *Richmond v.*

Shickler, 57 Iowa, 486. 10 N. W. 882; *Ennis v. Shily*, 47 Iowa, 552; *Engleken v. Webber*, 47 Iowa, 558.

⁶⁹ *Koerner v. Oberly*, 56 Ind. 284; 26 Am. Rep. 34; *Schafer v. Smith*, 63 Ind. 226; *Struble v. Nodwift*, 11 Ind. 64; *Albrecht v. Walker*, 73 Ill. 69. But see *Brannon v. Silvermail*, 51 Ill. 434.

⁷⁰ *Koerner v. Oberly*, 56 Ind. 284; 26 Am. Rep. 34, citing *Johnson v. Vuthrick*, 7 Ind. 137; *Struble v. Nodwift*, 11 Ind. 64; *Butler v. Mercer*, 14 Ind. 479; *Nossaman v. Rickert*, 18 Ind. 350; *Humphries v. Johnson*, 20 Ind. 190; *Meyer v. Bohlfling*, 44 Ind. 238.

early cases in Illinois, the Indiana rule seems to have been followed.⁷¹ Thus, says the court:⁷² “This court held, in *Freese v. Tripp*,^{72*} that damages could not be awarded by way of punishment of the seller, as the law has provided for that by indictment to be followed by fine and imprisonment. ‘Vengeance is mine,’ saith the law. * * * If appellant’s conduct was in violation of law and outraged the public, the public have their remedy by indictment, and punishment of the guilty will assuredly follow. Can the law be said to be vindicated by putting money in the pocket of an individual under the claim of a real or fancied wrong done by another?” The court then lays down the rule for its own guidance in allowing exemplary damages in the following language: “Where a seller of intoxicating drinks had been notified not to sell in a particular case, or where he placed temptations in the way of one to seduce him from the path of sobriety, or where one, who had been an habitual toper, was endeavoring to reform and free himself from the toils in which he had been bound, if he should be interfered with by the dram-seller to conquer his resolution, such a person would be a fit subject for exemplary damages, and such damages, so awarded, would be in the nature of compensation to the injured party.” The doctrine above laid down by the Illinois court seems to have been exploded by the later cases. Says the court in a later case:⁷³ “It is a misapprehension that *Freese v. Tripp*^{73*} sustains the position that exemplary damages cannot be recovered against the saloon keeper merely because he is liable to be indicted for the same act. We have frequently held that exemplary damages cannot be recovered unless there is first laid a basis of proof of actual damages; but where there is proof of actual damages, exemplary damages (the proof warranting it) may also be given, without regard to whether the party may or may not be liable to indictment and punishment criminally for the act or acts

⁷¹ *Freese v. Tripp*, 70 Ill. 496;
Albrecht v. Walker, 73 Ill. 69.

⁷² *Albrecht v. Walker*, 73 Ill. 69.

^{72*} 70 Ill. 496.

⁷³ *Brannon v. Silvermail*, 81 Ill.
434, citing *Roth v. Eppy*, 89 Ill.
283.

^{73*} 70 Ill. 469.

complained of." In Nebraska it is held that exemplary damages are not allowable in actions under the statute under any circumstances. The reasons for so holding are very cogently stated by the court in the following language:⁷⁴ "Where damages are awarded for an injury they are compensation therefor so far as money can compensate for the injury. In law, the party injured, upon being allowed this compensation, has no further claim upon the defendant for that injury, therefore he is not entitled to recover more. If it be said that such damages are given as a punishment, it may be answered that the State inflicts punishment, not individuals. As between individuals courts enforce rights. The law protects every one in the enjoyment of his property, and it cannot be taken from him under the pretext of punishment and given to another." In Ohio, in an early case, it was held that the jury in assessing exemplary damages may at the same time consider the allowance of reasonable counsel fees for plaintiff.⁷⁵

⁷⁴ *Roose v. Perkins*, 9 Neb. 304; 2 N. W. 715; 31 Am. Dec. 409, citing *Boyer v. Barr*, 8 Neb. 68.

⁷⁵ *Shafer v. Patterson*, 4 Ohio Dec. 157; 1 Cleve. Law Rep. 84.

Exemplary damages allowed by statute without a charge of willfulness. *Rude v. Faker*, 143 Ill. App. 402.

Exemplary damages discretionary with jury; allowed by statute. *Peterson v. Brockey* (Iowa), 119 N. W. 967.

Sale after notice not to sell, exemplary damages may be allowed. *Jokers v. Bongman*, 29 Kan. 109; 44 Am. Rep. 625; *Rosecrantz v. Showmaker*, 60 Mich. 4; 26 N. W. 794 (where sale willfully made).

Sale to person who defendant must have known to be in the habit of becoming intoxicated, exemplary damages allowed. *Earp v. Lilly*, 120 Ill. 123; affirmed 217 Ill. 582; 75 N. E. 552.

See *Buck v. Maddock*, 67 Ill. App. 466; affirmed 167 Ill. 219; 47 N. E. 208; *Weiser v. Welch*, 112 Mich. 134; 70 N. W. 438 (by statute); *Kear v. Garrison*, 13 Ohio Cir. Ct. R. 447 (sale to husband by defendant's agent whose name had been put on the prohibited or "black" list).

Under a statute making the lessor liable for the illegal sales made by his lessee, exemplary damages may be recovered. *Beckerle v. Brandon*, 133 Ill. App. 114; 229 Ill. 180; 82 N. E. 283.

Where the complaint laid the damages at a certain amount, and alleged special damages in the aggregate amounts to the sum sued for, the plaintiff can recover only the special damages, and cannot recover for general damages. *Wright v. Smith*, 128 Ga. 432; 57 S. E. 684.

Sec. 1073. Excessive damages.

The question as to what is excessive damages cannot be determined by any fixed rule but is determined largely from the circumstances of each particular case. A few illustrations will suffice to demonstrate this proposition. Thus, in an action by a widow against a dealer for causing the intoxication of her husband resulting in his death, the decedent being thirty-eight years old at the time of his death and capable of earning three dollars a day and having devoted his earnings to the support of his family, it was held that a verdict of eight hundred and fifty dollars was not excessive. Indeed, the court intimated that the evidence would have sustained a verdict for the full amount asked—five thousand dollars.⁷⁶ Again, in an action by a wife for causing and contributing to the habitual intoxication of her husband where it was shown that prior to the acts complained of the husband was contributing to the support of the family from fifty to sixty dollars a month and had an earning capacity of four dollars and a half a day, that prior to the acts complained of he had saved two hundred and fifty dollars, that after he began to drink to excess in defendant's saloon and others he contributed nothing to plaintiff's support, that he squandered the two hundred and fifty dollars, that he finally absconded and abandoned his family, and that at the time of the trial he was thirty-six years of age, it was held that a judgment of four thousand dollars was not excessive.⁷⁷ Again, in an action under the statute by a widow to recover for the death of her husband, where the evidence showed that the decedent was twenty-eight years old, healthy, well educated and of steady habits, that he was a machinist by trade and had been a soldier but was discharged, that for some time after such discharge he was out of work, it was held that a verdict of two thousand dollars was not excessive.⁷⁸ So also in an action under the statute for causing and contributing to the habitual

⁷⁶ *Schiek v. Sanders*, 53 Neb. 664; 74 N. W. 39.

⁷⁷ *Jessen v. Wilhite*, 74 Neb. 608; 104 N. W. 1064.

See also *Brown v. Butler*, 66 Ill. App. 86 (\$1,000).

⁷⁸ *Marshall v. Langhran*, 47 Ill. App. 29.

intoxication of plaintiff's husband where the evidence showed that he had by drink been reduced from a prosperous business man to a sot, his property ruined, it was held that one thousand dollars was not excessive damages though others than the defendant had been selling liquors to him.⁷⁹ So, again, in an action under the statute by a wife against a dealer and his lessor for causing the habitual intoxication of her husband, where the evidence tended to prove that the habitual intemperance of plaintiff's husband deprived her of the benefit of his former earning capacity and usefulness as a means of support, and that it was likely to continue so to do for some time at least, thus entailing on her greater mental and physical exertions in the care and support of herself and children, it was held that a verdict of one thousand dollars was not excessive.⁸⁰ It is seldom that judgments are reversed for excessive damages where exemplary damages are allowed by law and the evidence warrants the imposition of such damages. The rule seems to be that the amount of such damages is left to the sound discretion of the jury, subject to be controlled by the trial court when the discretion is abused.⁸¹ Thus, in a suit under the statute by a wife for selling to her husband after notice had been given defendant not to sell where the evidence showed that plaintiff gave her husband fifty dollars to buy a horse and that with this money the husband got on a drunken spree upon liquor sold by defendant and spent twenty-nine dollars thereof, it was held that a verdict of two hundred dollars was not excessive, there being twenty-nine dollars actual damages shown and the sales to plaintiff's husband being without excuse or palliation, and that exemplary damages could be assessed.⁸² But when the element of exemplary damages does not enter in, the verdict must not be more than the actual damages proven, and where

⁷⁹ *Bunyan v. Loftus*, 90 Iowa 122; 57 N. W. 685.

⁸⁰ *Bennett v. Levi*, 19 N. Y. Supp. 226; see also 23 Ill. App. 487; *Brown v. Butler*, 66 Ill. App. 86; *Gorey v. Kelley*, 64 Neb. 605;

90 N. W. 554; *Warrick v. Rounds*, 17 Neb. 411; 22 N. W. 785.

⁸¹ *Jockers v. Borgman*, 29 Kan. 109; 44 Am. Rep. 625.

⁸² *McEvoy v. Humphrey*, 77 Ill. 388; see also *Jockers v. Borgman*, 29 Kan. 109; 44 Am. Rep. 625.

such is the case the plaintiff will be required to file a remittitur to the amount of the excess or the case will be reversed.⁸³ Thus, where in an action under the statute brought by a wife against a dealer for causing the intoxication of her husband which resulted in his death, where the evidence showed that deceased had only partially supported his family and was fifty-eight years old at the time of his death, it was held that a verdict for twenty-five hundred dollars was excessive and plaintiff was required to file a remittitur of five hundred dollars.⁸⁴

Sec. 1074. Mitigation of damages.

We have already found that it is no defense in a suit under the "civil damage" statute for the defendant to show that he had instructed his bartenders not to make the sales complained of, for it is a well established rule that the master is responsible for acts performed by his servants although contrary to instructions.⁸⁵ But in those States where exemplary damages are allowed, where the defendant, in good faith, has forbidden his clerk or bartender to sell or give liquors to the party with whom he is charged with giving or selling, or where he has forbidden such clerk or bartender to give or sell intoxicating liquors in the manner and at the times as charged in the declaration, and such clerk or bartender willfully disobeys him, without defendant's connivance, that would be a fair subject for consideration in mitigation, not of the actual damage which may have been caused and done by the unauthorized acts of the servant, but of any exemplary damages claimed.⁸⁶ But in those States where exemplary damages are not allowable evidence of such instructions is not admissible.⁸⁷ Where exemplary damages are allowed, it has

⁸³ Roberts v. Taylor, 19 Neb. 184; 27 N. W. 87; Currant v. Percival, 21 Neb. 434; 32 N. W. 213.

⁸⁴ Curran v. Percival, 21 Neb. 434; 32 N. W. 213.

⁸⁵ *Supra*.

⁸⁶ Fentz v. Meadows, 72 Ill. 540; Keedy v. Howe, 72 Ill. 133;

Brantigam v. While, 73 Ill. 561; Bates v. Davis, 76 Ill. 222; Betting v. Hobbitt, 142 Ill. 72; 30 N. E. 1048; affirming 42 Ill. App. 174; Steele v. Thompson, 42 Mich. 594; 4 N. W. 536.

⁸⁷ In the case of Houston v. Gran, 38 Neb. 687; 57 N. W. 403, the court said: "By the ninth in-

been held competent in mitigation of such damages to show the previous habits of the intoxicated person as tending to disprove any shock to plaintiff.⁸⁸ Thus, in an action by a parent for damages from the sale of intoxicating liquor to a minor child, who became intoxicated thereby, it was held that the jury might consider in mitigation of exemplary damages, and as tending to show the extent of injury to plaintiff's feelings, the fact that such child had often been intoxicated before.⁸⁹ It is not proper in mitigation of damages for the jury to take into consideration the fact that the plaintiff has instituted a suit for divorce against the intoxicated

struction the jury were told that it was proper for them to consider in determining whether or not the defendant Gran or his employees did furnish intoxicating liquors, certain evidence tending to show that Gran had directed his servants not to sell intoxicants to the deceased. It is true, this language was qualified by the further instruction that Grau was nevertheless responsible for acts performed by his servants, although contrary to his instructions; but we think the court erred in admitting evidence of these instructions, and in directing the jury that this evidence should be considered. We do not think that the fact that Gran had directed his servants not to sell Houston intoxicants tends at all toward proving the issue in the case; that is, the fact of such sale. Where exemplary damages are allowed, the evidence might have been material in mitigation of damages, but under our rule of conferring compensation alone, Gran was liable for such compensation on account of his servant's acts, although done against his instructions, and the

giving of those instructions does not tend to disprove the fact of sale."

⁸⁸ *Bailey v. Briggs*, 143 Mich. 303; 105 N. W. 863; 12 *Detroit Leg. N.* 982.

⁸⁹ In the case of *Bailey v. Briggs*, 143 Mich. 303; 106 N. W. 863; 12 *Det. Leg. N.* 982, the court said: "Complaint is made that the circuit judge allowed the jury to consider the fact that this boy had, before the sale by defendant, been in the habit of getting intoxicated as bearing upon the amount of damages for injury to feelings. The court said in substance that the shock to plaintiff could not be so great in case the boy had to her knowledge been often intoxicated before, as it would be to discover the downfall of one previously sober and of perfectly correct habits. We have not quoted the language, but given the effect of the charge. We think this instruction is warranted by the experience of mankind, and is the law. It is by no means true that previous lapses furnish a defense or an excuse for unlawful sales by de-

person.⁹⁰ Thus, it was held in an action by a wife under the statute against a dealer for causing the habitual intoxication of her husband that an instruction which told the jury in substance that if the plaintiff had commenced an action of divorce against the husband, and if the plaintiff would not live with him under any circumstances if he should return to her, then the jury could not allow her damages for the loss of means of support beyond the date of the commencement of the suit for divorce, was properly refused.⁹¹ Said the court: "The instruction was properly refused. The action is not for damages for the loss of the society and companionship of the husband, but for damages to the means of support of the plaintiff and her children. If they have been permanently deprived of his support, and the jury were warranted in finding that they were, the sentiments the plaintiff may entertain toward her husband at this time, as well as her speculations as to whether she would receive him should he return sober, are wholly immaterial." It is also the law that abusive conduct by plaintiff toward the intoxicated person and toward the party causing the intoxication cannot be considered by the jury in mitigation of damages.⁹² Nor is it an

fendant. But in measuring the injury to plaintiff's feelings the previous habits of the minor must be an element to be considered."

⁹⁰ *Jessen v. Wilhite*, 74 Neb. 608; 104 N. W. 1064.

⁹¹ *Jessen v. Whilite*, 74 Neb. 608; 104 N. W. 1064.

⁹² In the case of *Gough v. State*, 32 Ind. App. 22; 68 N. E. 1043, the court said: "The only question presented as to this offered evidence is whether it was admissible in mitigation of damages. The offered evidence, so far as the brief points out the places in the record where it may be found, was with reference to certain conduct of the relatrix at different times; that, at a time not

stated, she had abused her husband on the street and has assaulted him; that at another time she went to appellant's saloon and attempted to demolish it with a hatchet; that during the months when the sales were alleged to have been made to the husband she would go down town and whip her husband on the way home. The statute upon which the action is based (section 7288, Burns Rev. St. 1901), gives a right of action to relatrix for injury or damages sustained to her person or property or means of support. The record does not disclose that the matters sought to be inquired about by the offered evidence had any connection with the injurious

element in mitigation of damages in a suit for death of a party caused by intoxication that decedent during his life had accumulated property which upon his death went to plaintiff.⁹³ The Supreme Court of Nebraska in commenting upon an instruction of the trial court to the opposite effect, said: "The plain inference from this language, framed as it was, and in the connection it appeared, was that the fact that the father and husband left an estate should go in mitigation of damages. The contrary is true. If a man deserts his family, leaving nothing to their support, and has accumulated no property, those facts constitute evidence tending to show that very slight, if any, damage results to the family from his death. If, on the contrary, a man is of industrious and economical habits, of business sagacity, and has in the past supported his family and accumulated property, the natural presumption is that such habits will continue if his life be prolonged, and that the damage to the family by reason of the untimely death is enhanced by those very facts. The estate left to the family would presumably not be less productive in the hands of the husband and father himself, had he lived, and its income would inure to the benefit of the family as much had he lived as after his death."

acts resulting in relatrix's injury. They were not matters of mitigation, and were not relevant to the issues being tried."

⁹³ *Houston v. Gran*, 38 Neb. 617; 51 N. W. 403.

If the defendant desires to show in mitigation of damages that plaintiff brought the suit to harass him and to aid his competitors, he should tender an issue of that fact. *Liebler v. Carrel*, 155 Mich.

196; 118 N. W. 975; 15 Detroit L. N. 976.

In an action by a mother for sales to her son, the defendant may show where the damages claimed are for injury to her feelings, that the son was in the habit of becoming intoxicated prior to the sales to him. *Liebler v. Carrel*, 155 Mich. 196; 118 N. W. 975; 15 Det. L. N. 976.

ARTICLE IX.—TRIAL AND REVIEW.

SECTION.	SECTION.
1075. Questions for jury.	1084. Intoxication cause of injury.
1076. Who made the sales.	1085. Instructions on measure of damages.
1077. Proximate cause of the injury.	1086. What constitutes intoxication.
1078. Plaintiff contributing to the injury.	1087. Injury to property.
1079. Plaintiff's injury to property or support.	1088. Unlawful sales.
1080. Instructions in general.	1089. Judgment against principal, when binding on surety.
1081. Instructions invading province of jury.	1090. Lien of judgment on premises used.
1082. Hypothetical instructions.	1091. Costs.
1083. Instructions on exemplary damages.	

Sec. 1075. Questions for jury.

Where the complaint or declaration states a cause of action, there are four primary questions which are in the sole province of the jury to answer by their verdict under proper instructions of the trial court, unless there be an absolute want of evidence upon any one of these questions, in which event it becomes the duty of the court to so instruct the jury. These questions are: (a) Did the defendant make the sales or gifts of intoxicating liquor causing the intoxication as alleged in the complaint or declaration? (b) Did the intoxicating liquors cause the injury as alleged in the complaint or declaration? (c) Did the plaintiff contribute to the injury described in the complaint or declaration? (d) Was plaintiff injured in his or her person, property or means of support in the manner as described in the complaint or declaration? Whenever there is any evidence tending to support any of these propositions, it is exclusively the province of the jury to determine them and the trial court has no right to withdraw the determination of any of such questions from their consideration.⁹⁴

⁹⁴ Smith v. People, 141 Ill. 447; Iowa 71; 28 N. W. 440; 58 Am. 31 N. E. 425; Huff v. Aultman, 69 Rep. 213; Doty v. Postal, 87 Mich.

Sec. 1076. Who made the sales.

Did the defendant make the sales or gifts of intoxicating liquors causing or contributing to the intoxication as alleged in the complaint or declaration? In an action under the statute brought by a widow for the death of her husband caused by his intoxication from liquors sold and given to him by defendant where there was some evidence, although slight, tending to show the giving of such liquors to decedent by defendant, it was held proper to submit to the jury the question of giving him liquors.⁹⁵

Sec. 1077. Proximate cause of the injury.

Did the intoxication cause the injury as alleged in the complaint or declaration? In an action brought by a father for the death of his son resulting from the son's intoxication upon liquors sold by the defendant, where the theory of plaintiff was that the son's death was caused by his being so intoxicated as to allow the horse he was driving to bring the buggy into collision with a telephone pole near the road, and the theory of the defendant was that the negligence of the telephone company in locating the pole was the cause of the death, it was held that the question as to what was the proximate cause of the injury was for the jury.⁹⁶ Again, in an

143; 49 N. W. 534; McMahon v. Dumas, 96 Mich. 467; 56 N. W. 13; Chemlir v. Sawyer, 42 Neb. 362; 60 N. W. 547; Cornelius v. Holtman, 44 Neb. 441; 62 N. W. 891; Davies v. McKnight, 146 Pa. 610; 23 A. 320; Jaroszewski v. Allen, 117 Iowa 632; 91 N. W. 941; Temme v. Schmidt, 210 Pa. 507; 60 A. 158; Triggs v. McIntyre, 215 Ill. 369; 74 N. E. 400, affirming 115 Ill. App. 257; Currier v. McKee, 99 Me. 364; 59 A. 442.

⁹⁵ In the case of Smith v. People, 141 Ill. 447; 31 N. E. 425, the court said: "In respect to

the first objection, suffice it to say that the declaration alleged, as well the giving as the selling of intoxicating liquors, and that there was some evidence, though but slight, tending to prove the giving of such liquors." See also McMahon v. Dumas, 96 Mich. 467; 56 N. W. 13.

⁹⁶ In the case of Jaroszewski v. Allen, 117 Iowa 632; 91 N. W. 941, the court said: "There is no merit in the suggestion that the death of plaintiff's son was caused by the negligence of the telephone company in setting its poles. The question of the proximate cause

action brought by a wife under the statute against a dealer for selling her husband intoxicating liquors, it was held that it was for the jury to determine whether an attack of gangrene was the result of alcoholism, caused by sales by defendant, or whether it was a separate and intervening cause of death.⁹⁷ Again, in an action brought by a widow for the death of her husband, where there was some evidence tending to show that the husband came to his death by falling upon a sidewalk while in a state of intoxication and there was other evidence going to show that decedent had been attacked by third persons and killed, it was held to be clearly a question for the jury.⁹⁸ Again, where the evidence showed that deceased

of the injury was for the jury, and was submitted under appropriate instructions, and we cannot disturb the finding in that respect."

⁹⁷ In the case of *Temme v. Schmidt*, 210 Pa. St. 507; 60 A. 158, the court said: "In the present case there is testimony upon the part of the plaintiff, which, if believed by the jury, is sufficient to warrant a finding that the liquor sold by the defendant to the decedent was the proximate cause of the attack of alcoholism and the delirium and exposure which accompanied it. There was medical testimony to the effect that gangrene might follow as the result of alcoholism alone, although exposure would increase the liability. But it was the jury to find whether the attack of gangrene was the result of the alcoholism and the exposure induced by it, or whether the gangrene was a separate and sufficient independent intervening cause of the death."

⁹⁸ In the case of *Triggs v. McIntyre*, 215 Ill. 369; 74 N. E. 400, affirming 115 Ill. App. 257, the

court said: "Whether or not, however, the death of the deceased was due to intoxication or to an attack made upon him by third persons, was a question of fact to be determined by the jury. There was evidence tending to show that there were some marks and bruises upon the face or body of McIntyre, but there was also as much testimony tending to show that the same may have been caused by his fall upon the sidewalk as that they were the result of any attack made upon him. It is stated by the witnesses on both sides, expert and otherwise, that his death was the result of suffocation or strangulation. There were, however, no marks of any kind upon his throat to show that he had been choked to death, and there was evidence tending to show that the suffocation may have been caused by not external violence, but, as the appellate court says, 'because of the deceased's inability to extricate himself from some position in which his neck and body had become placed while he was in a stupor from intoxication.'

on the morning after the evening on which he was seen intoxicated was found dead near the railroad track, between the town in which he lived and that in which defendant's saloon was located, and it was apparent that he had been struck by a train, it was held that it was a question for the jury to determine whether the intoxication of deceased caused his death.⁹⁹ For other cases illustrative of the proposition the reader is referred to those cited in the notes.¹

Sec. 1078. Plaintiff contributing to the injury.

Did the plaintiff contribute to the injury described in the complaint or declaration? Thus, in an action under the statute brought by a widow for the death of her husband caused by his intoxication where it appeared from the evidence that the plaintiff had given the wages to her husband when drunk after the husband had surrendered them to her when sober, knowing that such wages would be used in the purchase of intoxicating liquor, it was held that the question whether plaintiff voluntarily contributed to the injury was one of fact for the jury.

There was also evidence tending to show that the pockets of the deceased were turned outward, and that a watch, which some of the testimony tends to show that he wore, was missing. But, if his body was robbed, the evidence tends as well to show that such robbery may have been committed after his death, or while he was in a stupor from intoxication, as that it was the result of an attack upon his person. Citing *Schroder v. Crawford*, 94 Ill. 357; 34 Am. Rep. 236.

⁹⁹In the case of *McMahon v. Dumas*, 96 Mich. 467, 56 N. W. 13, the court said: "It is contended that there was no evidence that the deceased was killed by the railroad train, or by reason of

his intoxication. It is urged in this behalf that the night was dark and stormy, that the deceased had no lantern, that he might have been killed for the purpose of robbery, and his body placed on the track, or that he might have stumbled and fallen on the rail and injured himself so as to be unable to avoid the train. We think all these questions were for the jury, not the court, to determine."

¹*Doty v. Postal*, 87 Mich. 143; 49 N. W. 534; *Chemlir v. Sawyer*, 42 Neb. 362; 60 N. W. 547; *Cornelius v. Hultman*, 44 Neb. 441; 62 N. W. 891; *Davies v. McKnight*, 146 Pa. 610; 23 A. 320; *Currier v. McKee*, 99 Me. 364; 59 A. 442.

Sec. 1079. Plaintiff's injury in property or support.

Was plaintiff injured in his or her person, property or means of support? Thus, where a suit was brought by a wife under the statute against a dealer for causing or contributing to the habitual intoxication of her husband whereby she was injured in her means of support, where the evidence of the loss of support was not definite, it was held, nevertheless, that it was for the jury to estimate the damages.³ Again,

³ In the case of *Huff v. Aultman*, 69 Iowa 71; 28 N. W. 440; 58 Am. Rep. 213, the court said: "Their position (meaning defendant's) is that as she furnished him the money with knowledge of his habits, and of the use to which he intended to put it, she thereby contributed to his intoxication, and for that reason the law will not afford her a remedy for the injury which she sustained in consequence of such intoxication. They asked the circuit court to instruct the jury in accordance with that view. But the court, as we infer from the record, left it to the jury to say from the evidence whether plaintiff voluntarily contributed to the intoxication of her husband, and instructed them that if she did so, she was not entitled to recover. In that respect the circuit court followed the holding of this court in *Engleken v. Hilger*, 43 Iowa 563. The correctness of the ruling in the abstract is not questioned by counsel. They insist, in effect, however, that it should have been determined as a matter of law, from the undisputed evidence, that plaintiff had precluded herself from all right of recovery for the injury complained of by her acts in vol-

untarily delivering the money to her husband while knowing the use to which he intended to appropriate it. But we are of the opinion that the question presented was one upon which plaintiff was entitled to have the verdict of the jury. It cannot be said that the conclusion that she voluntarily contributed to the intoxication of her husband is the only deduction which can fairly or reasonably be drawn from the facts proven. It must be borne in mind that the money, while it was in plaintiff's possession in fact belonged to her husband. It was his earnings, and he had a right to the possession and control of it. He was under a moral and legal obligation, it is true, to afford a support for his wife and children, but that fact did not vest her with the title or right of possession in the money he earned. It must be borne in mind also that the probable result of a refusal by her to deliver the money to him at his request, on any occasion, would have been the refusal by him to pay any portion of his further earnings to her. She was, to some extent, under the compulsion of necessity. She was dependent on the earnings of her husband for

where a husband becomes an habitual drunkard and abandons his family, and ceases to provide for its support, it is for the jury to say whether such loss of support is permanent or otherwise.⁴

Sec. 1080. Instructions in general.

It is always proper and, indeed, necessary for the trial court to inform the jury, by the instructions, in a clear and concise manner, as to what material facts must be found to authorize a recovery.⁵ It is not error, although it is a practice not to be commended, for the court to refer the jury to the declaration or complaint for the issues, for, the averments, as

support. But his habits were such that those earnings, except the pittance which she was able to obtain and keep from him, were squandered at the saloon and brewery; and on every occasion when he made a demand upon her for a portion of the money he had given her she was probably remitted to a choice between the surrender of the sum demanded and the loss of the whole of his earnings in the future. It was not for the court to say that she necessarily consented to his drunkenness because she chose the lesser of these evils. We think the question was properly submitted to the jury, and their finding upon it abundantly sustained by the evidence."

⁴ In the case of *Bowden v. Voorheis*, 135 Mich. 648; 98 N. W. 406; 10 Detroit Leg. N. 908, the court says: "Defendants contend that the court erred in not directing a verdict in their favor, on the ground that the testimony relating to damages was too indefinite and uncertain to justify a verdict

for plaintiff. The trial court properly denied defendant's request. It may be inferred from plaintiff's testimony that the sale of liquor by defendant contributed to make her husband, who had occasionally drank, an habitual drunkard. From this it may be inferred that plaintiff suffered shame and social disgrace. It is clearly to be inferred from her testimony that plaintiff lost in her means of support, though precisely how much is uncertain. Of this we may say, as this court said in a former case, 'She did not show the exact amount that he contributed, and counsel urge that there was no way for the jury to tell how much she received.' We think there was sufficient to enable the jury to estimate her damages." Citing *Safler v. Fisher*, 121 Mich. P. 62; 79 N. W. 934; *Jessen v. Willhite*, 74 Neb. 608; 104 N. W. 1064.

⁵ *Baker v. Summers*, 201 Ill. 52; 66 N. E. 302, reversing 103 Ill. App. 237.

found in the declaration or complaint, which would be clear to a lawyer, would often be obscure and unintelligible to the average jurymen. But, where the jury, in the instructions, are not only referred to the declaration or complaint to determine the issues, but they are instructed to find a verdict for the plaintiff if the material allegations of the declaration or complaint are proved and without any instructions as to what those material allegations are, it was held that the jury were left to decide, as a matter of law, what the material allegations were, and, therefore, the instruction was erroneous.⁶ Otherwise as to what are and what are not proper instructions to the jury will be determined largely by the fact as to whether such instructions state correctly the principles of the "civil damage" law which appertain to the particular case. These principles we have tried to review in the foregoing sections so that it will not be necessary to review the adjudications of the courts on instructions which involve them. It will not be amiss, however, to state a few general rules which should govern trial courts in giving instructions or in giving or refusing to give requested instructions.

Sec. 1081. Instructions invading province of jury.

An instruction should never invade the province of the jury.⁷ Thus, in an action by a wife for the death of her husband, it was held error for the court to instruct the jury that certain facts, if shown, would establish that the sales of intoxicating liquor made by defendant to decedent was the proximate cause of the death, for the reason that the question of what was the proximate cause of the death was purely a question of fact and not of law.⁸ Again, where an instruction assumed as a matter of law that the selling of intoxicating

⁶ *Baker v. Summers*, 201 Ill. 52; 66 N. E. 302, reversing 103 Ill. App. 237. See generally, *Minot v. Doherty* (Mass.), 89 N. E. 188; *Cook v. Newton*, 14 Ky. L. Rep. (abstract) 860.

⁷ *Ludwig v. Sager*, 84 Ill. 99; *Knott v. Peterson*, 125 Iowa, 404; 101 N. W. 173; *Jokers v. Borgman*, 39 Kan. 109; 44 Am. Rep. 825.

⁸ *Knott v. Peterson*, 125 Iowa 404; 101 N. W. 173.

liquors to a person who was far gone in the habits of intoxication, and who had become diseased bodily and mentally, would be more aggravating than selling to one not so badly addicted to intemperance, or who had more vigor of body or mind, it was held to be error as invading the province of the jury.⁹

Sec. 1082. Hypothetical instructions.

Where an instruction attempts to state the hypothesis upon which is predicated non-liability, such instruction must also expressly exclude the hypothesis of intoxication. Thus, it was held that it was not error for the trial court to exclude an instruction which stated that no recovery could be had in the case if the death of the deceased was occasioned by the negligence or want of caution or willful act of the deceased in handling or driving a dangerous team, for the reason that such instruction did not exclude the hypothesis that such negligence, want of caution, or willful act was due to or caused by his intoxication.¹⁰

Sec. 1083. Instructions proximate cause of injury.

Where punitive or exemplary damages are allowable the court should instruct the jury as to the meaning of such damages and when such damages can be awarded.¹¹

⁹ Ludwig v. Sager, 84 Ill. 99.

¹⁰ Smith v. People, 141 Ill. 447; 31 N. E. 425, affirming 38 Ill. App. 630.

¹¹ In the case of Larzelere v. Kirchgessner, 73 Mich. 276; 41 N. W. 488, the court said: "We think the court should have defined what was meant by 'exemplary damages' as distinguished from actual damages mentioned in the statute. He should have instructed the jury that the exem-

plary damages referred to in this statute were punitive in their character, and designed to punish the defendant for some positive wrong he had willfully inflicted upon or caused the plaintiff, or for some very gross neglect of her rights in furnishing liquor to her husband at the time alleged in the declaration, and that the jury must exercise a sound discretion in determining the amount they would impose."

Sec. 1084. Intoxication proximate cause of injury.

If an instruction informs the jury that the intoxication was the natural and proximate cause of the injury complained of, it is not error to refuse to instruct that the injury must be the necessary result of the intoxication. Says the Massachusetts court:¹² "If the intoxication was the natural and proximate cause of the injury, in the words of the instruction, it was in one sense the necessary cause of it. If the insertion of the word 'necessary' in the request meant that the result must be one which ought to have been foreseen as necessary, at the time of sale, it unduly restricted the words of the statute. The statute imposes the liability for an injury 'in consequence' of the intoxication. If we assume that these words are limited to such a connection of consequences as is recognized by the common law, men are held liable every day in tort for the natural and proximate results of their wrongs, although the particular result could not have been foreseen specifically as necessary at the time of the act."

Sec. 1085. Instructions on measure of damages.

Care should be exercised in drafting instructions on the measure of damages so as not to permit the assessing of double damages by the jury. Thus, where in an action by a wife for damages for the sale of intoxicating liquors to her husband, the court charged the jury to allow damages to plaintiff's support or means thereof caused by defendant's act, an instruction authorizing additional damages for injury occasioned by the husband's impaired ability to secure or hold remunerative employment was erroneous, because allowing double damages, especially as the testimony showed that one element of damage was the husband's failure to secure and hold positions because of his intemperate habits.¹³

¹² McNary v. Blackburn, 180 Mass. 141; 61 N. E. 885, citing Eddy v. Courtright, 91 Mich. 264-268; 51 N. W. 887; Brockway v. Patterson, 72 Mich. 122, 126; 40 N. W. 192; 1 L. R. A. 708; Dun-

lap v. Wagner, 85 Ind. 529; 44 Am. Rep. 42; Roth v. Eppy, 80 Ill. 283.

¹³ Mathre v. Devendorf, 130 Iowa 107; 106 N. W. 366.

Sec. 1086. What constitutes intoxication.

It is not necessary in an action under the statute for the court in an instruction to define what constitutes intoxication. It is enough to charge that the evidence must prove the intoxication.¹⁴ The term "under the influence of liquor," as used in an instruction in an action under the statute, has been held to mean the same as "drunk" or "intoxicated."¹⁵ The latter term, however, is always to be preferred.

Sec. 1087. Injury to property.

Where the declaration or complaint counts on injury to property, before a court is authorized to give an instruction that plaintiff is entitled to recover therefor, there must be some evidence as to the value of the property injured or destroyed. Thus, it was held error in a suit under the statute against a dealer for causing the intoxication of plaintiff which resulted in his disposing of certain property at a nominal figure, for the court to instruct the jury that they might award the plaintiff such damages as he had sustained

¹⁴ In the case of *Shorb v. Weber*, 188 Ill. 126; 58 N. E. 949, affirming 89 Ill. App. 474, the court said: "Something is said in the argument as to what will constitute the intoxication within the meaning of this section of the statute. We know of no terms which could safely be incorporated in an instruction defining intoxication. It certainly will not be claimed that a plaintiff, in an action like this, as a condition to the right of recovery must prove that the person was intoxicated to the degree of insensibility or incapacity to take care of himself or guard against danger. It is well known that at least some persons under the influence of in-

toxicating liquors are reckless with regard to their own safety, while others become insensible to danger, and are incapable of self-protection. We think when the court informed this jury that the evidence must prove that the deceased was intoxicated, it did all that the law required."

¹⁵ In the case of *Buck v. Maddock*, 167 Ill. 219; 47 N. E. 208, the court said: "Counsel argue that the phrase 'under the influence of liquor' is too vague, and is not equivalent to 'drunk' or 'intoxicated.' This expression is often used as a mere euphemism of those harsher terms, and is generally understood to mean the same thing."

by reason of disposing of his property while intoxicated, there being no evidence of the value of the property disposed of.¹⁶

Sec. 1088. Unlawful sale.

Where the statute makes liability contingent upon the sale or sales being unlawful, and the declaration or complaint alleges sales which are unlawful, an instruction which tells the jury that if the sales as alleged in the complaint were, in fact, made, and it sets out such allegations, the instruction need not set out the fact that the sales were unlawful.¹⁷

Sec. 1089. Judgment against principal—When binding on surety.

In suits under the "civil damage" statute it seems to be the rule that a judgment against the principal is *prima facie* evidence as to the amount of damages in a subsequent suit against the surety, especially where the surety had been notified of the pendency of the original action and had opportunity to defend.¹⁸ But, as stated by Brandt,¹⁹ in his work on Suretyship: "Although there is a conflict of authority on the subject, it seems to be the better opinion that, except in cases where, upon the fair construction of the contract, the surety may be held to have undertaken to be responsible for

¹⁶ *Roberts v. Hopper*, 55 Neb. 599; 76 N. W. 21.

¹⁷ In the case of *Lafler v. Fisher*, 121 Mich. 60; 79 N. W. 934, the court said: "It is said that certain requests to charge in effect stating that damages could be recovered only in cases where an unlawful sale was proved, were denied. The court repeatedly told the jury that the plaintiff was not entitled to a verdict unless the respective defendants or their principals were shown to have sold liquor to the deceased at a time when he was intoxicated. Such

a sale would be unlawful, and we think the point was sufficiently covered."

¹⁸ *Wanack v. People*, 187 Ill. 116; 58 N. E. 242, affirming 87 Ill. App. 371, and citing *State v. Martin*, 20 Ark. 629; *Webbs v. State*, 4 Cold. 199; *Comstock v. Drohan*, 8 Hun 373; *Berger v. Williams*, 4 McLean 377; *Fed. Cas. No. 1341*; *Drummond v. Prestman's Ex'rs*, 12 Wheat. 515; 6 L. Ed. 712; see also *Blackeny v. Green*, 9 Ohio Dec. 570.

¹⁹ Brandt on Suretyship, Sec. 524, and cases cited.

the result of a suit, or where by notice and the opportunity being given him to defend it, a judgment against the principal alone is, as a general rule, evidence against the surety of the fact of its recovery only, and not of any fact which it was necessary to find in order to recover such judgment." It would seem, therefore, to be the better practice, where the statute will permit it, to join the principal and sureties in the same action; or, where the statute permits an action against the owner of the premises, to join the lessor and lessee and the lessee's bondsmen; or where there are two or more joint tort-feasors, to join all of them together with their bondsmen, although it is quite clear that a previous suit against one or more is no bar to a new suit against the others, even though the first suit be pending or have proceeded to judgment when the second is brought. The second, or even a subsequent suit, may proceed until a stage has been reached in some one of them at which the plaintiff is deemed in law to have either received satisfaction or to have elected to rely upon one proceeding for his remedy to the abandonment of the others.²⁰ Where a judgment has been obtained against the lessor of the premises without the lessee being made a party to the suit, and the lessor pays the judgment and sues his lessee to recover back the amount he paid, it has been held that the judgment as rendered in the suit against the lessor is not conclusive in the subsequent suit brought against the lessee, but such lessee may offer the same defense to such an action as he could have offered if sued in the first instance by the party who obtained the judgment.²¹

²⁰ *Wanack v. People*, 187 Ill. 116; 58 N. E. 242, affirming 87 Ill. App. 371.

²¹ In the case of *Burkman v. Jamieson*, 25 Wash. 606; 66 Pac. 48, the court said: "Section 2945, 1 Ballinger's Am. Codes and Stat. makes the owner or lessor of premises wherein intoxicating liquors are kept for sale severally and jointly liable with the person sell-

ing, when injury in person or property or means of support is caused to another by reason thereof. Section 2947, 1 Ballinger's Am. Codes and Stat. provides as follows: 'Any owner or lessor of real estate, who shall pay any money on account of his liability incurred under this chapter, for any act of his tenant may, in a civil action recover from such ten-

Sec. 1090. Lien of judgment on premises used.

In some States, as already noted, the statute makes a judgment rendered under the "civil damage" law a specific lien

ant the money so paid.' The object of these sections evidently was to make the tenant liable for the damages he causes. He is liable to the persons injured, and liable also to the landlord or lessor who has paid money for liability incurred by the act of the tenant, either in a joint or several action. The liability of the owner or lessor depends upon the liability of the tenant. If there is no liability of the tenant there can, of necessity, be no liability of the lessor or owner. Before there can be any recovery against the lessor or owner, the liability must be established against the tenant, and a judgment against the landlord must depend upon the liability of the tenant. If the landlord does not require the tenant to defend or give him an opportunity to do so, he must assume the burden of maintaining the liability against the tenant. This statute does not give a right of action for money paid without liability, but on account thereof. Where a person is made liable in damages for any act, he ought, in justice, to have a right to defend against a claim therefor. It is but a common right that he should have his day in court, and an opportunity to plead and prove a defense if he have one. Under the rule contended for by respondents, viz., that the judgment in this case is conclusive against the appellant, this principle, which is as old as

the law itself, might, in many instances, be set aside. For example, it would be possible for an owner or lessor of premises, who had been severally sued on account of an act of his tenant, to compromise such action without notice to the tenant either of the suit or compromise, and thereupon in good faith have a jury called and proof taken and a verdict and judgment for an amount agreed upon, which judgment would be conclusive against the tenant, who might have a perfect defense. And, again, the tenant may have settled a claim in full without suit, and an action for the same injury be brought against the owner without knowledge of the tenant, and judgment recovered which would be binding upon the tenant. Or again, the owner might be sued severally and a recovery had without notice to the tenant for an injury which had once been defeated by the tenant in an action against him, and against which he had a perfect defense. If the judgment against the owner is binding upon the tenant he could not be heard to defend against it in a suit by the owner to recover from him. These conditions and others would be possible under the construction urged by respondents. It was evidently not the intention of the Legislature to deprive a tenant of his right or opportunity to make a defense to a claim for liability, and no fair construction

upon the premises where the intoxicating liquors were sold which caused the injury. Before, however, a judgment will become a lien on such property its owner must be a party to the suit under the statute and a judgment must be rendered against him and such judgment made a lien upon the property. In some States, where the statute so provides, it is necessary for the plaintiff to show knowledge and consent of the owner of the premises to the illegal sales complained of, before a judgment can be rendered against the owner of the building where the sales were made and the property subjected to the lien of the judgment.²² However, where the entire business, as conducted, is illegal, and the owner of the premises has knowledge thereof and consents thereto, it is not necessary that such owner should have knowledge of the particular sales complained of to subject the premises to a lien of the judgment.²³ Nor is it necessary to establish such a lien that the consent of the owner be shown by any positive affirmative act on his part, but such consent may be inferred from circumstances.²⁴ Nor is it error for the trial court to refuse to instruct the jury that the premises are not liable for sales made prior to the time when it was shown the owner first learned of them, as the statute does not contemplate that the judgment may be split up, and a part only charged as a lien on the building.²⁵ In other States, the statute is

of the language quoted can make it do so." But see *Goodman v. Hailes*, 59 Ohio St. 342; 52 N. E. 829.

²² *Meyers v. Kirt*, 57 Iowa 421; 10 N. W. 828; *Loan v. Etzel*, 62 Iowa 429; 17 N. W. 611; *Cobleigh v. McBride*, 45 Iowa 116.

²³ *Wing v. Benham*, 76 Iowa 17; 39 N. W. 21.

²⁴ *Loan v. Etzel*, 62 Iowa 429; 17 N. W. 611.

The lien of the judgment cannot be defeated by a voluntary conveyance by the defendant of his land after the suit is brought and

before judgment is recovered. *La Roche v. Brewer*, 1 Ohio C. D. 432.

²⁵ In the case of *Arnold v. Barkalow*, 73 Iowa 183; 34 N. W. 807, the court said: "Besides, we have to say that we do not think that the statute contemplates that a judgment like the one in question may be split up, and a part only charged as a lien. Now, the right to the lien exists by statute solely, the same being given upon the ground that the landlord has furnished the liquor seller in part the means of committing the injury."

broader, and it is not necessary to render the premises liable that the owner should have leased them for the purpose of selling liquor thereon in violation of law, or that he had knowledge that such liquors were to be sold thereon, or knowingly permitted the sales which caused the damage, but only that the premises were leased to be used for the sale of intoxicating liquors or were permitted by the owner to be so used.²⁶ But under such a statute, it has been held that where a wife in good faith objected to her husband selling intoxicating liquors on her premises, and had not rented or leased the premises to him for such purpose, they could not be subjected to the satisfaction of a judgment recovered against the husband for the illegal sale of such liquors on her premises.²⁷ And where the premises sought to be subjected to the lien of a judgment were leased to the dealer by a person holding a life estate therein, it was held that the estate in remainder was not liable.²⁸ It is not necessary that the lessor be joined with the lessee in the same action. An action may be first prosecuted to a judgment against the lessee and the judgment afterwards established as a lien on the premises in a suit against the lessor.²⁹ But a judgment against the lessee is not a lien on the lessor's premises until so declared by judgment, and it is held that if the lessor dies before such judgment is rendered the liability abates, and no liability can be taken against his heirs and devisees.³⁰ Neither is such a judgment a paramount lien to a mortgage upon the premises on which the liquor was sold, where the mortgage was executed and recorded prior to the rendition of the judgment against the owner.³¹ Such a judgment, where the property

²⁶ *Mullen v. Peck*, 49 Ohio St. 447; 31 N. E. 1077; *Dugan v. Neville*, 49 Ohio St. 462; 31 N. E. 1080.

²⁷ *Benhoff v. Weaver*, 6 O. C. D. 361.

²⁸ *Mullen v. Peck*, 49 Ohio St. 447; 31 N. E. 1077; *Dugan v. Neville*, 49 Ohio St. 462; 31 N. E. 1080.

²⁹ *McVey v. Manett*, 80 Iowa 132; 45 N. W. 548.

³⁰ *Hart v. Corlett*, 4 Ohio Dec. 181; 1 Clev. Law Rep. 92.

³¹ *Bell v. Cassem*, 158 Ill. 45; 41 N. E. 1089; 29 L. R. A. 571, affirming 56 Ill. App. 260; *Good-enough v. McCoid*, 44 Iowa 659.

sought to be subjected to a lien, is used in part as a home-
stead, should specifically fix the part of the property to
which the lien attaches.³² It has been held that an action to
subject premises to the lien of a judgment obtained under
the "civil damage" statute is not an equitable one, but purely
an action at law, and that the owner is entitled to a jury
trial to decide whether he consented to or had knowledge of
the sales of intoxicating liquors which caused the injury com-
plained of.³³ It has been held that the saloon keeper and the
landlord are not joint tort-feasors and that where a judg-
ment was obtained against the former and it was par-
tially collected the plaintiff is not precluded thereby from
bringing a suit against the landlord to subject the premises
to the payment of the balance of the judgment.³⁴ As already
found, a judgment against the saloon keeper in an action to
subject the premises upon which the liquor was sold to a
lien of the judgment, is evidence that the judgment was
rendered, but not of the amount for which the property is to
be subjected, as against the owner, when such owner was not
a party to the original action.³⁵ In Ohio, in an early case,
it was intimated that after the commencement of a suit
against the landlord to subject the premises to a lien of the
judgment obtained against the dealer, that the judgment cred-
itor acquires an interest in the property which could not be
obviated by a sale and conveyance prior to a judgment
rendered in such suit.³⁶ In the absence of a showing of
fraud, we seriously doubt if this rule will hold to-day without
a statutory provision. In a later case in Ohio it was held
that the lessor of a building occupied for the sale of intoxi-
cating liquors cannot, by a voluntary conveyance of the prem-
ises, without consideration, pending a suit against him by a
wife for selling liquor to her husband, defeat her lien on the
premises for whatever judgment may be obtained.³⁷

³² Engleken v. Webber, 47 Iowa
558.

³³ Loan v. Hiney, 53 Iowa 89; 4
N. W. 865.

³⁴ McVey v. Marratt, 80 Iowa
132; 45 N. W. 548.

³⁵ Buckham v. Grape, 65 Iowa
535; 17 N. W. 755; 22 N. W. 664.

³⁶ Ballinger v. Griffith, 23 Ohio
St. 619.

³⁷ LaRoche v. Brewer, 1 O. C. D.
432.

Sec. 1091. Costs.

It seems to be the rule that where the "civil damage" statute is silent as to the matter of costs, the general statute with reference to the recovery of costs applies. Thus, where plaintiff sued under the statute in the circuit court to recover damages for the intoxication of her husband and recovered one hundred dollars, it was held that because the amount recovered was such as if sued for would have come within the exclusive jurisdiction of a justice of the peace, that, therefore, the costs must go against the plaintiff.³⁸ But where the "civil damage" statute specifically designates that if plaintiff is entitled to recover at all, he is entitled to costs where the claim for damages brings the case within the jurisdiction of a court of record, it is held that the general statute for the recovery of costs does not apply and that plaintiff is entitled to his costs although the amount of the judgment is less than the amount sued for.³⁹

³⁸In the case of *Dikeman v. Harrison*, 38 Mich. 617, the court said: "The case is a hard one, and we cannot but think the Legislature would have exempted it from this rule if the matter had been brought to their attention.

But we are bound to enforce the law as we find it." See also *Rosenbaum v. Dunston*, 16 Neb. 111; 19 N. W. 610.

³⁹*Purvis v. Segar*, 132 Mich. 167; 93 N. W. 261; 9 Detroit Leg. N. 556.

CHAPTER XXXIII.

GUARDIANS AND ASYLUMS FOR DRUNKARDS.

SECTION.

1092. Constitutionality of statutes for the appointment of guardians for drunkards.

1093. The inquisition.

1094. Revocation of guardianship.

SECTION.

1095. Sale of ward's property by his guardian.

1096. Contracts—Statute of limitations—Suits.

1097. Inebriate asylums.

Sec. 1092. Constitutionality of statutes for the appointment of guardians for drunkards.

Statutes have been enacted in a number of States authorizing the appointment of guardians for habitual drunkards, and these guardians are usually given such powers as are given to guardians of lunatics, and even of minors. Some of these statutes provide that a guardian may be appointed upon the request or consent of the drunkard. Thus, in Maryland it is provided that "any person who may be alleged to be an habitual drunkard may dispense with the legal proceedings to establish the same, and may, with the approbation of the court wherein said petition [to have a guardian appointed] may be filed, appoint his own committee."¹ In other States statutes provide for the appointment of guardians for such persons without their consent. The Indiana statute on this subject is one of this kind of statutes. In that State upon the filing of a complaint under oath in the circuit court charging that the person for whom the appointment of a guardian is desired who owns real or personal property, or both, is incapable of taking care of it, or that there is danger of his squandering it, a summons is issued

¹ Maryland Code, Art. 16, § 47.

by the clerk which is served on such person ten days before the beginning of the term. An issue is raised upon this complaint, a formal trial is had, either by court or jury, and if the allegations of the complaint are found to be true the court appoints some resident of the county to act as guardian, "under like restrictions and in the same manner, and with the same powers and duties as in the case of guardians for minors."² This Indiana statute has been held valid. "We think," said the Supreme Court of that State, "there is no doubt as to the power of the Legislature to pass such a law, or as to the duty of the courts to enforce it in all proper cases. We presume that no one will call in question the power of the Legislature to pass laws depriving idiots, lunatics, and all persons of unsound mind, of the power of controlling and squandering their estates, and appointing guardians of their persons and estates. This is done for the protection of such persons as are incapable of protecting themselves. It surely can make no difference whether the disability has existed from birth, or has been caused by disease or accident, or produced by the excessive use of intoxicating liquors. The true inquiry is whether a person, from any cause, is incapable of making contracts and managing his property. When this fact is found by a competent court, it is the duty of such court to place such person under guardianship, and when such person is restored to reason and is capable of managing his property and making contracts, then the disability should be removed and the party restored to all his rights. In England the court of chancery has the control of the persons and estates of idiots, lunatics and persons of unsound mind. In this country it is regulated by the statutes of the several States."³

² Burns Rev. Stat. 1908, §§ 6175-6177.

³ Devin v. Scott, 34 Ind. 67.

Citing 1 Parson's Contracts 386; 2 Kent Com. 450; *In re Wendell*, 1 Johns. Ch. 600, and *Hovey v. Harmon*, 49 Me. 269; *Foreman v.*

Commissioners, 64 Minn. 371; 67 N. W. 207.

See also *Baltimore v. Keeley Institute*, 31 Md. 106; 31 Atl. 437; 27 L. R. A. 646, where *dicta* can be found on this question. *Metro-politan Police Commissioners v.*

Sec. 1093. The inquisition.

The statutes provide for an inquisition to secure the appointment of a guardian for a drunkard, and their provisions must be at least substantially followed. Notice to the drunkard, except where he consents to the appointment, is absolutely necessary,⁴ and a statute authorizing the appointment of a guardian for such a person without his consent and without notice to him would be unconstitutional, because it would deprive him of the control and management of his property—as much a vested right as the ownership of such property—without any notice to him.⁵ A person against whom an inquest has been found may have the regularity of the proceedings reviewed upon exceptions.⁶ And where it was the duty of the court to find how long the person alleged to be an habitual drunkard was such, which finding was *prima facie* evidence of his incapacity during such time to make a contract, it was held that a vendee who had received a conveyance from him during such time was a person “aggrieved” by the finding under a statute allowing any person “aggrieved” to appear and traverse the petition.⁷ If the drunkard appears and consents to the appointment, under a statute authorizing it, thus dispensing with legal proceedings, his consent need not be in writing and filed as a part of the case, but it is sufficient if he appears in court and orally consents to it.⁸ An appointment of a guardian is a final order and is reviewable on a direct appeal therefrom.⁹ Where a statute provided

⁴ *In re Coffin*, 41 N. Y. Misc. 131; 83 N. Y. Supp. 941; *People v. St. Saviour's Sanitorium*, 34 N. Y. App. Div. 363; 56 N. Y. Supp. 431.

⁵ *Ex parte Simmons*, 76 Neb. 639; 107 N. W. 863; *Leavitt v. Morris*, 105 Minn. 170; 117 N. W. 393.

⁶ *In re Burr*, 3 Lack. Leg. N. 162.

In this case the judge went into the jury room and gave further instructions to the jury, and then

immediately retired, and this was held not to be error. It was also held the fact that the jurors while deliberating upon their verdict made remarks concerning the consequences of their finding him not to be a drunkard, upon him and his family, was not cause for a new trial.

⁷ *In re Sampson*, 19 Pa. Co. Ct. Rep. 1; 5 Pa. Dist. Rep. 717.

⁸ *Tome v. Stump*, 89 Md. 264; 42 Atl. 902.

⁹ *Tome v. Stump*, *supra*.

that a probate decree should not be deemed invalid in any collateral proceedings or quashed for want of proper form, or for want of jurisdiction appearing upon its face, it was held that such a decree appointing a guardian for a drunkard and spendthrift which only adjudged him to be lacking in discretion in the management of his estate, was only voidable and not void.¹⁰ But confinement of a drunkard without the filing of a complaint against him and proceedings adjudging him to be an habitual drunkard is illegal and the proceedings absolutely void.¹¹ The disposition of the courts is to appoint a guardian for the drunkard's property rather than to deny the application. "If there must be some evidence of squandering property to declare an individual an habitual drunkard, the object of the act in many cases would be defeated, for it is precautionary in its design and hence a disposition of mind or body which might lead to the wasting of an estate is sufficient to justify the enforcement of its provisions. It is, indeed, impossible that a man can be an habitual drunkard without waste or mismanagement, as the very act of drunkenness is itself waste."¹²

Sec. 1094. Revocation of guardianship.

Statutes provide for a revocation of the appointment of a guardian for an habitual drunkard on the restoration, as it were, of his former capacity to care for his property. This means, of course, a setting aside of the decree for the appointment of a guardian. Usually this is done upon an application by the ward himself, and a statute providing that "any person" may institute an inquiry as to whether one who is under guardianship by reason of his being incapable of managing his own affairs, on account of habitual drunkenness remains so,

Donovan, 72 L. J. K. B. 545
[1903], 1 K. B. 13, 895; 88 L. T.
555; 52 W. R. 14; 67 J. P. 147;
20 Cox C. C. 435; Rex v. Meehan
[1905], 2 Irish Rep. 577.

¹⁰ Brown v. Probate Court, 28
R. I. 370; 67 Atl. 527.

¹¹ *Ex parte* Simmons, 76 Neb.
639; 107 S. W. 863.

¹² Ludwick v. Commonwealth, 18
Pa. St. 172; Still v. McNight, 7
W. & S. 245; *In re* Tracy, 1 Paige,
580.

authorizes the drunkard himself to apply for his restoration.¹³ Upon such an application notice to his family or guardian is not jurisdictional, the want of it being at most only an irregularity, of which advantage cannot be taken in a collateral proceeding.¹⁴ When so discharged, on his own application, the drunkard cannot impeach his judgment of discharge on the ground that such notice had not been given.¹⁵ The fact that the drunkard may apply for a discharge does not prevent him from applying for a writ of *habeas corpus* where he is detained in custody in an asylum for drunkards, and the fact that he had, a month previous to the application for the writ, made application to have the decree for a guardianship set aside will not be a bar to the issuance of the writ, where it appears that during such month he had ceased to be an habitual drunkard.¹⁶ If a guardian be discharged, in the absence of evidence concerning how he was discharged, it will be presumed he was discharged in pursuance of proceedings under the statute.¹⁷ Where a statute provided that an application might be made by a drunkard under restraint, on the ground that he had reformed, if the jury find in his favor the finding should be conclusive, and the court should enter judgment setting him at liberty and restoring him to his property; but if he did not demand a jury trial, then the court should take the proofs, and, if satisfied, make an order that the commission, inquisition and appointment of a committee be suspended or superseded, as it should decide, it was held that a decree, no jury having been demanded, that the drunkard had become habitually sober and was competent to transact business, but that, considering the limited time that had elapsed, the commission, inquisition and appointment of a committee be merely suspended until further order of the court, did not prevent a reinstatement of the proceedings.¹⁸

¹³ *Cockrill v. Cockrill*, 79 Fed. 143; *Cockrill v. Cockrill*, 92 Fed. 811; 34 C. C. A. 254; *In re Roberts' Estate*, 197 Pa. 621; 47 Atl. 987.

¹⁴ *Cockrill v. Cockrill*, 92 Fed. 811; 34 C. C. A. 254.

¹⁵ *Cockrill v. Cockrill*, 92 Fed. 811; 34 C. C. A. 254.

¹⁶ *In re Larner*, 79 N. Y. Supp. 1039; 12 N. Y. Ann. Cas. 362.

¹⁷ *Makepeace v. Bronnenberg*, 146 Ind. 243; 45 N. E. 336.

¹⁸ *In re Roberts' Estate*, 197 Pa. 621; 47 Atl. 987.

Sec. 1095. Sale of ward's property by his guardian.

The usual statute for the appointment of a guardian for an habitual drunkard empowers the court upon application of such guardian to order a sale of the drunkard's land or property in order to obtain means for his support. Such was held to be the case where a statute provided that the proceedings in case of habitual drunkards should "be like those now authorized by law in cases of persons alleged to be lunatics or insane, and the rules of law and proceedings now applicable to the property of lunatics," and should apply to cases of persons "declared" to be habitual drunkards under its provisions.¹⁹ The ward's lands may be sold to support not only himself, but his family; he is a ward of the court and his estate is in *custodia legis*.²⁰

Sec. 1096. Contracts—Statutes of limitations—Suits.

Elsewhere we have discussed the validity of contracts of habitual drunkards made after an inquisition found, and we need not here repeat what is there said, but merely remark that such contracts, as a general rule, are not merely voidable but void.²² An habitual drunkard for whom a guardian has been appointed is not under such disabilities that the statute of limitations does not run against him.²³ If he be sued he

¹⁹ Tome v. Stump, 89 Ind. 264; 42 Atl. 902.

This case discusses the practice of sales by guardians, not necessary here to discuss.

²⁰ *In re Tarr's Estate*, 10 Pa. Super. Ct. 554.

In this case the court awarded a counsel fee in proceedings which resulted in the discharge of the committee, a correction of the committee's accounts and a betterment of the security of the estate.

If a testator appoints a trustee for a drunken devisee, the *corpus* of the estate devised rests in the

beneficiary, and he has full power to dispose of it, to take effect upon his death. *In re Engle's Estate*, 14 Montg. Co. Law Rep. 74.

²² Devin v. Scott, 34 Ind. 67.

In Pennsylvania the contract of such a person entered into before an inquisition held, but at a time convened by a finding in the order for the appointment of a guardian that he was an habitual drunkard, *prima facie* renders the contract void. *In re Sampson*, 19 Pa. Cr. Ct. Rep. 1; 5 Pa. Dist. Rep. 717.

²³ *Makepeace v. Bronnenberg*, 146 Ind. 243; 45 N. E. 336.

defends by his guardian and not by guardian *ad litem*.²⁴ An action brought by the guardian to set aside a conveyance of lands made by his ward abates upon such ward's death, and cannot be revived and prosecuted by his heirs.²⁵ The declarations of a drunkard after an appointment of a guardian for him are not evidence against his estate.²⁶

Sec. 1097. Inebriate asylums.

The Legislature of Maryland adopted a statute providing that any inhabitant of the State, who is akin to or friend of an habitual drunkard, might apply by petition to the circuit court of the county where the drunkard resided, for leave to send him, at the expense of the county, to an institution located in the State, for the medical treatment of drunkenness, as the court might designate. The petition was required to be verified and state the name, age and condition of the drunkard and show that neither he nor his kin was financially able to incur the expense of his cure, and be accompanied by the written agreement of the drunkard that he was willing to take the treatment and obey the rules of the institution to which he might be sent. If the court was satisfied of the truth of the facts stated in the petition and that the charge for treating him would not exceed \$100, it should order him sent to some institution of that kind and order the expense be paid out of the county treasury in the same manner as other claims for the administration of justice were paid. The officers of the institution to which the drunkard was sent became sworn officers, without compensation, of the court sending him there for treatment. The statute defined a drunkard to be "any person who has acquired the habit of using spirituous, malt or fermented liquors, cocaine or other narcotics to such a degree as to deprive him or her of reasonable self-control." It was contended that this act was unconstitutional because the Legislature had no power to compel a county, without its

²⁴ Makepeace v. Bronnenberg, *supra*.

²⁶ Ruffner v. Lather, 19 Pa. Co. Ct. Rep. 349.

²⁵ *Ex parte Williams*, 87 Ala. 547; 6 So. 314.

consent, to tax its citizens for the treatment of habitual drunkards at an inebriate asylum, but the court held that the contention was not well founded. The court also called attention to the fact that legislation had stood upon the statute books for years previous to the date of this statute wherein it was provided that any person charged under oath with being a drunkard and incapable of taking care of himself or his property might be arrested on a warrant issued out of the circuit court, tried and treated as a lunatic pauper, and declared that the principle invoked by the statute had "just the same force in its application to the condition of an habitual drunkard as to a lunatic pauper." The court had no doubt of the power of the State to treat habitual drunkards as a class of citizens who may be restrained or medically cared for by placing them in institutions for treatment.²⁷ But where a statute of Michigan provided that any person convicted of drunkenness might be released on a recognizance conditioned that he would take treatment for the cure of drunkenness of some corporation organized by law to make and file reports in reference thereto, and that he would obey all regulations prescribed by those administering such cure, with the further provision that he might be acquitted and discharged at the end of sixty days on proof that he had conformed to such conditions, was held invalid, because it attempted to permit unofficial persons to prescribe rules which should acquit persons charged with crime, while such rules might be as variable as the corporations were numerous.²⁸ So in Wisconsin it was held that a private corporation is not made a public institution by the fact that it is subject to visitation and inspection by public officers, and that public

²⁷ *Baltimore v. Keeley Institute*, 81 Md. 106; 31 Atl. 437; 27 L. R. A. 646.

In this case the title of the statute was, "An act to provide for the treatment and cure of habitual drunkards," and this was held not to describe more than one subject, or vary from the body

of the act which mentioned treatment only and not cure.

A very similar statute of Colorado was held constitutional. *In re House*, 23 Colo. 87; 46 Pac. 117; 33 L. R. A. 832.

²⁸ *Senate of the Happy Home Club v. Board*, 99 Mich. 117; 57 N. W. 1110; 23 L. R. A. 142.

money could not be paid it for treatment of habitual drunkards who are not financially able to pay for their own treatment, and, therefore, a county could not be compelled to pay for the treatment in a private institution of habitual drunkards, although they are pecuniarily unable to procure and pay for their treatment.²⁹ So a like ruling has been made in Minnesota.³⁰ A statute, however, authorizing a hospital farm for inebriates, requiring the board of control to purchase lands for it and provide means for the buildings and the maintenance of such institution, and providing a tax on all license fees for the sale of liquor for its support is valid, not being in violation of a constitutional provision that public property used exclusively for public purposes shall be exempt from taxation.³¹ A statute providing that when a patient ordered confined in an inebriate asylum has been cured he may be paroled on the condition that he will sign a pledge to the effect that he will refrain from the use of liquors and will make written monthly reports that he has not violated his parole is invalid, because it is an unlawful restraint upon the liberty of the person.³² Such a person cannot be confined after he has been cured, and such requirements are a kind of confinement.³³

²⁹ Wisconsin Keeley Institute Co. v. Milwaukee Co., 95 Wis. 153; 70 N. W. 68; 36 L. R. A. 55.

³⁰ Foreman v. Hennepin Co., 65 Minn. 371; 67 N. W. 207.

Under the Wisconsin statutes warrants were issued pursuant to its terms to pay the expenses of treating inebriates, and these warrants came into the hands of innocent purchasers. The Legislature made an appropriation to pay them, but this appropriation was held invalid. State v. Froehlich, 118 Wis. 129; 94 N. W. 50; 61 L. R. A. 345.

An inebriate cannot be confined in an asylum without a decree of court ordering his confinement. *Ex*

parte Simmons, 76 Neb. 639; 107 N. W. 863; Leavitt v. Morris, 105 Minn. 170; 117 N. W. 393.

³¹ Leavitt v. Morris, 105 Minn. 170; 117 N. W. 393; People v. House of Good Shepherd, 32 N. Y. Misc. Rep. 453; 15 N. Y. Cr. Rep. 145; 66 N. Y. Supp. 794.

Under the New York laws [1857], p. 431, the inebriate ordered confined in an inebriate asylum could not be kept there by force, although the time of his confinement had not expired. *In re Baker*, 29 How. Pr. 485.

³² *Ex parte* Schwarting (Neb.), 108 N. W. 125.

³³ *Ex parte* Schwarting, *supra*.

CHAPTER XXXIV.

DRUNKENNESS AS A CRIME.

SECTION.

- 1098. Drunk in a public place.
- 1099. Drunkenness at a private residence.
- 1100. Permitting drunkenness on licensed premises.
- 1101. Found drunk on licensed premises.
- 1102. Being a common drunkard.

SECTION

- 1103. Drunkenness in office.
- 1104. What intoxication by statute is made criminal.
- 1105. Arrest for drunkenness.
- 1106. Arrest without warrant for liquor offenses.
- 1107. Miscellaneous.

Sec. 1098. Drunk in a public place.

It has been held not to be a common law offense to be drunk in a public place,¹ but in some instances it has been held that such drunkenness is a sort of public nuisance and the offense may be indicted at common law.² But none of these cases hold that mere passive drunkenness not amounting to an annoyance to the public is an offense,³ though in Tennessee a single act of drunkenness, public and notorious, is indictable.⁴ Statutes make it an offense for a person to appear when drunk on a public highway, and when that is the case a charge that he was "found when intoxicated in a public street, highway and sidewalk" is a sufficient charge under the statute;⁵ but a charge that the defendant was found in

¹ *In re Livingstone*, 6 Prac. (Can.) Rep. 17.

² *State v. Waller*, 3 Murph. 229; *Smith v. State*, 1 Humph. 396.

³ *State v. Deberry*, 5 Iowa 371; *State v. Waller*, 3 Murph. 229.

⁴ *Smith v. State*, 1 Humph.

396. Afterwards made so by statute. *Hutchinson v. State*, 5 Humph. 142; *State v. Smith*, 3 Heisk. 465.

⁵ *State v. Waggoner*, 52 Ind. 481; *State v. Moriarty*, 74 Ind. 103; *Cleveland v. State*, 4 Ga. App. 62; 60 S. E. 801.

that condition in a "public road" is not sufficient.⁶ An intoxicated person walking on a public street in order to reach land adjacent to it violates such a statute.⁷ So statutes make drunkenness in a "public place" an offense, and under a power to prevent nuisances and disorderly conduct a municipality may make such conduct punishable by fine.⁸ A hotel is a public place and so is a passageway leading from the street to the bedrooms in it, ordinarily open to the public.⁹ When the charge is that the defendant was found drunk in a public highway, then the prosecution must show that the road in question was such a highway, either directly or by circumstantial evidence.¹⁰ Where an indictment alleged that the defendant was drunk "in a certain public place, to-wit, in the town of H and near the public road, at a building known as the 'Old Graves Mill,' " it was held insufficient because it did not show that the drunkenness occurred at a public place, it not being alleged that the mill was a public place, and as the drunkenness was charged to have been at the mill it could not be proven it was near and in the public highway.¹¹ A public place is a place where all people have a right to go.¹² A conviction for being drunk in a public place

⁶ Johnson v. State, 1 Ga. App. 195; 58 S. E. 265.

⁷ People v. Camp, 142 Mich. 219; 105 N. W. 155; 12 Det. L. N. 665.

⁸ DeWitt v. La Cotts, 76 Ark. 250; 88 S. W. 877; Winslow v. Gallagher, 27 N. B. 25; Brooke v. Morrilton, 86 Ark. 364; 111 S. W. 471.

⁹ *Ex parte Hallett*, 15 W. N. (N. S. W.) 234.

¹⁰ Cleveland v. State, 4 Ga. App. 62; 60 S. E. 801.

¹¹ Murray v. State, 48 Tex. Cr. App. 219; 87 S. W. 349.

¹² Rosenstein v. State, 9 Ind. App. 290; 36 N. E. 652; State v. Tinscher, 21 Ind. App. 142; 51 N. E. 943.

A statute of England forbidding drunkenness in a "public place" defines it as "any place to which the public has access, whether on payment or otherwise." Acts 1902, 2 Edw. VII, c. 7, c. 28.

This definition applies to a railway carriage while traveling on its journey. Langrish v. Archer, 10 Q. B. Div. 44; 47 J. P. 295; 52 L. J. M. C. 47; 31 W. R. 183; 47 L. T. 548; to the platform of a railway station, 2 H. & N. 149; 21 J. P. 280; 26 L. J. M. C. 178; to a private house in which a sale by public auction is being held, Sewell v. Taylor, 7 C. P. (N. S.) 160; 23 J. P. 792; 1 L. T. 37; 29 L. J. M. C. 50; and to a licensed alehouse. Cole v. Coulton, 2 E. &

is not a bar to a prosecution for disturbing the peace by cursing and swearing during the time the offender was drunk.¹³ It cannot be charged merely that the accused was found drunk in a "public place,"¹⁴ but the character of the place must be set out as a "public highway, street and sidewalk."¹⁵ Where a statute made it an offense to be "found in any public place in a state of intoxication," it was held that the question of intent to become intoxicated was immaterial and involuntary drunkenness rendered the intoxicated person liable to fine, for the offense was not mere intoxication but the appearance of a person in that condition in a public place.¹⁶ Under a power conferred upon a municipality to prohibit drunkenness within its limits it may enact an ordinance prohibiting public drunkenness.¹⁷ So it may under a power "to ordain and establish all such ordinances and by-laws for the government and good order of the village, the suppression of vice and immorality, the prevention of crime, the protection of public and private property, the benefit of trade and commerce, and the promotion of health as they shall deem expedient."¹⁸

Sec. 1099. Drunkenness at a private residence.

A statute making it an offense to be found in a state of intoxication in a "public place" cannot be made to apply to a social party held at a private residence. "The private house of a gentleman, at which he gives or holds a social

E. 695; 29 L. J. M. C. 125; 24 J. P. 596; 2 L. T. 216; 8 W. R. 412.

¹³ Mitchell v. State, 48 Tex. Cr. App. 533; 89 S. W. 645.

¹⁴ State v. Welch, 88 Ind. 308.

¹⁵ State v. Waggoner, 52 Ind. 481; State v. Moriarty, 74 Ind. 103; Rosenstein v. State, 9 Ind. App. 291; 36 N. E. 652.

¹⁶ State v. Sevier, 117 Ind. 338; 20 N. E. 245.

A statute making it an offense

to appear in an intoxicated condition in any street, alley or other public place, does not apply to a highway in the country. State v. Stevens, 36 N. H. 59. For other cases see Hill v. People, 20 N. Y. 363; Evans v. State, 59 Ind. 563; State v. Moriarty, 74 Ind. 103.

¹⁷ Gallatin v. Tarwater, 143 Mo. 40; 44 S. W. 750.

¹⁸ Fairmont v. Meyer, 83 Minn. 456; 86 N. W. 457; Bloomfield v. Trimble, 54 Iowa 399.

party, cannot, within the meaning of the statute, or in any sense of society or government, be understood to be a public place.”¹⁹ “A private residence is not a public place in any sense of the term, and the mere suggestion of the fact is a sufficient argument to support it. We are unable to see how a private residence can be made a public place by a number of persons in the neighborhood gathering there, with or without invitation, to pass an evening in social intercourse and innocent amusement.”²⁰ But where a statute made it an offense for a person to be guilty of “drunkenness by the voluntary use of intoxicating liquor,” it was held that one drunk in a private dwelling house, although he made no disturbance and was not exposed to public view, had violated its provisions.²¹ But if the owner of a private residence open an auction in it and invite the public to such auction, then a person appearing at the auction in a state of intoxication violates a statute prohibiting drunkenness in a public place.²²

Sec. 1100. Permitting drunkenness on licensed premises.

An occasional statute makes it an offense for a licensed liquor dealer by retail to permit drunkenness on the licensed premises. Under such a statute he cannot be convicted of permitting drunkenness on his premises in the absence of knowledge, or connivance, or carelessness on his part; but if it be proven that any person was drunk on the premises, then he must prove that he and the persons employed by him took all reasonable steps for preventing drunkenness on the premises.²³ Under such a statute, to supply drink on the premises

¹⁹ *State v. Sowers*, 52 Ind. 311; *State v. Tincher*, 21 Ind. App. 142; 51 N. E. 943; *Pugh v. State*, 55 Tex. Cr. App. 462; 117 S. W. 817; *Regina v. Blakely*, 6 P. C. (Can.) Rep. 244.

²⁰ *State v. Tincher*, 21 Ind. App. 142; 51 N. E. 943.

²¹ *Commonwealth v. Conlin*, 184 Mass. 195; 68 N. E. 207; *Commonwealth v. Miller*, 8 Gray 484; *Com-*

monwealth v. Conley, 1 Allen 6.

²² *Sewell v. Taylor*, 7 C. B. (N. S.) 160; 23 J. P. 792; 1 L. T. 37; 29 L. J. M. C. 50

²³ *Somerset v. Wade* [1894], 1 Q. B. 574; 58 J. P. 231; 63 L. J. M. C. 126; 70 L. T. 452; 42 W. R. 399.

It is not an offense for the keeper of licensed premises himself to get drunk under a statute mak-

to one already drunk is a commission of the offense,²⁴ and it is not necessary to furnish the drunken man liquor to constitute the offense.²⁵ If the keeper of the premises does not know the drunken person is on the premises, or his agents or servants in charge of them do not know he is on them, then he is not guilty of "permitting" such a person to be on his premises.²⁶ The statute applies to licensed premises after the hour for sales has closed.²⁷ Thus, where an hotel keeper during closing hours let a bedroom to a drunken applicant and took no steps to eject him, but allowed him to remain in the smoking room with other lodgers nearly an hour, when he was found there drunk, by the police, it was held that the keeper was guilty.²⁸ So where the wife of the owner of licensed premises entertained some friends on his premises, and stood the treats all round, and at one o'clock in the morning two of the guests were found there drunk, it was held that the owner had violated the statute.²⁹ The landlord has full power to eject a drunken man from his premises, even if force be necessary.³⁰ Where a statute provided that it shall be an offense for a person who was drunk, violent, quarrel-

ing it an offense to permit drunkenness on licensed premises. *Warden v. Tye*, 26 C. P. Div. 74.

²⁴ *Edmund v. James* [1892], 1 Q. B. 18; 56 J. P. 40; 61 L. J. M. C. 56; 40 W. R. 140; 65 L. T. 675; *Ex parte Ethelstane*, 40 J. P. 39; 33 L. T. 339.

²⁵ *Hope v. Warburton* [1892], 2 Q. B. 134; 56 J. P. 328; 61 L. J. M. C. 147; 66 L. T. 589; 40 W. R. 510; *Queen v. Reynolds*, 11 East Dist. Ct. Rep. 17.

²⁶ *Somerset v. Wade*, 63 L. J. M. C. 126 [1894]; 1 Q. B. 574; 10 L. R. 105; 70 L. T. 452; 42 W. R. 399; 58 J. P. 231; *Queen v. Otto*, 13 *Juta* 251.

²⁷ *Regina v. Pelly*, 66 L. J. Q. B. 519 [1897]; 2 Q. B. 33; 76 L. T. 467; 45 W. R. 504; 61 J. P.

373; 18 Cox C. C. 556; *Kessack v. Smith*, 7 F. (Just. Cas.) 75.

²⁸ *Thompson v. McKenzie*, 77 L. J. K. B. 605 [1908]; 1 K. B. 905; 98 L. T. 896; 72 J. P. 150; 24 T. L. R. 330.

²⁹ *Lawson v. Edminson*, 78 L. J. K. B. 36 [1908]; 2 K. B. 952; 72 J. P. 79; 25 T. L. R. 11.

³⁰ *Sealy v. Tandry* [1902], 1 K. B. 296; 66 J. P. 19; 71 L. J. K. B. 41; 50 W. R. 347; 85 L. T. 459; 18 T. L. R. 38; *Rex v. Willouby*, 1 East P. C. 288; *Pidgeon v. Legge*, 21 J. P. 743; *Regina v. Rymer*, 2 Q. B. Div. 136; 46 L. J. M. C. 108; 41 J. P. 199; 25 W. R. 415; *Howell v. Jackson*, 6 C. & P. 725. See *Dallimore v. Sutton*, 62 J. P. 423; 78 L. T. 469.

some or disorderly not to leave the premises on request of the landlord, it was held that if a person so requested to leave was neither drunk, violent, quarrelsome nor disorderly, no offense was committed by him in refusing to leave upon request made, although on a former occasion he had been drunk, violent, quarrelsome and disorderly.³¹ Where a statute provided that proof of the fact that a drunken man was drunk on licensed premises should be sufficient to authorize a conviction, and that it should "lie on the licensed person to prove that he and the persons employed by him took all reasonable steps for preventing drunkenness on the premises,"³² it is said by a standard authority that the effect of the statute appeared "to be that where any person is drunk on licensed premises this will be *prima facie* evidence of permitting drunkenness, and to rebut this the licensed person must prove that he and his servants took all reasonable steps for preventing drunkenness on the premises. If a licensed person, or his servant, as soon as he found that the person was drunk, turned him off the premises, he would rebut the *prima facie* presumption. If, on the other hand, he supplied the person drink so that the latter became drunk on the premises, the licensee would be liable to be convicted, for, by supplying the drink which caused the drunkenness, he was not taking all reasonable steps to prevent drunkenness on the premises. A licensee would be similarly liable if he neglected to notice the condition of the drunken person entering or being on his premises."³³ Where the accused sold liquor to soldiers who became excited and verging on intoxication, with the result that they quarreled and fought with his other customers, it was held that he was guilty of permitting drunkenness on his premises.³⁴ It is no excuse that the defendant was too busy attending to other customers to put the drunken person off his premises.³⁵ If a barkeeper

³¹ *Dallimore v. Sutton*, 62 J. P. 423; 78 L. T. 469.

³² Act 1902, 2 Edw. VII, c. 28, § 4.

³³ *Patterson's Licensing Acts* 299. (19 ed.), p. 583.

See also *Kessack v. Smith*, 7 F. (Just. Cas.) 75.

³⁴ *Rex v. Norman*, 19 Jut. 200.

³⁵ *Queen v. Robertson*, 9 Jut.,

with general authority from his master to serve liquor and control the bar on his behalf permit a drunken man to come on the licensed premises, he must have him put off, and merely telling him to leave is not a performance of his duty.³⁶

Sec. 1101. Found drunk on licensed premises.

Where a statute made it an offense to be "found drunk * * * on any licensed premises," it was held that the "licensed premises"—the term having been used in connection with public place or highway, making it an offense to be there found drunk—meant premises open to the public during the time when the premises are a *quasi* public place. Under such a statute it is not necessary that the drunken person should be found on the premises by a police officer. If such person, before being found, has staggered out of the licensed premises into an adjoining field he escapes the penalty, and if he is in his own house he is not liable unless he was found drunk there during open hours in the public part of the premises.³⁷ Yet a person who enters the house to use it as licensed premises, and not as a lodger or inmate, and is found drunk in the house after the closing time, may be convicted.³⁸

Sec. 1102. Being a common drunkard.

To be a common drunkard is made an offense by some statutes. Who is and who is not an habitual or common drunkard has been elsewhere discussed in this work. Occasional fits of drunkenness are not enough,³⁹ but daily drunkenness is not essential to the offense.⁴⁰ It has been held that

³⁶ *McRobie v. Bowden*, 24 N. Z. 10, following *Edmunds v. James*, *supra*, and disapproving *Faber v. Dwyer*, 3 Gay L. R. 471.

³⁷ *Lester v. Torrens*, 2 Q. B. Div. 404; 41 J. P. 821; 25 W. R. 691; 46 L. J. M. C. 280; *Warden v. Tye*, 2 C. P. Div. 74; 41 J. P. 120; 46 L. J. M. C. 111; 35 L. T. 852.

³⁸ *Regina v. Pelly* [1897], 2 Q. B. 33; 61 J. P. 373; 66 L. J. Q. B. 519; 45 W. R. 504.

³⁹ *Ludwick v. Commonwealth*, 8 Harris 172.

⁴⁰ *Commonwealth v. McNamee*, 112 Mass. 285; *Commonwealth v. Whitney*, 5 Gray 85.

An officer who is an habitual drunkard may be impeached and

proof of three specific instances of intoxication must be shown to prove a man to be a common drunkard,⁴¹ and yet such a rule is not accepted in other jurisdictions.⁴² It is sufficient to charge in an indictment that the defendant at a certain time in a certain place was a "common drunkard."⁴³

Sec. 1103. Drunkenness in office.

Drunkenness by an officer during the hours he is required to perform his official duties, or when he is engaged in their performance, is frequently made an offense by statute. Thus, where a justice of the peace was drunk when performing his official duties, it was held sufficient cause to amerce him and remove him from his office.⁴⁴ So a grand juror was held indictable at common law for getting drunk while performing his duties and thereby "disqualifying himself for the discharge of the office of juror."⁴⁵

Sec. 1104. What intoxication by statute is made criminal.

Slight intoxication will not warrant an arrest or conviction for being drunk in a public place, and evidence that the defendant was drinking and showed some signs of its effect is held not sufficient when he was attending to his business in an orderly manner and had not lost control of his faculties. To warrant conviction he must have been so under the influence of intoxicating liquor as to have lost the normal control of his bodily and mental faculties and commonly to evince a disposition to violence, quarrelsome and bestiality.

removed from office. Being drunk six or eight times a year for more than three years, each spree lasting one to three days, is sufficient to authorize his removal. *State v. Savage*, 89 Ala. 1; 7 So. 70; 7 L. R. A. 427.

⁴¹ *State v. Kelly*, 12 R. I. 535.

⁴² *State v. Pratt*, 34 Vt. 323; *Mapes v. People*, 69 Ill. 523; *Commonwealth v. Whitney*, 5 Gray 85.

⁴³ *Commonwealth v. Whitney*, 5 Gray 85; *Commonwealth v. Foley*,

99 Mass. 499; see *Commonwealth v. McNamara*, 116 Mass. 340; *Commonwealth v. Miller*, 8 Gray 484; see also *State v. Kelly*, 12 R. I. 525; *Commonwealth v. Boon*, 2 Gray 74.

⁴⁴ *Commonwealth v. Alexander*, 1 Va. Cas. 156; 4 Hen. & M. 522; *Commonwealth v. Mann*, 1 Va. Cas. 308.

⁴⁵ *Pennsylvania v. Keffer*, *Addison (Pa.)*, 290.

Where the words "drunkenness" and "in a state of intoxication" are used in a statute punishing drunkenness, they are used in their ordinary signification and mean the condition produced by taking intoxicating liquor in excessive quantities; it is, therefore, not necessary for the court to define drunkenness or intoxication in its instructions to the jury, and it is not error to refuse to tell the jury that the words meant more than that the defendant should have drunk intoxicating liquors sufficient to exhilarate him.⁴⁶ Proof that the intoxication was occasioned by chloroform or opium will not warrant a conviction; the drunkenness must have been produced by drinking intoxicating liquors.⁴⁷

Sec. 1105. Arrest for drunkenness.

A statute which authorizes a police officer to arrest for a misdemeanor upon view will authorize him to arrest a person

⁴⁶ Clark v. State, 53 Tex. Cr. App. 529; 111 S. W. 659; Roden v. State, 136 Ala. 89; 34 So. 351.

[Citing Standard Life and Accident Ins. Co. v. Jones, 94 Ala. 434, 441, 442; 10 So. 530; Wadsworth v. Dunham, 98 Ala. 610, 613, 614; 13 So. 597; State v. Savage, 89 Ala. 1, 8; 7 So. 7, 183; 7 L. R. A. 426; State v. Robinson, 111 Ala. 482, 485; 20 So. 30.]

See also Rex v. Norman, 19 Juta 200; Brooke v. State, 86 Ark. 364; 111 S. W. 471; Coleman v. State, 3 Ga. App. 298; 59 S. E. 829.

Testimony concerning the condition and conduct of the defendant after leaving a house in which he was drinking and before reaching another house was held admissible. Coleman v. State, 3 Ga. App. 298; 59 S. E. 829; but statements made out of his presence to the arresting officer concerning his condition are not admissible. People v. Soloman, 57 N. Y. Misc. Rep. 288; 106 N. Y. Supp. 1110.

The accused may prove his character is good, to rebut the presumption of having been drunk. People v. Soloman, *supra*.

Evidence that the accused drew a knife on the street and right at the door of a neighbor's house was held admissible. Coleman v. State, *supra*.

It is not competent for a defendant, in order to show he was not intoxicated, to prove that his companion at the same time drank the same kind and number of drinks and that it did not make him drunk. "Some men can drink twice as much as others without showing it." Commonwealth v. Cleary, 135 Pa. St. 64; 19 Atl. 1017; 8 L. R. A. 301.

What is not irregularity of counsel in argument to the jury, urging a conviction, see Clark v. State, 53 Tex. Cr. App. 529; 111 S. W. 659.

⁴⁷ Commonwealth v. Whitney, 11 Cush. 477.

found drunk in a public street, where it is an offense to be drunk in such a place, or to arrest him where he finds him drunk in a public place where a similar statute makes drunkenness in a public place an offense.⁴⁸ But an officer who does not see the drunken person in a prohibited place may not arrest him without a warrant, and his superior—as a mayor of a city—cannot orally authorize him to so make the arrest.⁴⁹ And if an officer in such an instance undertakes to arrest and does arrest such a person without a warrant, he has the burden to show, when sued for false imprisonment, that such person was actually drunk in a prohibited place.⁵⁰ Power to arrest on view a person found drunk in a public place will not authorize the officer to arrest a person found drunk in a private place.⁵¹ An ordinance declaring drunkenness in a public place a nuisance is not in conflict with a statute authorizing a State peace officer to arrest a drunken person found in a public place.⁵² An arrest by an officer, without a warrant, of a person who had been drunk earlier in the day is unauthorized,⁵³ and perhaps he may not arrest a drunken person in the charge of a discreet person who is taking him to a private place.⁵⁴ If the officer arrest a person apparently drunk in a public place,

⁴⁸ *People v. Jones*, 2 Mich. N. P. 194; *Commonwealth v. O'Connor*, 7 Allen, 583; *People v. Board*, 110 N. Y. Supp. 745; *People v. Markell*, 20 N. Y. Misc. Rep. 149; 45 N. Y. Supp. 904; *In re Rogers*, 75 Vt. 329; 55 Atl. 661; *DeWitt v. La Cotts*, 76 Ark. 250; 88 S. W. 877; *Stevens v. Commonwealth*, 98 S. W. 284; 30 Ky. L. Rep. 200; *Pratt v. Brown*, 80 Tex. 608; 16 S. W. 443; *Commonwealth v. Coughlin*, 123 Mass. 436; *Commonwealth v. Presby*, 14 Gray 65; *Wing v. Commonwealth*, 7 Ky. L. Rep. 216; *Newton v. Locklin*, 77 Ill. 103.

⁴⁹ *Snider v. Thompson*, 134 Iowa 725; 112 N. W. 239; *Griffin v.*

Wilcox, 21 Ind. 370; *Webb v. State*, 51 N. J. L. 189; 17 Atl. 113; *Bright v. Patton*, 5 Mackey 534; 8 Cent. Rep. 711; *State v. Sims*, 16 S. C. 486; *Meyer v. Clark*, 9 Jones & S. 107; *Taylor v. Strong*, 3 Wend. 384; *Wahl v. Walton*, 30 Minn. 506; 16 N. W. 397; *Kruevitz v. Eastern R. Co.*, 143 Mass. 228; 9 N. E. 613.

⁵⁰ *Snider v. Thompson*, 134 Iowa 725; 112 N. W. 239.

⁵¹ *Commonwealth v. O'Connor*, 7 Allen 583.

⁵² *De Witt v. La Cotts*, 76 Ark. 250; 88 S. W. 877.

⁵³ *Newton v. Locklin*, 77 Ill. 103.

⁵⁴ *Wing v. Commonwealth*, 7 Ky. L. Rep. 216.

when in fact he is not drunk, he will not be liable for a false arrest, if he acted in good faith.⁵⁵ Where the question is whether the person arrested was drunk, the conclusion of an observer of him is admissible to prove the fact of his drunkenness.⁵⁶ When he arrests a drunken person the officer arresting him may confine him in jail until he can take him before a magistrate.⁵⁷ Where an officer arrested a drunken man, and then released him on his promise to go home, it was held that he could rearrest him on his going into a bar-room in sight of such officer.⁵⁸ Under an ordinance making it an offense to be "found drunk in the streets, hallooing or making an unusual noise," an officer may not arrest without warrant a person on the streets who is merely drunk.⁵⁹ But public and disorderly drunkenness committed in the presence of an officer authorizes him to arrest the offenders without a warrant.⁶⁰

⁵⁵ *Commonwealth v. Presby*, 14 Gray, 65; *Commonwealth v. Cheney*, 141 Mass. 102; 6 N. E. 724.

In one case it was held that if the peace officer finds a citizen sober or partially intoxicated, but not disturbing the peace, he may not arrest nor interfere with him. *Commonwealth v. Fisher*, 1 Leg. Opinion, 50.

⁵⁶ *People v. Gaynor*, 33 N. Y. App. Div. 98; 53 N. Y. Supp. 86.

⁵⁷ *People v. Jones*, 2 Mich. N. P. 194; *Stevens v. Commonwealth*, 124 Ky. 32; 98 S. W. 284; 30 Ky. L. Rep. 200.

A soldier in the army may be arrested for drunkenness. *Ex parte Bright*, 1 Utah, 145. (In this case it was held he having violated a city ordinance, that he ought to be turned over to the military authorities, on demand, for court martial, the offense being only cognizable before that tribunal, and that a city ordi-

nance was not a law of the land within the meaning of the Thirtieth Article of War, which provides that when an officer or soldier shall be accused of an offense, such as is punishable by the known laws of the land, he may be surrendered to the civil magistrate.)

⁵⁸ *Commonwealth v. Hastings*, 9 Met. 259.

⁵⁹ *State v. Hunter*, 106 N. C. 796; 11 S. E. 366; 8 L. R. A. 529; distinguishing *State v. McNinch*, 87 N. C. 567, where the arrest for "public drunkenness and loud and profane swearing," which was declared to be a nuisance, was held valid.

⁶⁰ *Bryan v. Bates*, 15 Ill. 87; *State v. Bowen*, 17 S. C. 58; *Charleston v. Payne*, 2 Nott & McC. 475; *Mosley v. State*, 23 Tex. App. 409; 4 S. W. 907; *Shanley v. Wells*, 71 Ill. 78; *State v. Laferty*, 5 Har. (Del.) 491;

Sec. 1106. Arrest without warrant for liquor offense.

A statute may authorize a police officer to arrest on view any person he sees transporting intoxicating liquors and detain him until a warrant can be procured. Such a statute is constitutional.⁶¹ So it may empower him to arrest a person who in his presence has in his possession whisky for illegal sale or is selling it without paying the tax due on it.⁶² When he arrests him the officer may confine him in jail until he can be taken before a magistrate.⁶³ But an officer has not authority, without a warrant or previous demand to enter a closed shop or saloon and arrest the owner and others engaged in unlawfully selling liquors.⁶⁴ If he arrest a person for illegally transporting liquors in a wagon, he may detain the wagon and horses for such reasonable time as is necessary to remove the liquors from the wagon.⁶⁵ Where a statute provides that a child under sixteen years of age, except in charge of its parent or guardian, found in a place where liquors are sold, must be arrested and taken before a magistrate, the arrest may be without a warrant, and it is the duty of a police officer finding a child under such circumstances to arrest and take it before a magistrate.⁶⁶

State v. Russell, 1 Houst. (Del.) 122; Main v. McCarty, 15 Ill. 442; Commonwealth v. Coughlin, 123 Mass. 426; Phillips v. Fadden, 125 Mass. 198; Roberts v. State, 14 Mo. 138; People v. Pratt, 22 Hun, 300; State v. Freeman, 86 N. C. 683; White v. Kent, 11 Ohio St. 550; Thomas v. Ashland, 12 Ohio St. 127.

But the officer cannot arrest a person disturbing the peace not in his immediate presence; as where he was out of sight on another street, 150 feet away, although he heard the disturbance. People v. Johnson, 86 Mich. 175; 48 N. W. 870; 13 L. R. A. 163.

⁶¹ Jones v. Root, 6 Gray, 435; Mason v. Lathorn, 7 Gray, 354.

Such is the case where an officer is empowered to arrest any one committing a misdemeanor in his presence. Weser v. Welty, 18 Ind. App. 664; 47 N. E. 639.

⁶² Carico v. Wilmore, 51 Fed. 196.

⁶³ People v. Jones, 2 Mich. N. P. 194.

⁶⁴ McLenon v. Richardson, 15 Gray, 74.

⁶⁵ Jones v. Root, 6 Gray, 435; Mason v. Lathorn, 7 Gray, 354.

⁶⁶ People v. Angie, 74 N. Y. App. Div. 539; 77 N. Y. Supp. 832

Sec. 1107. Miscellaneous.

Under a statute authorizing a magistrate to commit a person arrested for being drunk who refuses to tell where and from whom he obtained the liquor that made him drunk, such magistrate has a discretion to determine when a full disclosure has been made, and his decision will be sustained on an application for a writ of *habeas corpus* to release the drunken man, unless he has abused his discretion.⁶⁷

⁶⁷ *In re Carpenter*, 71 Vt. 91; 41 Atl. 1042.

CHAPTER XXXV.

DRUNKENNESS AS A DEFENSE IN CRIMINAL PROSECUTIONS.

SECTION.	SECTION.
1108. Voluntary intoxication no excuse for the commission of crime — Reasons for rule.	1121. Extent of intoxication to reduce the degree of the offense.
1109. Voluntary drunkenness as an excuse— <i>Continued</i> .	1122. Incapacity to deliberate, reducing homicide below second degree.
1110. Involuntary intoxication.	1123. Specific intent — Assault with intent.
1111. Evidence of physical incapacity.	1124. Assault with intent to commit rape.
1112. Aggravating crime.	1125. Conspiracy to commit murder.
1113. Assault and battery.	1126. Attempt to commit suicide.
1114. Drunkenness producing permanent disability or insanity — <i>Delirium tremens</i> .	1127. Burglary.
1115. What degree of insanity is a defense.	1128. Forgery.
1116. <i>Dipsomania—Ooinomania</i> .	1129. Larceny and robbery.
1117. Instructions to jury—Cases of <i>delirium tremens</i> .	1130. Self-defense.
1118. Provocation.	1131. Willful drunkenness—Previously formed intent.
1119. Intoxication reducing the grade of homicide—Evidence.	1132. Burden to show the incapacity to form a criminal intent.
1120. Intoxication reducing the grade of homicide—Malice —Premeditation.	1133. Instructions concerning the reduction of the degree of the offense.
	1134. Drunken insane person.
	1135. Voluntary use of drugs.
	1136. Texas statute—Use of drugs.
	1137. Miscellaneous.

Sec. 1108. Voluntary intoxication no excuse for commission of crime—Reasons for rule.

It has been often decided and more often said that voluntary intoxication or drunkenness is neither an excuse nor a palliation for the commission of crime, by

which we are to understand that an accused cannot urge as a defense or palliation that at the time he committed the offense he was drunk or intoxicated, when he had voluntarily brought that condition upon himself.⁶⁸

- ⁶⁸ Byrd v. State, 76 Ark. 286; 88 S. W. 974; State v. Truit, 5 Pennewill (Del.), 466; 62 Atl. 790; Butler v. State (Miss.), 39 So. 1005; State v. Stibbins, 188 Mo. 387; 87 S. W. 460; Brown v. State, 142 Ala. 237; 38 So. 268; People v. Griffith, 146 Cal. 339; 80 Pac. 68; Cook v. State, 46 Fla. 20; 35 So. 665; People v. Dowell, 141 Cal. 493; 75 Pac. 45; Cribb v. State, 118 Ga. 316; 45 S. E. 396; State v. Roan, 122 Iowa, 136; 97 N. W. 997; State v. Sparegrove, 134 Iowa, 599; 112 N. W. 83; State v. Corrivon, 93 Minn. 38; 100 N. W. 638; Porter v. State, 140 Ala. 87; 37 So. 81; State v. Brown, 181 Mo. 192; 79 S. W. 1111; Thomas v. State (Fla.), 23 So. 161; State v. Di Guglielmo (Del.), 55 Atl. 350; State v. Pasnau, 118 Iowa, 501; 92 N. W. 682; Wright v. Commonwealth (Ky.), 72 S. W. 340; 24 Ky. L. Rep. 1838; Commonwealth v. Dudash, 204 Pa. 124; 53 Atl. 756; Fielding v. State, 135 Ala. 56; 33 So. 677; Lanckton v. United States, 18 App. D. C. 348; State v. Kavanaugh, 4 Pennewill (Del.), 31; 53 Atl. 335; Montag v. People, 141 Ill. 75; 30 N. E. 337; State v. Kraemer, 49 La. Ann. 766; 22 So. 254; Starke v. State, 49 Fla. 41; 37 So. 850; State v. Woodward, 191 Mo. 617; 90 S. W. 90; Bell v. State, 140 Ala. 57; 37 So. 281; United States v. Abigan, 1 Philippine, 83; State v. Dillard, 59 W. Va. 197; 53 S. E. 117; Robb v. Commonwealth (Ky.), 101 S. W. 918; 31 Ky. L. Rep. 246; Bleich v. People, 227 Ill. 80; 81 N. E. 36; Davis v. State, 152 Ala. 86; 44 So. 561; Commonwealth v. Parsons, 195 Mass. 560; 81 N. E. 291; People v. Hower, 151 Cal. 638; 91 Pac. 507; Carney v. United States, 7 Ind. Ty. 247; 104 S. W. 606; Atkins v. State (Tenn.), 105 S. W. 353; 13 L. R. A. (N. S.) 1031; State v. Kidwell, 62 W. Va. 466; 59 S. E. 494; 13 L. R. A. (N. S.) 1024; Brennan v. People, 37 Colo. 256; 86 Pac. 79; People v. Pekarz, 185 N. Y. 470; 78 N. E. 294; State v. Hogan, 117 La. 863; 42 So. 352; State v. Rowell, 75 S. C. 494; 56 S. E. 23; State v. Johnny, 29 Nev. 203; 87 Pac. 31; State v. Yates, 132 Iowa, 475; 109 N. W. 1005; Laws v. State, 144 Ala. 118; 42 So. 40; People v. Koerner, 117 N. Y. App. Div. 40; 102 N. Y. Supp. 93; State v. Adams (Del.), 65 Atl. 510; State v. Church, 199 Mo. 605; 98 S. W. 16; Ryan v. United States, 26 App. D. C. 74; State v. Clevenger, 156 Mo. 190; 56 S. W. 1078; Leroy v. State (Ala.), 25 So. 247; People v. Fellows, 122 Cal. 233; 54 Pac. 830; State v. Kindred, 148 Mo. 270; 49 S. W. 845; State v. Faino, 1 Marv. (Del.) 492; 41 Atl. 134; People v. Hill, 123 Cal. 47; 55 Pac. 692; State v. Hand, 1 Marv. (Del.) 545; 41 Atl. 192; Hite v. Commonwealth, 96 Va. 489; 31 S. E. 895; State v. Weaver, 35 Ore. 415; 58 Pac. 109; State v. Kale,

And the reason usually assigned for this rule is that voluntary drunkenness is itself a crime, at least in morals,

124 N. C. 816; 32 S. E. 892; Whitten v. State, 115 Ala. 72; 22 So. 483; People v. Klass, 115 Cal. 567; 47 Pac. 459; State v. Alcorn, 137 Mo. 121; 38 S. W. 548; State v. Snow, 3 Penn. (Del.) 259; 51 Atl. 607; Gustavenson v. State (Wyo.), 68 Pac. 1006; State v. Peterson, 129 N. C. 556; 40 S. E. 9; State v. Haab, 105 La. 230; 29 So. 725; Booher v. State, 156 Ind. 435; 60 N. E. 156; 54 L. R. A. 391; People v. Meth-e-ver, 132 Cal. 326; 64 Pac. 481; Hempton v. State, 111 Wis. 127; 86 N. W. 596; State v. Rigley, 7 Idaho, 292; 62 Pac. 679; People v. Koerner, 117 N. Y. App. Div. 40; 102 N. Y. Supp. 93; affirmed, 191 N. Y. 528; 84 N. E. 1117; Longley v. Commonwealth, 99 Va. 807; 37 S. E. 339; 2 Va. Sup. Ct. Rep. 660; Finley v. Commonwealth, 6 Ky. L. Rep. (abstract) 443; Montgomery v. State (Ala.), 49 So. 1902; Commonwealth v. Nazarko (Pa.), 73 Atl. 210; State v. Wilson, 124 La. 82; 49 So. 986; Morris v. Territory, 1 Okla. Cr. Rep. 637; 99 Pac. 760; 101 Pac. 111; State v. Pell (Iowa), 119 N. W. 154; Commonwealth v. Snyder (Pa.), 73 Atl. 910; Regina v. Moore, 3 Car. & K. 319; 16 Jur. 750; Frost's Case, 22 How. St. Tr. 472; Dammaree's Case, 15 How. St. Tr. 522; Reniger v. Fogossa, 1 Plowd. 19; Regina v. Gamlen, 1 Fost. & F. 90; Rex v. Meakin, 7 Car. 297; Rex v. Thomas, 7 Car. & P. 817; Bever-ley's Case, 4 Coke, 125a; Rennie's Case, 4 Coke, 76; Burrow's Case, 1 Lewin C. C. 75; Pearson's Case,

2 Lewin C. C. 144; Regina v. Dick-son, 11 Cox C. C. 341; Regina v. Doody, 6 Cox C. C. 463; Regina v. Monkhouse, 4 Cox C. C. 55; United States v. Cornell, 2 Mason, 99; United States v. Forbes, Crabbe, 558; United States v. Mc-Glue, 1 Curt C. C. 1; United States v. Bowen, 4 Cranch. C. C. 604; United States v. Rouden-bush, Baldw. 514; United States v. Claypool, 14 Fed. Rep. 127; State v. Robinson, 20 W. Va. 713; 43 Am. Rep. 799; State v. Tatro, 50 Vt. 483; Commonwealth v. Jones, 1 Leigh, 598; Willis v. Commonwealth, 32 Gratt. 929; Boswell v. Commonwealth, 20 Gratt. 860; Pugh v. State, 2 Tex. App. 539; Brown v. State, 4 Tex. App. 275; Jeffries v. State, 9 Tex. App. 598; Payne v. State, 5 Tex. App. 35; Colbath v. State, 4 Tex. App. 76; Scott v. State, 12 Tex. App. 31; Ward v. State, 19 Tex. App. 664; Williams v. State, 25 Tex. App. 76; 7 S. W. 661; Clore v. State, 26 Tex. App. 624; 10 S. W. 242; *Ex parte* Evers, 29 Tex. App. 539; 16 S. W. 341; State v. John, 8 Ired. L. 330; 49 Am. Dec. 396; State v. Wilson, 104 N. C. 868; 10 S. E. 315; Lanergan v. People, 6 Park. Crim. Rep. 209; Rogers v. People, 3 Park. Crim. Rep. 633; People v. Robinson, 2 Park. Crim. Rep. 235; People v. Hammill, 2 Park. Crim. Rep. 223; People v. Wiley, 2 Park. Rep. 19; People v. Fuller, 2 Park. Rep. 16; People v. Porter, 2 Park. Crim. Rep. 14; People v. Robinson, 1 Park. Crim. Rep. 649; People v. Jones, 2 Edm. Sel. Cas. 88; Ken-

if not always in law, and it always is, at least, a vice,
 “and it would be subversion of law and of all moral-

- ney v. People, 27 How. Pr. 202; People v. Batting, 49 How. Pr. 392; People v. Cavanagh, 62 How. Pr. 187; People v. O'Connell, 62 How. Pr. 436; People v. Pine, 2 Barb. 566; Lanergan v. People, 50 Barb. 266; Friery v. People, 54 Barb. 319; People v. Rogers, 18 N. Y. 9; 72 Am. Dec. 484; Kenny v. People, 31 N. Y. 330; Flanigan v. People, 86 N. Y. 554; 40 Am. Rep. 556; Territory v. Franklin, 2 N. M. 307; State v. Martin (N. J.), 3 Crim. L. Mag. 44; State v. Thompson, 12 Nev. 140; Smith v. State, 4 Neb. 277; Schlencker v. State, 9 Neb. 241; 1 N. W. 857; O'Grady v. State, 36 Neb. 320; 54 N. W. 556; Territory v. Manton, 8 Mont. 95; 19 Pac. 387; Kelly v. State, 3 Smedes & M. 518; State v. O'Reilly, 126 Mo. 597; 29 S. W. 597; Mix v. McCoy, 22 Mo. App. 488; Whitney v. State, 8 Mo. 165; Schaller v. State, 14 Mo. 502; State v. Harlow, 21 Mo. 446; Ferrell v. State, 43 Tex. 503; Kelley v. State, 31 Tex. Crim. Rep. 216; 20 S. W. 357; Evers v. State, 31 Tex. Crim. Rep. 318; 20 S. W. 744; 18 L. R. A. 421; Crew v. State (Tex. Crim. Rep.), 23 S. W. 14; Osburn v. State (Tex. Crim. Rep.), 26 S. W. 625; Carter v. State, 12 Tex. 500; 62 Am. Dec. 539; Outlaw v. State, 35 Tex. 481; Bennett v. State, Mart. & Y. 133; Cornwell v. State, Mart. & Y. 147; Swan v. State, 4 Humph. 136; Clark v. State, 8 Humph. 671; Pirtle v. State, 9 Humph. 663; Wilcox v. State, 94 Tenn. 106; 28 S. W. 312; State v. Toohy, 2 Rice, Dig. (S. C.) 105; State v. Stark, 1 Strobh. L. 479; State v. McCants, 1 Speers L. 389; State v. Paulk, 18 S. C. 514; State v. Bundy, 24 S. C. 439; 58 Am. Rep. 262; State v. Morgan, 40 S. C. 345; 18 S. E. 937; Kelly v. Commonwealth, 1 Grant, Ca. 484; Respublica v. Weidle, 2 U. S. 2 Dall. 88; 1 L. Ed. 301; State v. Thompson, 1 Wright (Ohio), 617; Commonwealth v. Hart, 2 Brewst. (Pa.) 546; Commonwealth v. Baker, 11 Phila. 631; Pennsylvania v. McFall, 1 Addison (Pa.), 257; Commonwealth v. Dougherty, 1 Browne (Pa.), (Appendix xviii); Commonwealth v. Perrier, 3 Phila. 229; Keenan v. Commonwealth, 44 Pa. 66; 84 Am. Dec. 414; Jones v. Commonwealth, 75 Pa. 403; McGinnis v. Commonwealth, 102 Pa. 66; Commonwealth v. Cleary, 148 Pa. 26; 23 Atl. 1110; Cline v. State, 43 Ohio St. 332; 1 N. E. 22; State v. Turner, 1 Wright (Ohio), 30; Pigman v. State, 14 Ohio, 556; 45 Am. Dec. 558; O'Herrin v. State, 14 Ind. 420; Dawson v. State, 16 Ind. 428; 79 Am. Dec. 439; Bailey v. State, 26 Ind. 422; Bradley v. State, 31 Ind. 492; Cluck v. State, 40 Ind. 263; Gillooley v. State, 58 Ind. 182; Fisher v. State, 64 Ind. 435; Colee v. State, 75 Ind. 513; Smurr v. State, 88 Ind. 504; Sanders v. State, 94 Ind. 147; Goodwin v. State, 96 Ind. 550; Surber v. State, 99 Ind. 71; Robinson v. State, 113 Ind. 510; 16 N. E. 184; Aszman v. State, 123 Ind. 347; 8 L. R. A. 33; McKee v. Ingalls, 5 Ill. 30; McIntyre v. Peo-

ity if the commission of one vice or crime could be permitted to operate as an excuse or palliation for another

ple, 38 Ill. 514; Rafferty v. People, 66 Ill. 118; Upstone v. People, 109 Ill. 169; Crosby v. People, 137 Ill. 325; 27 N. E. 49; Jenkins v. State, 93 Ga. 1; 18 S. E. 992; Mercer v. State, 17 Ga. 146; Golden v. State, 25 Ga. 527; Choice v. State, 31 Ga. 424; Estes v. State, 55 Ga. 30; Henry v. State, 33 Ga. 441; Marshall v. State, 59 Ga. 154; Hanvey v. State, 68 Ga. 612; Beck v. State, 76 Ga. 452; Vann v. State, 83 Ga. 44; 10 S. E. 591; McCook v. State, 91 Ga. 740; 17 S. E. 1019; Garner v. State, 28 Fla. 113; 9 So. 835; State v. Dillahunt, 3 Harr. (Del.) 551; State v. McGonigal, 5 Harr. (Del.) 510; State v. Hurley, Houst. Crim. Rep. (Del.) 28; State v. Thomas, Houst. Crim. Rep. (Del.) 511; State v. Cross, 27 Mo. 332; State v. Hundley, 46 Mo. 414; State v. Pitts, 58 Mo. 556; State v. Dearing, 65 Mo. 530; State v. Edwards, 71 Mo. 324; State v. Ramsey, 82 Mo. 133; State v. Sneed, 88 Mo. 138; State v. Lowe, 93 Mo. 547; 2 S. W. 840; State v. Carter, 98 Mo. 176; 11 S. W. 624; State v. Riley, 100 Mo. 493; 13 S. W. 1063; State v. Murphy, 118 Mo. 7; 25 S. W. 95; State v. Garvey, 11 Minn. 154; People v. Garbutt, 17 Mich. 9; 97 Am. Dec. 162; People v. Wilson, 55 Mich. 506; 21 N. W. 905; People v. Finley, 38 Mich. 482; Lawton v. Sun Mut. Ins. Co., 2 Cush. 500; Commonwealth v. Gilbert, 185 Mass. 45; 42 N. E. 336; Commonwealth v. Malone, 114 Mass. 295; State v. Coleman, 27 La. Ann. 691; Tyra v. Commonwealth, 2 Met. (Ky.) 1; Curry v. Commonwealth, 2 Bush, 67; Blimm v. Commonwealth, 7 Bush, 320; Shannahan v. Commonwealth, 8 Bush, 464; 8 Am. Rep. 465; Conly v. Commonwealth, 98 Ky. 125; 32 S. W. 285; McCarty v. Commonwealth, 14 Ky. L. Rep. 285; Carpenter v. Commonwealth, 92 Ky. 452; 18 S. W. 9; Buckhannon v. Commonwealth, 86 Ky. 110; 5 S. W. 358; State v. Horner, 9 Kan. 119; State v. White, 14 Kan. 538; State v. Mowry, 37 Kan. 369; 15 Pac. 282; State v. O'Neil, 51 Kan. 651; 33 Pac. 287; 24 L. R. A. 555; State v. Donovan, 61 Iowa, 369; 16 N. W. 206; State v. Hart, 29 Iowa, 268; State v. Bell, 29 Iowa, 316; State v. Maxwell, 42 Iowa, 208; State v. Harrigan, 9 Houst. (Del.) 369; State v. Davis, 9 Houst. (Del.) 407; State v. Till, Houst. Crim. Rep. (Del.) 233; People v. Odell, 1 Dak. 189; State v. Johnson, 41 Conn. 584; 40 Conn. 136; People v. Blake, 65 Cal. 275; 4 Pac. 1; People v. Young, 102 Cal. 411; 36 Pac. 770; Pickett v. Sutter, 5 Cal. 412; People v. Nichol, 34 Cal. 212; People v. Lewis, 36 Cal. 531; People v. Williams, 43 Cal. 344; People v. Ferris, 55 Cal. 588; Chrisman v. State, 54 Ark. 283; Casat v. State, 40 Ark. 511; Cavaness v. State, 43 Ark. 331; State v. Bullock, 13 Ala. 413; Mooney v. State, 33 Ala. 419; Beasley v. State, 50 Ala. 149; 20 Am. Rep. 292; Ross v. State, 62 Ala. 224; Tidwell v. State, 70 Ala. 33; Ford v. State, 71 Ala. 385; Williams v. State, 81 Ala. 1; 1 So. 179; 60 Am. Rep.

crime.”⁶⁹ “If the prisoner was,” said Justice Story in an early case, “at the time of committing the offense intoxicated, as his counsel have earnestly contended, I cannot perceive how it can, in point of law, help his case. This is the first time that I ever remember it to have been contended that the commission of one crime was an excuse for another. Drunkenness is a gross vice, and in contemplation of some of our laws is a crime, and I learned in my earliest studies that, so far from its being in law an excuse for murder, it is rather an aggravation of its malignity. If it be fit that another rule of law should prevail, it will be for the Legislature to prescribe it. It is my duty to administer the law upon its settled principles; and I confess that I do not well know how a doctrine more dangerous to the peace and good order of society could be established than that the vices of men, as this voluntary madness is, should constitute an excuse for their crimes.”⁷⁰ “In the forum of conscience,” said Justice Denio, “there is no doubt considerable difference between a murder deliberately planned and executed by a person of unclouded intellect and the reckless taking of life by one infuriated by intoxication; but human laws

133; *Gunter v. State*, 83 Ala. 96; 3 So. 600; *Morrison v. State*, 84 Ala. 405; 4 So. 402; *Walker v. State*, 85 Ala. 7; 4 So. 686; *Carter v. State*, 87 Ala. 113; 6 So. 356; *Engelhardt v. State*, 88 Ala. 100; 7 So. 154; *Fonville v. State*, 91 Ala. 39; 8 So. 688; *Chatham v. State*, 92 Ala. 47; 9 So. 607.

⁶⁹ *Harris v. United States*, 8 App. D. C. 20; 36 L. R. A. 465. “There is too much refinement and false reasoning on this question,” said the court in this case. “It is quite plausible to argue that, because a condition of intoxication may so far impair the mental faculties as to preclude a person from the capability of acting with a design or premeditation, there-

fore, no person in that condition can be guilty of a crime in which one of the constituent elements is premeditation. Intoxication is likened to insanity, and is characterized as a disease. And it is in many cases most undoubtedly a disease, and all crime is insanity. But it would be wholly absurd to argue from this that society may not punish crime at all, or that a resulting disease shall condone the vice that leads to it. The habit of intoxication may be a disease, but voluntary intoxication is a vice, and if it leads to criminal action, it is a crime.”

⁷⁰ *United States v. Cornell*, 2 Mason, 99.

are based upon consideration of policy, and look rather to the maintenance of personal security and social order than to any accurate discrimination as to the moral qualities of individual conduct. But there is, in truth, no injustice in holding a person responsible for his acts committed in a state of voluntary intoxication. It is a duty which every one owes to his fellowmen and to society, to preserve, so far as it lies in his own power, the inestimable gift of reason. If it is perverted or destroyed by fixed disease, though brought on by his own vices, the law holds him not accountable. But if by a voluntary act he temporarily casts off the restraints of reason and conscience, no wrong is done him if he is considered answerable for any injury which in that state he may do to others or to society.”⁷¹ In those crimes where violence is used, it cannot be successfully urged that the accused was so drunk that he was incapable of forming an intention to commit the offense. “In order that one should be guilty of crime,” said Justice Morris, in a late case, “it is not always a necessity that intention should expressly appear in order that specific crime should be committed. Intention is usually inferred from the act itself and from circumstances. But it may be inferred from other criminal conduct. One who commits arson, intending only to commit that crime, may be held guilty of murder if a homicide is the result of his act, although he may not have contemplated any such result. One who wantonly or wickedly throws a missile in the public thoroughfare is responsible civilly and criminally for resulting injury, although he may not have intended any such injury. When the result of any specific course of conduct, such as the indulgence in intoxicating liquors to excess, is notoriously such as easily and naturally lead to the commission of crime, society can only be safe in rightly holding the author of such conduct to accountability for its usual consequences.”⁷² These extracts

⁷¹ *People v. Rogers*, 18 N. Y. 9; 72 Am. Dec. 484; *Commonwealth v. Hawkins*, 3 Gray, 463; *Flanigan v. People*, 86 N. Y. 554; 40 Am. Rep. 556.

⁷² The court adds: “These are elementary principles of law: but they seem to be ignored in those judicial decisions and by those text-writers who would reduce the

from judicial opinions show really two principal reasons for the rule they adopt: (1) That as voluntary intoxication is a vice, and sometimes a crime, a man is not permitted to plead a condition brought about by himself as an excuse when he has voluntarily brought it about; and (2) it is absolutely necessary to adopt it as a protection to society; for otherwise men would seek intoxication when bent upon the commission of crime, so as to be able to escape punishment.⁷³

grade of crime or relieve entirely from responsibility for those who have committed it while in a state of voluntary intoxication." *Harris v. United States*, 8 App. D. C. 20; 36 L. R. A. 465. In a subsequent part of the opinion the same judge says, speaking for the court: "The principles here stated seem to us to be the dictate of reason and common sense, and to be inexorably demanded for the protection of society against lawlessness. We prefer to follow them rather than the false sentimentality, as we regard it, of those judicial utterances which set a premium on vice by the condonation of crime resulting from reckless habit."

⁷³ "If the rule for which counsel contends should prevail, then the common drunkard, whose appetite controls his mind and will, may, with impunity, commit the gravest crimes, but, happily, the law is subject to no such reproach." *Goodwin v. State*, 96 Ind. 550.

"As a matter of course the rule is universal that voluntary intoxication is no excuse for crime, nor does it in any degree mitigate or palliate an offense actually committed. To hold otherwise would

unbridle crime and subvert public order. On the contrary, there is reason to believe that one who has conceived the design to commit a crime, and while harboring the unlawful purpose, voluntarily becomes intoxicated in order to blunt his moral sensibilities and nerve himself up to the execution of his preconceived design, the offense is thereby greatly aggravated." *Aszman v. State*, 123 Ind. 347; 24 N. E. 123; 8 L. R. A. 33; *State v. Robinson*, 20 W. Va. 713; 43 Am. Rep. 799.

The court will not inquire as to whether the intoxicating liquor was, by reason of adulteration, peculiarly calculated to affect the mind of the accused. *Cribb v. State*, 118 Ga. 316; 45 S. E. 396.

The general rule applies even where the accused became drunk at the solicitation of the deceased. *Commonwealth v. Dudash*, 204 Pa. 124; 53 Atl. 756; *State v. Sopher*, 70 Iowa, 494.

An insane man may voluntarily get drunk; and his drunkenness does not withdraw him from the protection due to insanity; but when he commits a homicide during the time he is drunk, reliance must be placed upon the original

Sec. 1109. Voluntary intoxication as an excuse—Continued.

Mere drunken excitement and rage cannot shield a defendant from the law's condemnation,⁷⁴ nor can any condition which is the immediate result of drunkenness.⁷⁵ Nor can mental incapacity to know or understand what he is doing, resulting from the immediate use of liquor, and not of a permanent character, be urged as a defense.⁷⁶ One who is a drunkard merely, or is greatly intoxicated, cannot be said to be a person of unsound mind.⁷⁷ Thus, temporary de-

insanity, and not on the subsequent drunkenness. *State v. Kraemer*, 49 La. Ann. 766; 22 So. 254.

It is not error, on a charge of murder, to refuse an instruction requested that if the accused was so drunk he was incapable of forming the intent to take the life of the deceased, he must be acquitted. *Bell v. State*, 140 Ala. 57; 37 So. 281.

It is no excuse that the defendant, from a long habit, had no power to resist drinking strong liquors. *State v. Haab*, 105 La. 230; 29 So. 725.

Mr. Bishop has stated the rule concerning intoxication as an excuse for crime in his usual felicitous style: "When a man voluntarily becomes drunk, there is the wrongful intent; and if, while too far gone to have any further intent, he does a wrongful act, the intent to drink coalesces with the act done while drunk, and for this combination of act and intent he is liable criminally. It is, therefore, the doctrine, applicable in ordinary cases, that voluntary intoxication furnishes no excuse for crime committed under its influence. It is so even when intoxica-

tion is so extreme as to make the person unconscious of what he is doing, or to create temporary insanity." 1 Bishop Crim. Law (7th Ed.), § 400.

⁷⁴ *State v. Wilson*, 104 N. C. 868; 10 S. E. 315.

⁷⁵ *State v. Lowe*, 93 Mo. 547; 5 S. W. 889.

⁷⁶ *Fisher v. State*, 64 Ind. 435; *State v. Bullock*, 13 Ala. 413; *Garner v. State*, 28 Fla. 113; 9 So. 835; *State v. Thompson*, 12 Neb. 140; *Schlencker v. State*, 9 Neb. 241; 1 N. W. 857; *State v. Hundley*, 46 Mo. 414; *Upstone v. People*, 109 Ill. 169; *Beck v. State*, 76 Ga. 452; *People v. Lewis*, 36 Cal. 531; *People v. Williams*, 43 Cal. 344; *State v. Robinson*, 20 W. Va. 713; 43 Am. Rep. 799; *State v. Davis*, 9 Houst. (Del.) 407; *People v. Robinson*, 1 Park. Cr. Rep. 649; *People v. Garbutt*, 17 Mich. 9; 97 Am. Dec. 162; *Boswell v. Commonwealth*, 20 Gratt. 860; *Conly v. Commonwealth*, 98 Ky. 125; 32 S. W. 285; *State v. Till*, Houst. Crim. Rep. (Del.) 233.

⁷⁷ *In re Johnson's Estate*, 57 Cal. 529; *Aszman v. State*, 123 Ind. 347; 24 N. W. 123; 8 L. R. A. 33.

pression or aberration of the mind, not infrequently accompanying or following intoxication, although often accompanied by hallucination, delusion and illusions, is not such insanity as excuses the commission of crime.⁷⁸ Nor can the usual tests of insanity, namely, that the accused must have labored under such a defect of reason as not to know the nature or quality of his act, or if he did know it, did not know he was doing wrong, apply to a defendant who committed the crime at a time when he was overcome or excited by liquors.⁷⁹ Even incapacity to control one's actions, brought about by voluntary intoxication, is not a defense.⁸⁰ So, as a general rule, if a drunken man commit a crime, he is subject to the same legal inferences as if he were sober.⁸¹ Thus where a defendant and his wife went to a house together where they both drank together and became intoxicated, and in that condition started on their return to their own home, when she fell down on the ice and he left her there all night, thinly clad and exposed to cold, it was held that his inability to appreciate her condition was no excuse for having exposed her to the inclement weather.⁸² Likewise where an accused was charged with having carried on his person concealed weapons (brass knucks), and at the time of their discovery on his person he was too drunk to know he had them, it was held, on a prosecution for carrying them, no defense that he was so drunk he did not know he had them, unless they had been placed on his person by another without his knowledge.⁸³

Sec. 1110. Voluntary intoxication.

The rule that drunkenness or intoxication is no excuse for the commission of crime is limited to voluntary drunken-

⁷⁸ *Gunter v. State*, 83 Ala. 96; 3 So. 600.

⁷⁹ *People v. Ferris*, 55 Cal. 588; *Beasley v. State*, 50 Ala. 149; 20 Am. Rep. 292; *Mercer v. State*, 17 Ga. 146; *State v. Bundy*, 24 S. C. 439; 58 Am. Rep. 262.

⁸⁰ *Flanigan v. People*, 86 N. Y. 554; 40 Am. Rep. 556.

⁸¹ *State v. McCants*, 1 Speers

L. 389; *State v. Morgan*, 40 S. C. 345; 18 S. E. 937; *People v. Rogers*, 18 N. Y. 9; 72 Am. Dec. 484; *Shannahan v. Commonwealth*, 8 Bush, 464; 8 Am. Rep. 465.

⁸² *Territory v. Manton*, 8 Mont. 95; 19 Pac. 387.

⁸³ *Osborn v. State* (Tex. Cr. Rep.), 26 S. W. 625.

ness or intoxication; it has no application to involuntary drunkenness or intoxication. For drunkenness which is involuntary may excuse crime.⁸⁴ But the fact that a person is slightly under the influence of liquor cannot be urged as an excuse, although it was taken involuntarily.⁸⁵ Nor can it be urged as a defense that the liquor had been furnished by the deceased, with a request that he drink it, for it cannot be presumed—and evidence of that fact is inadmissible to show such a presumption—that the deceased intended the accused to become so drunk he would be impelled thereby to commit murder, and even though he had such an intention it would be illegal and no justification.⁸⁶ Yet if the intoxication was occasioned through the fraud, contrivance or force of another for the purpose of inducing the accused to commit the particular offense, his drunkenness will be a good defense.⁸⁷ Thus, where a defendant was charged with having committed larceny, it was held competent for him to show that he was under the influence of liquor caused by the fraud or contrivance of another person, in order to induce him to commit or to aid in the commission of the larceny.⁸⁸ But the fact that others gave him liquor in a social way, with no intent at the time to induce him to commit the crime, yet when he became so drunk he did not know what he was doing, they induced him to commit it, is no defense.⁸⁹ If, however, a person, by fraud and imposition, secure the intoxication of another with the intent to induce him when so overcome with liquor as to be oblivious of his act, to commit a crime, such person, and not the intoxicated

⁸⁴ *People v. Robinson*, 2 Park. Crim. Rep. 235; *Carter v. State*, 12 Tex. 500; 62 Am. Dec. 539.

⁸⁵ *Commonwealth v. Gilbert*, 165 Mass. 45; 42 N. E. 336.

⁸⁶ *State v. Sopher*, 70 Iowa, 494; 30 N. W. 917; *Commonwealth v. Dudash*, 204 Pa. 124; 53 Atl. 756.

⁸⁷ *People v. Nichol*, 34 Cal. 212.

⁸⁸ *Bartholomew v. People*, 104 Ill. 605; 44 Am. Rep. 97. It

should be observed that in this case a statute was involved providing that drunkenness should not be an excuse for crime unless occasioned by fraud, contrivance or force of some other person, for the purpose of causing the perpetration of an offense.

⁸⁹ *McCook v. State*, 91 Ga. 740; 17 S. E. 1019.

person, will be guilty of having committed the offense perpetrated.⁹⁰

Sec. 1111. Evidence of physical incapacity.

Where the accused denies he committed the act charged, he may always show as a complete defense that he was physically incapacitated by liquor from performing the physical act which he is charged to have committed. Such evidence is admitted to throw light on other facts or circumstances.⁹¹

Sec. 1112. Aggravating crime.

While drunkenness is no excuse for the commission of crime, evidence of it cannot be resorted to in order to aggravate the offense,⁹² unless the drunkenness was intentionally resorted to, to blunt the moral responsibility, when it will heighten the culpability of the offender,⁹³ and perhaps will elevate the offense of homicide to murder in the first degree.⁹⁴ And where an accused was prosecuted for pointing a pistol at a woman who was pregnant, it was held that his drunkenness was no excuse, but aggravated the assault.⁹⁵

⁹⁰ *McCook v. State*, 91 Ga. 740; 17 S. E. 1019.

Where the prosecuting witness made a boy of thirteen drunk, it was held that he should not be convicted. *Commonwealth v. French*, Thacher Cr. Cas. 163.

⁹¹ *Jenkins v. State*, 93 Ga. 1; 18 S. E. 992; *Ingalls v. State*, 48 Wis. 647; 4 N. W. 785.

⁹² *McIntyre v. People*, 38 Ill. 514; *Ferrell v. State*, 43 Tex. 503; *Garner v. State*, 28 Fla. 113; 9 So. 835; *Smith v. Commonwealth*, 1 Duv. (Ky.) 224; *Haile v. State*, 11 Humph. 154. But see *State v. Thompson*, Wright (Ohio), 617; *United States v. Cornell*, 2 Mason, 99, and *United States v. Forbes*, Crabbe. 558.

⁹³ *United States v. Claypool*, 14 Fed. 127.

⁹⁴ *Willis v. Commonwealth*, 32 Gratt. 929.

A remark of the court in the presence of the jury that drunkenness is more an aggravation than an excuse for crime, without explanation, is error. *State v. Donovan*, 61 Iowa, 369.

"Where a person having a desire to do another an unlawful injury, drinks intoxicating liquors to nerve himself to the commission of the crime, intoxication is held, and properly, to aggravate the offense; but at present the rule that intoxication aggravates crime is confined to cases of this class." *Cline v. State*, 43 Ohio St. 332; 1 N. E. 22.

⁹⁵ *Barbee v. Reese*, 60 Miss. 906.

Sec. 1113. Assault and battery.

Voluntary intoxication, however great, is no defense to a charge of assault and battery, for in such a case the question of malice and intent is not involved.⁹⁶ But the jury may look to all the evidence to determine whether he was drunk or sane.⁹⁷ So upon a charge of stabbing, the jury may consider his drunken condition to determine whether he acted under *bona fide* apprehension that his person or property was about to be attacked.⁹⁸ So they may consider it to increase the probability of his having committed the assault.⁹⁹

Sec. 1114. Drunkenness producing permanent disability or insanity—*Delirium tremens*.

Where drunkenness produces permanent mental disability, then the rule that it is no excuse for crime does not apply. Justice Story long ago lucidly discussed this phase of intoxication: "We are of the opinion," said he, "that the indictment upon these admitted facts¹ cannot be maintained.

⁹⁶ Engelhardt, 88 Ala. 100; 7 So. 154; Carter v. State, 87 Ala. 113; 6 So. 356; Commonwealth v. Malone, 114 Mass. 295; Tyra v. Commonwealth, 2 Met. (Ky.) 1; State v. Truitt, 5 Pennewill (Del.), 466; 62 Atl. 790.

⁹⁷ Ross v. State, 62 Ala. 224.

⁹⁸ Marshall's Case, 1 Lewin C. C. 76.

⁹⁹ Bagley v. Mason, 69 Vt. 175; 37 Atl. 287.

If the defendant take the witness stand in his own behalf, he may be required to testify, on his cross-examination, that he had taken intoxicating liquor a short time before the alleged time of the assault. Jowell v. State, 44 Tex. Cr. App. 328; 71 S. W. 286.

¹ "It appeared that for a considerable time before the fatal act Drew [the defendant] had been in

the habit of indulging himself in very gross and almost continual drunkenness; that about five days before it took place, he ordered all the liquors on board, which was accordingly done. He soon after began to betray great restlessness, uneasiness, fretfulness and irritability, expressed his fear that the crew intended to murder him; and complained of persons, who were unseen, talking to him, and urging him to kill Clark; and his dread of so doing. He could not sleep, but was in almost constant motion during the day and night. The night before the act he was more restless than usual, seemed to be in great fear, and said that whenever he laid down there were persons threatening to kill him, if he did not kill the mate [Clark]. In short, he ex-

The prisoner was unquestionably insane at the time of committing the offense. And the question made at the bar is, whether insanity, whose remote cause is habitual drunkenness is, or is not, an excuse in a court of law for a homicide committed by the party, while so insane, but not at the time intoxicated or under the influence of liquor. We are clearly of opinion that insanity is a competent excuse in such a case. In general, insanity is an excuse for the commission of every crime, because the party has not the possession of that reason, which includes responsibility. An exception is when the crime is committed by a party while in a fit of intoxication, the law not permitting a man to avail himself of the excuse of his own gross vice and misconduct to shelter himself from the legal consequences of such crime. But the crime must take place and be the immediate result of the fit of intoxication, and while it lasts, and not, as in this case, a remote consequence, superinduced by the antecedent exhaustion of the party, arising from gross and habitual drunkenness. However criminal in a moral point of view such an indulgence is, and however justly a party may be responsible for his acts arising from it to Almighty God, human tribunals are generally restricted from punishing them, since they are not the acts of a reasonable being. Had the crime been committed while Drew was in a fit of intoxication, he would have been liable to be convicted of murder. As he was not then intoxicated, but merely insane from an abstinence from liquor, he cannot be pronounced guilty of the offense. The law looks to the immediate and not to the remote cause, to the actual state of the party, and not to the cause, which remotely produced it. Many species of insanity arise remotely from what in a moral view is criminal neglect or fault of the party, as from religious melancholy, undue exposure, extravagant pride, ambition, etc. Yet such insanity has always been deemed a sufficient excuse for any crime done under its influence.”² There are many other cases to

hibited all the marked symptoms of the disease brought on by intemperance, called *delirium tremens* [*mania a potu*].”

²United States v. Drew, 5 Mason, 28; Fisher v. State, 64 Ind. 435.

the same effect, that *delirium tremens* or *mania a potu* is a good defense.³ And the fact that an accused was suffering from *delirium tremens* when he committed a crime is no excuse, it has been held, unless he was not responsible for the crime by reason of that fact.⁴ The diseased condition may be of a temporary character, if it actually existed at the time the offense was committed.⁵ To establish a defense in such case it is not necessary to show that ac-

³ United States v. Forbes, Crabbe, 558; Fed. Cas. No. 15129; Beasley v. State, 50 Ala. 149; 20 Am. Rep. 292; People v. Blake, 65 Cal. 275; 4 Pac. 1; State v. Harrigan, 9 Houst. (Del.) 369; 31 Atl. 1052; Bailey v. State, 26 Ind. 422; Bradley v. State, 31 Ind. 492; Cornwell v. State, Mart. & Y. (Tenn.) 147; State v. Robinson, 20 W. Va. 713; 43 Am. Rep. 799; United States v. Woodward, 2 Hayw. & H. 119; Fed. Cas. No. 16760a; Territory v. Davis, 2 Ariz. 59; 10 Pac. 359; Commonwealth v. French, Thacher Cr. Cas. 163; Roberts v. People, 19 Mich. 401; Lanergan v. People, 50 Barb. 266; United States v. McGlue, 1 Curt. 1; Fed. Cas. No. 15679; State v. Dillahunt, 3 Harr. (Del.) 551; State v. McGonigal, 5 Harr. (Del.) 510; State v. Hurley, 1 Houst. Cr. Cas. (Del.) 28; State v. Thomas, 1 Houst. Cr. Cas. (Del.) 511; Macconnehey v. State, 5 Ohio St. 77; State v. Strobh. L. (S. C.) 479; Carter v. State, 12 Tex. 500; 62 Am. Dec. 539; Kelley v. State, 31 Tex. Cr. Rep. 216; 20 S. W. 357; French v. State, 93 Wis. 325; 67 N. W. 706; State v. Hand, 2 Hard. (Del.) 149; 1 Marv. (Del.) 545; 41 Atl. 192; People v. Methever, 132 Cal. 326; 64 Pac. 681; State v. Kraemer, 49

La. Ann. 766; 22 So. 254; State v. Sewell, 3 Jones L. (N. C.) 245; People v. Fellows, 122 Cal. 233; 54 Pac. 830; State v. Kidwell, 62 W. Va. 466; 59 S. E. 494; 13 L. R. A. (N. S.) 1024; Commonwealth v. Parsons, 195 Mass. 560; 81 N. E. 291; State v. Kavanaugh, 4 Pennewill (Del.) 131; 53 Atl. 335; Porter v. State, 140 Ala. 87; 37 So. 81; Fonville v. State, 91 Ala. 39; 8 So. 688; Gunter v. State, 83 Ala. 96; 3 So. 600; State v. Martin, 3 Crim. L. Mag. 44; State v. Hundley, 46 Mo. 414; State v. Coleman, 27 La. Ann. 691; People v. Ferris, 55 Cal. 588; Boswell v. Commonwealth, 20 Graff. 860; Cavaness v. State, 43 Ark. 331; Hill v. State, 42 Neb. 503; 60 N. W. 916; Commonwealth v. Baker, 11 Phila. 631; People v. Travers, 88 Cal. 233; 26 Pac. 88; O'Brien v. People, 36 N. Y. 276; People v. O'Connell, 62 How. Pr. 436; State v. Potts, 100 N. C. 457; Carter v. State, 12 Tex. 500; 62 Am. Dec. 539; Erwin v. State, 10 Tex. App. 700; DeAlberts v. State, 34 Tex. Crim. Rep. 508; 31 S. W. 391; Stuart v. State, 1 Baxt. 178.

⁴ State v. Hand, 1 Marv. (Del.) 545; 2 Hard. 149; 41 Atl. 192.

⁵ State v. Potts, 100 N. C. 457; 6 S. E. 657.

cused was drunk when he committed the crime.⁶ If a person be subject to a tendency toward insanity, which is liable to be excited by intoxication, of which fact he is ignorant, having no reason from his experience in the past, or from information derived from others, to believe that such extraordinary effects are likely to result from intoxication, he is not criminally liable if he commits a crime when thus excited by liquor, and if the jury believes his actions resulted from these, and not from the natural effects of drunkenness, or from previously formed intentions, the same degree of competency should be required to render him capable of entertaining or being responsible for the intent, as when the only question is one of insanity.⁷ But to relieve an accused on the ground of insanity produced by intoxication, the mental disease thereby produced must be fixed and of some continuance,⁸ and disable him from distinguishing right from wrong,⁹ and mere deficiency of memory is not sufficient.¹⁰ Temporary insanity, however, produced immediately by intoxication does not excuse a person from the responsibility of his act, where he, when sane, voluntarily made himself drunk.¹¹ "There are two kinds of insanity produced by

⁶ Territory v. Davis, 2 Ariz. 59; 10 Pac. 359; State v. Kidwell, 62 W. Va. 466; 59 S. E. 494; 13 L. R. A. (N. S.) 1024; United States v. Woodward, 2 Hayw. & H. 119; Fed. Cas. No. 16760a; DeAlberts v. State, 34 Tex. Crim. Rep. 508; 31 S. W. 391.

⁷ Roberts v. People, 19 Mich. 401.

⁸ Lanergan v. People, 50 Barb. 266; State v. Thomas, 1 Houst. Cr. Cas. (Del.) 511; French v. State, 93 Wis. 325; 67 N. W. 706.

⁹ State v. McGonical, 5 Harr. (Del.) 510; Carter v. State, 12 Tex. 500; 62 Am. Dec. 539.

¹⁰ State v. Stark, 1 Strob. L. (S. C.) 479.

A statute providing that tem-

porary insanity produced by the recent use of intoxicating liquors, does not destroy responsibility for crime, has no application to an instance where the accused committed the offense when laboring under a fit of *delirium tremens*. Kelley v. State, 31 Tex. Cr. Rep. 216; 20 S. W. 357; People v. Methever, 132 Cal. 326; 64 Pac. 481.

¹¹ United States v. McGlue, 1 Curt. 1; Fed. Cas. No. 15679; United States v. Drew, 5 Mason, 28; Fed. Cas. No. 14993; State v. Bullock, 13 Ala. 413; People v. Travers, 88 Cal. 233; 26 Pac. 88; State v. Thomas, 1 Houst. Cr. Cas. (Del.) 511; State v. Davis, 9 Houst. (Del.) 407; 33 Atl. 55;

alcoholism: *First*, delirium tremens, caused by the breaking down of the person's long-continued or habitual drunkenness, and brought on by abstinence from drink. This is what is called 'settled insanity,' to distinguish it from 'temporary insanity,' or drunkenness, directly resulting from drink. 'Settled insanity,' from the earliest times, has been held to be a complete defense to crime. Lord Hale says: 'If by means of drunkenness an habitual or fixed madness be caused, though contracted by the will of the party, it will excuse crime.' * * * *Second*, the other kind of insanity, or temporary insanity, is that condition of the mind directly produced by the use of ardent spirits, and where a fit of intoxication is carried to such a degree that the person becomes incapable of knowing the act he is doing is wrong and criminal, as above stated, he is in that condition referred to by the statute¹² as being 'temporarily insane.' * * * There is no difference between the two kinds of insanity, so far as the mental status is concerned, but they differ widely in their causes and results. The first is from drinking as a remote result; the second from drinking as a direct result. The first is an involuntary result from which all shrink alike; the second is voluntarily sought after. In the first there is no criminal responsibility, but in the second responsibility never ceases."¹³

Mercer v. State, 17 Ga. 146; Upstone v. People, 109 Ill. 169; Fisher v. State, 64 Ind. 435; Tyra v. Commonwealth, 2 Met. (Ky.) 1; People v. Garbutt, 17 Mich. 9; 97 Am. Dec. 162; State v. Hundley, 46 Mo. 414; Schlenger v. State, 9 Neb. 241; 1 N. W. 857; State v. Thompson, 12 Nev. 140; Lanergan v. People, 50 Barb. 266; Flanigan v. People, 86 N. Y. 554; State v. Paulk, 18 S. C. 514; Bennett v. State, Mart. & Y. (Tenn.) 133; Cornwell v. State, Mart. & Y. (Tenn.) 147.

While the books and the cases speak of insanity produced by

overindulgence in intoxicating liquors as an excuse for crime, it is not in fact an excuse, for really a person thus affected is incapable of committing a crime. Lyle v. State, 31 Tex. Cr. Rep. 103.

¹² The Texas statute is that "Neither intoxication nor temporary insanity of mind produced by the voluntary, recent use of ardent spirits, shall constitute any excuse in this State for the commission of crime," etc. Texas Penal Code, Article 40a.

¹³ Evers v. State, 31 Tex. Cr. App. 318; 20 S. W. 744; 18 L. R. A. 421; 37 Am. St. 811.

Sec. 1115. What degree of insanity is a defense.

Of course, we are here speaking of insanity only as produced by the use of intoxicating liquors and not of insanity generally. As mere drunkenness is not insanity, proof merely that the accused was drunk, however great was his drunken condition when he committed the offense, will not be a defense.¹⁴ The evidence must go farther; it must show that his mind was at the time in such a condition, produced by the use of liquor, that he did not know what he was doing or the consequences of his act and did not know right from wrong.¹⁵ But it need not be shown that he was under the immediate effect of liquor, it being sufficient to show he was so insane that he did not know what he was doing or was unable to distinguish between right and wrong.¹⁶ The absence of power to distinguish between right and wrong must be as to the particular offense charged and not as to another offense.¹⁷ If the insanity was such as to deprive the accused of reason and judgment and make him totally incapable of forming a deliberate and preconceived design, or entertaining a rational thought or motive, or distinguishing between right and wrong (as previously stated), he cannot be convicted.¹⁸ While absence of self-governing power, caused by insanity, although caused by long-continued intoxication, is a defense, yet if the commission of the offense resulted from wickedness and depravity, the absence of such power is no defense.¹⁹ The

¹⁴ *Ross v. State*, 62 Ala. 224.

¹⁵ *Casat v. State*, 40 Ark. 511; *State v. Erb*, 74 Mo. 199; *Beasley v. State*, 50 Ala. 149; 20 Am. Rep. 292; *Beek v. State*, 76 Ga. 452; *Cavaness v. State*, 43 Ark. 33; *Fisher v. State*, 64 Ind. 435; *State v. Riley*, 100 Mo. 493; 13 S. W. 1063; *Burrow's Case*, 1 Lewin C. C. 75; *Rennie's Case*, 1 Lewin C. C. 76; *Bailey v. State*, 26 Ind. 422; *State v. Dillahunt*, 3 Harr. (Del.) 551; *State v. O'Neil*, 51 Kan. 651; 33 Pac. 287; 21 L. R. A. 555; *O'Brien v. People*, 48 Barb.

274; *United States v. McGlue*, 1 Curt. 1; Fed. Cas. No. 15679; *State v. McGonigal*, 5 Harr. (Del.) 510; *Regina v. Davis*, 14 Cox C. C. 563; 28 Mack Eng. Rep. 657.

¹⁶ *Ward v. State*, 19 Tex. App. 664; *United States v. Clarke*, 2 Cranch. C. C. 158.

¹⁷ *Evers v. State*, 31 Tex. Cr. Rep. 318; 20 S. W. 744; 18 L. R. A. 421.

¹⁸ *State v. Harrigan*, 9 Houst. (Del.) 369.

¹⁹ *Nevling v. Commonwealth*, 98 Pa. 323.

insanity produced by intoxication to be a defense must amount to settled insanity and not be a merely temporary condition.²⁰ Thus, where it was shown that the accused, a soldier, shot his officer without any apparent motive, that he was addicted to the inordinate use of liquor, and at the time was suffering from depression, it was held that the defense of insanity occasioned by the use of liquor had not been made out.²¹ Isolated instances tending to show insanity scattered through several years, together with acts not tending to show insanity, are not sufficient, although excessive drinking be shown as against a shown competency to transact business, and that the accused was treated in business and social intercourse as a sane man.²² So where it appears that the accused was not laboring under fits and *delirium tremens* at the time of the act, and circumstances proven showed sense and deliberation and a perfect understanding of the nature of his act, under proof of a great amount of senseless extravagance and eccentricity of conduct, coupled with habits of excessive drinking causing fits and *delirium tremens*, it was held that the defense of insanity was not made out.²³ Whether or not the accused was suffering from temporary insanity produced immediately from intoxication, or from fixed insanity, are questions for the jury, and their determination will not be disturbed unless it is clearly against the evidence.²⁴ They should be instructed in a clear and pointed manner as to the law applicable to *delirium tremens* if the evidence presents the question whether the defendant, at the time he committed the act was in a drunken frenzy or laboring under that disease.²⁵ If there be no evidence of the accused's insanity, but there is evidence of temporary drunkenness, it is not error to fail or refuse to instruct concerning

²⁰People v. Travers, 88 Cal. 233; 26 Pac. 88; Cornwell v. State, Mart. & Y. (Tenn.) 147; Lanergan v. People, 50 Barb. 266; McCarty v. Commonwealth, 14 Ky. L. Rep. 285.

²¹Regina v. Dixon, 11 Cox C. C. 341.

²²Hoard v. State, 15 Lea, 318.

²³Regina v. Leigh, 4 Fost. & F. 915; State v. Riley, 101 Mo. 493; 13 S. W. 1063.

²⁴Upstone v. People, 109 Ill. 169; Fisher v. State, 64 Ind. 435.

²⁵Erwin v. State, 10 Tex. App. 700.

the question of insanity.²⁶ It is not error to instruct the jury that voluntary drunkenness, though resulting in temporary frenzy or insanity, is not an excuse for crime;²⁷ but it is error to so instruct them if there be no evidence to show that the accused was intoxicated.²⁸ If there be conflicting evidence, however, on his condition, then the court may give such an instruction;²⁹ but if there be no evidence on the accused's condition, there is no error committed in refusing to instruct concerning drunkenness as a defense,³⁰ and the mere fact that he frequently became drunk does not call for an instruction on that question.³¹ A misleading instruction on the question may, of course, be refused.³² An instruction "that where a person is insane at the time he commits a murder he is not punishable as a murderer, although such insanity be remotely occasioned by undue indulgence in spirituous liquors," should be refused.³³ A charge mentioning only *delirium tremens* as urged as a defense, but concluding that "insanity is a complete defense to all criminal acts committed while under its influence, whether such insanity be permanent or temporary, and from whatever cause produced," is not sufficient where there is evidence tending

²⁶ *Wilkerson v. Commonwealth*, 88 Ky. 29; 9 S. W. 836; *Buckhannon v. Commonwealth*, 86 Ky. 110; 5 S. W. 358; *People v. Robinson*, 2 Park. Crim. Rep. 235; *Carpenter v. Commonwealth*, 92 Ky. 452; 18 S. W. 9; *Delgado v. State*, 34 Tex. Cr. Rep. 157; 29 S. W. 1070.

²⁷ *State v. Clevenger*, 156 Mo. 190; 56 S. W. 1078; *Longley v. Commonwealth*, 99 Va. 807; 37 S. E. 339; 2 Va. Sup. Ct. Rep. 660.

²⁸ *Montag v. People*, 141 Ill. 75; 30 N. E. 337; *Menach v. State* (Tex. Cr. App.), 97 S. W. 503; *Clark v. State*, 32 Neb. 246; 49 N. W. 367. This is true, even though drunkenness be shown as a contributing cause of an accident which results in the death of the

deceased. *State v. Cross*, 42 W. Va. 253; 24 S. E. 996.

²⁹ *Jamison v. People*, 145 Ill. 357; 34 N. E. 486; *White v. State*, 74 Ark. 491; 86 S. W. 296; *Cross v. State*, 55 Wis. 261; 12 N. W. 425.

³⁰ *State v. Brown*, 181 Mo. 192; 79 S. W. 1111; *Carpenter v. Commonwealth*, 92 Ky. 452; 18 S. W. 9; *State v. Riley*, 101 Mo. 493; 13 S. W. 1063; *Leeper v. State*, 29 Tex. App. 63; 14 S. W. 398.

³¹ *State v. Brown*, 181 Mo. 192; 79 S. W. 1111; *People v. Gosch*, 82 Mich. 22; 46 N. W. 101.

³² *Porter v. State*, 140 Ala. 87; 37 So. 81.

³³ *State v. Coleman*, 27 La. Ann. 691.

to show hereditary insanity, *delirium tremens* produced by long-continued use of intoxicating liquors, and temporary insanity produced by an overdose of morphine.³⁴ An instruction that "mental incapacity produced by voluntary intoxication, existing only temporarily, but at the time of the commission of the offense, is no excuse for crime, nor a defense to a prosecution therefor; but where the habit of intoxication, though voluntary, has been long continued, and has produced disease which has perverted or destroyed the mental faculties of the accused so that he was incapable at the time of the commission of the alleged crime, on account of disease, of acting from motive, or of distinguishing right from wrong, in short, insane, he will not be held accountable for the act charged as a crime committed while in such condition," is correct and not the subject of criticism.³⁵ Where it is claimed the accused was temporarily insane, proceeding upon the theory that the insanity was induced by strong drink operating upon a mind rendered unsound by an injury to his brain, it is error to leave the question of criminal responsibility to be determined upon the facts of injury and mental unsoundness, or upon the effect of intoxication, apart from the other facts.³⁶ A charge to the jury that insanity produced by voluntary intoxication of a long-continued habit is a defense, need not use the term *delirium tremens*, nor define the various types of insanity, if it be sufficiently comprehensive to embrace the class of insanity in question.³⁷ An instruction requested that if the jury has a reasonable doubt whether the accused's conduct at the time of the homicide was inspired by his intoxicated condition and not by malice, may and should be refused.³⁸ To charge the jury, in a trial for murder, that if the accused, though drunk, was conscious of and understood what he was doing when he committed

³⁴ *State v. Rippey*, 104 N. C. 752; 10 S. W. 259.

³⁵ *Wagner v. State*, 116 Ind. 181; 18 N. E. 833; *Gillooley v. State*, 58 Ind. 182.

³⁶ *People v. Cummins*, 47 Mich. 334; 11 N. W. 184.

³⁷ *Stuart v. State*, 1 Baxt. 178.

³⁸ *Fonville v. State*, 91 Ala. 39; 8 S.o. 688; *Shannahan v. Commonwealth*, 8 Bush, 463; 8 Am. Rep. 465.

the homicide, so as to give an intelligent and true account of it at the trial he is responsible, is not error.³⁹

Sec. 1116. Dipsomania—Oenomania.

Dipsomania or oenomania, which is an insatiable thirst for intoxicating liquors, intensified by long indulgence, is not a defense to a prosecution for having committed a criminal act.⁴⁰ Such a person must at all hazards control his appetite.⁴¹

Sec. 1117. Instructions to jury in cases of *delirium tremens*.

If there be evidence that the accused was laboring under an attack of *delirium tremens* when he committed the offense, then it is error to merely charge that drunkenness or intoxication is no excuse for crime and no defense to a charge thereof.⁴² But if the court inform the jury what degree of unsoundness of mind is a defense, whether the disease be permanent or temporary or whether caused by the voluntary use of intoxicating liquors, or otherwise, a failure to define *mania a potu* will not be error, though requested by the accused to do so.⁴³ If there be no evidence of *delirium tremens*, a refusal to charge concerning the responsibility of one affected by them will not be error.⁴⁴ If the court has charged the jury that if they believed the accused at the time of the commission of the offense was suffering from any species of insanity which prevented him from distinguishing between right and wrong, or acting from deliberation or premeditation, they must acquit him, it is not error to refuse to instruct them that they must acquit if they find he was at the time suffering from the effects of *delirium tremens* or any other species of insanity.⁴⁵ So neglect to fully charge

³⁹ *Territory v. Franklin*, 2 N. M. 307; *Brown v. Commonwealth*, 32 Leg. Int. (Pa.) 320; *Delgado v. State*, 34 Tex. Cr. Rep. 157; 29 S. W. 1070.

⁴⁰ *State v. Potts*, 100 N. C. 457; 6 S. E. 657; *Choice v. State*, 31 Ga. 424.

⁴¹ *State v. Haab*, 105 La. 230;

29 So. 725; *Commonwealth v. Gilbert*, 165 Mass. 45; 42 N. E. 336.

⁴² *Erwin v. State*, 10 Tex. App. 700

⁴³ *Stuart v. State*, 1 Baxt. 178; *Spence v. State*, 15 Lea, 539.

⁴⁴ *McLeod v. State*, 31 Tex. Cr. Rep. 331; 20 S. W. 749; *Spence v. State*, 15 Lea, 539.

⁴⁵ *People v. Mills*, 98 N. Y. 176.

on the question is not error if the one given be correct as far as it goes and the court's attention was only called to that portion of the charge in a general way without specifying it was not full enough on that point.⁴⁶ But the jury cannot be told that they may determine from the accused's personal appearance whether he was insane from *delirium tremens* when the alleged offense took place several months before and there is no evidence that his disorder left any infallible mark of its existence.⁴⁷ If the testimony tends to show hereditary insanity, permanent insanity produced by a long use of intoxicating liquors, *delirium tremens*, and temporary insanity and frenzy caused by an overdose of a drug, which is general, then it is error to mention only the theory of *delirium tremens*, because it tends to confine the deliberations of the jury to that particular phase of defense, although it may have been sufficiently comprehensive to embrace every view of it.⁴⁸

Sec. 1118. Provocation.

Where a murder is committed after provocation offered the accused by the deceased, the intoxicated condition of the accused may be considered in determining whether it was done in the heat of passion or with deliberate purpose, or otherwise, and generally to explain his conduct.⁴⁹ Thus, where the accused was struck a blow by the deceased, and the accused then struck him with an instrument he happened to have in his hand, it was held that his drunkenness might be considered on the question whether he was excited by passion or acted from malice, and also whether the expressions he used manifested a deliberate purpose or were merely the idle expressions of a drunken man.⁵⁰ But the provocation

⁴⁶ Williams v. State, 25 Tex. App. 76.

⁴⁷ Bowden v. People, 12 Hun, 85.

⁴⁸ State v. Ripley, 104 N. C. 752; 10 S. E. 259.

⁴⁹ People v. Rogers, 18 N. Y. 9; 72 Am. Dec. 484; State v. Mullin,

14 La. Ann. 577; Rex v. Thomas, 7 Car. & P. 817; State v. McCants, 1 Speer L. 389.

⁵⁰ Rex v. Thomas, 7 Car. & P. 817; Morrison v. State, 84 Ala. 405; 4 So. 402; Vann v. State, 83 Ga. 44; 9 S. E. 945.

must be a sufficient one such as would provoke a sober man,⁵¹ unless his intoxication was so great as to render him unable to form a willful, deliberate and premeditated design to kill, or of judging of his acts and their consequences.⁵² It has been held, however, that intoxication is entitled to no weight in determining whether the provocation was such as to reduce the crime from murder to manslaughter.⁵³

Sec. 1119. Intoxication reducing the grade of homicide—Evidence.

While drunkenness is no excuse for crime, yet it may produce such a state of mind in the accused as to render him incapable of entertaining or forming a design to take life,⁵⁴ and evidence, therefore, to explain his conduct at and prior to the date of the homicide and with reference to the design with which the act was perpetrated is always admissible,⁵⁵

⁵¹ *State v. Mullen*, 14 La. Ann. 577; *State v. McCants*, 1 Speer L. 389; *Keenan v. Commonwealth*, 44 Pa. 55; 84 Am. Dec. 414; *McIntyre v. People*, 38 Ill. 514.

⁵² *Keenan v. Commonwealth*, 44 Pa. 55; 84 Am. Dec. 414; *Smith v. Commonwealth*, 1 Duv. (Ky.) 224.

⁵³ *Commonwealth v. Hawkins*, 3 Gray, 463; *Garten v. State*, 11 Tex. App. 544.

⁵⁴ *Fonville v. State*, 91 Ala. 39; *Rogers v. People*, 3 Park. Cr. Rep. 633; *Commonwealth v. Baker*, 11 Phila. 631; *People v. Dillon*, 8 Utah, 92; 30 Pac. 150; *State v. Hurley*, *Houst. Cr. Rep. (Del.)* 28; *State v. Johnson*, 41 Conn. 584; *Tidwell v. State*, 70 Ala. 33; *People v. Rogers*, 18 N. Y. 9; 72 Am. Dec. 484; *Brennan v. People*, 37 Colo. 256; 86 Pac. 79; *Gustavsen v. State*, 10 Wyo. 300; 68 Pac. 1006; *State v. Pasnau*, 118 Iowa, 501; 92 N. W. 682;

People v. Hower, 151 Cal. 638; 91 Pac. 507; *State v. Faino*, 2 Hardesty, 153; 1 Marv. (Del.) 492; 41 Atl. 134; *Wilson v. State*, 60 N. J. L. 171; 37 Atl. 954; *Porter v. State*, 135 Ala. 51; 33 So. 694; *Warner v. State*, 56 N. J. L. 686; 29 Atl. 505; 44 Am. St. 415; *State v. Agnew*, 10 N. J. L. Jr. 165; *Real v. People*, 42 N. Y. 270; affirming 55 Barb. 551; 8 Abb. Prac. (N. S.) 314; *Madison v. Commonwealth*, 17 S. W. 164; 13 Ky. L. Rep. 313; *Cartwright v. State*, 8 Lea, 376; *Curry v. Commonwealth*, 2 Bush, 67; *People v. Hammill*, 2 Park. Cr. Rep. 223; *Leroy v. State (Ala.)*, 25 So. 247; *State v. Yates*, 132 Iowa, 475; 109 N. W. 1005; *State v. Sparegrove*, 134 Iowa, 599; 112 N. W. 83; *State v. Roan*, 122 Iowa, 136; 97 N. W. 997.

⁵⁵ *People v. Eastwood*, 14 N. Y. 562; *People v. Nichol*, 34 Cal. 211; *Lanergan v. People*, 6 Park. Cr.

and may be taken into consideration by the jury in determining the accused's motive, purpose and intent in the commission of the homicide,⁵⁶ as well as upon the existence or non-existence of malice.⁵⁷ Evidence of intoxication is particularly admissible where the commission of the offense was apparently without motive, as being particularly pertinent and admissible in helping to explain and account for an act otherwise inexplicable.⁵⁸ It is even admissible in those cases where the homicide was committed upon a sudden heat, occasioned by provocation or the like, notwithstanding the fact that a man's passions are liable to be more quickly and easily aroused when drunk than sober;⁵⁹ and the same is true where the drunkenness is prompted by mere social hilarity.⁶⁰ If the evidence be sufficient to raise a reasonable doubt as to whether the accused was in a condition to have premeditated the offense or know the consequences of his act, or been actuated with malice, then he is entitled to the benefit of the presumption that he was in such a condition, and he is not

Rep. 209; *United States v. Meagher*, 37 Fed. 875; *Charles v. State*, 13 Tex. App. 658; *Jones v. State*, 29 Ga. 594; *Willis v. Commonwealth*, 32 Gratt. 929; *Hopt v. People*, 104 U. S. 631; 26 L. Ed. 873; *Pignan v. State*, 14 Ohio, 555; 45 Am. Dec. 558; *State v. Robinson*, 20 W. Va. 713; 43 Am. Rep. 799; *State v. O'Neil*, 51 Kan. 651; 33 Pac. 287; 24 L. R. A. 555; *State v. Johnson*, 40 Conn. 136; *Gallihier v. Commonwealth*, 2 Duv. 164; *Hill v. State*, 42 Neb. 503; 60 N. W. 916; *Buckhannon v. Commonwealth*, 86 Ky. 110; 5 S. W. 358; 9 Ky. L. Rep. 411.

⁵⁶ *People v. Cassino*, 30 Hun, 388; *Aszroan v. State*, 126 Ind. 347; 24 N. E. 123; 8 L. R. A. 33; *People v. King*, 27 Cal. 507; 87 Am. Dec. 95; *Kelly v. State*, 3 Sm. & M. 518; *People v. Ham-mill*, 2 Pa'k. Cr. Rep. 223.

⁵⁷ *Wilkerson v. Commonwealth*, 88 Ky. 29; 9 S. W. 836; 10 Ky. L. Rep. 656; *Shannalan v. Commonwealth*, 8 Bush, 464; 8 Am. Rep. 465; *Ford v. State*, 71 Ala. 385; *Kelly v. State*, 3 Sm. & M. 518; *Moon v. State*, 68 Ga. 687; *State v. Johnson*, 40 Ind. 136.

⁵⁸ *Blimm v. Commonwealth*, 7 Bush, 320.

⁵⁹ *State v. Hurley*, *Houst. Cr. Rep. (Del.)* 28; *People v. Dillon*, 8 Utah, 92; 30 Pac. 150; *Eastwood v. People*, 3 Park. Cr. Rep. 25; *Rex v. Thomas*, 7 Car. & P. 817; *Willis v. Commonwealth*, 32 Gratt. 929; *Cartwright v. State*, 8 Lea, 377. See *Commonwealth v. Hawkins*, 3 Gray, 463.

⁶⁰ *Kriel v. Commonwealth*, 5 Bush, 363; *Smith v. Commonwealth*, 1 Duv. (Ky.) 224.

bound to prove his condition beyond a reasonable doubt.⁶¹ The mere fact that the accused was drunk when he committed the homicide does not, as a matter of law, reduce his crime in degree from murder in the first to murder in the second degree or to manslaughter, it being merely a fact for the jury to consider in determining his mental condition,⁶² for one may be actuated by malice though drunk.⁶³ As a rule, evidence of drunkenness is received with caution, even with great caution.⁶⁴ If there be no degrees in the offense, and no specific intent is involved, then evidence of drunkenness is not admissible.⁶⁵ If the defendant formed the design to commit the murder and voluntarily became drunk for the purpose of committing it, then he is not entitled to have his offense reduced from the first to the second degree, and evidence of that fact being shown, the court may rightly refuse to instruct the jury that his intoxication may reduce the degree of his offense from what it would otherwise be.⁶⁶ Evidence of intoxication can only be considered to reduce the degree of the offense and not as a defense,⁶⁷ for intoxication

⁶¹ *Smith v. State*, 4 Neb. 277; *Gustavenson v. State*, 10 Wyo. 300; 68 Pac. 1006.

⁶² *State v. Johnson*, 40 Conn. 136; *United States v. Meagher*, 37 Fed. 875; *Cook v. Territory*, 3 Wyo. 110; 4 Pac. 887; *King v. State*, 90 Ala. 612; 8 So. 856; *Gwatkin v. Commonwealth*, 9 Leigh, 678; 33 Am. Dec. 264.

⁶³ *State v. Ashley*, 45 La. Ann. 1036; *People v. Fish*, 125 N. Y. 136; 26 N. E. 319.

⁶⁴ *People v. Ferris*, 55 Cal. 588; *People v. Lewis*, 36 Cal. 531; *United States v. Meagher*, 37 Fed. 875; *People v. Kemmler*, 119 N. Y. 580; 24 N. E. 9; *People v. Vincent*, 95 Cal. 425; 30 Pac. 581; *People v. Belencia*, 21 Cal. 544.

⁶⁵ *Engelhardt v. State*, 88 Ala. 100; 7 So. 154.

⁶⁶ *State v. Dillard*, 59 W. Va. 197; 53 S. E. 117; *State v. Gut*, 13 Minn. 341; *State v. Kale*, 124 N. C. 816; 32 S. E. 892; *Upstone v. People*, 109 Ill. 169; *Cook v. State*, 46 Fla. 20; 35 So. 665; *Blim v. Commonwealth*, 7 Bush, 320.

⁶⁷ *State v. Pell* (Iowa), 119 N. W. 154; *People v. Methever*, 132 Cal. 326; 64 Pac. 481; *People v. Hower*, 151 Cal. 638; 91 Pac. 507; *Brennan v. People*, 37 Colo. 256; 86 Pac. 79; *Kriel v. Commonwealth*, 5 Bush, 363; *People v. Fuller*, 2 Park. Cr. Rep. 16; *Cleveland v. State*, 86 Ala. 1; 5 So. 426; *State v. Johnson*, 40 Conn. 136; *Jones v. State*, 29 Ga. 594; *Garner v. State*, 28 Fla. 113; 9 So. 835; *People v. Vincent*, 95 Cal. 425; 30 Pac. 581; *State v.*

is not an absolute defense.⁶⁸ It has been held that intoxication, however great, is no answer to a charge of murder in the second degree,⁶⁹ and it cannot reduce a charge of murder to manslaughter;⁷⁰ but it will not prevent the provocation offered by the deceased to the accused from reducing what would otherwise have been murder to the lowest grade of homicide.⁷¹ So it has been said it is of little weight if the charge be of murder in the second degree, unless it existed to such an extent as to show the accused was at the time of the offense incapable of forming a purpose, or did not intend to act as he did, or unless it caused or was caused by a sudden quarrel so as to make the act manslaughter.⁷² But the fact that the accused was drunk when he accidentally discharged a revolver and killed another does not render the killing a willful and premeditated felony.⁷³

Agnew, 10 N. J. L. Jr. 165; Williams v. State, 81 Ala. 1; 1 So. 179; 60 Am. Rep. 133.

⁶⁸ Commonwealth v. Nazarko (Pa.), 73 Atl. 210; Cleveland v. State, 84 Ala. 1; 4 So. 193; State v. Martin (N. J.), 3 Crim. L. Mag. 44.

⁶⁹ Commonwealth v. Platt, 11 Phila. 415. See State v. Johnson, 41 Conn. 584.

⁷⁰ Brown v. State, 4 Tex. App. 275; Hanvey v. State, 68 Ga. 612; State v. Weaver, 35 Ore. 415; 58 Pac. 109; State v. Robinson, 20 W. Va. 713; 43 Am. Rep. 799.

⁷¹ Pirtle v. State, 9 Humph. 663; People v. Langton, 67 Cal. 427; State v. Robinson, 20 W. Va. 713; 43 Am. Rep. 799; People v. Nichol, 34 Cal. 211.

⁷² Davis v. State, 25 Ohio St. 369.

⁷³ State v. Cross, 42 W. Va. 253; 24 S. E. 996.

Justice Simkins, of the Texas Court of Criminal Appeals, in

1892, discussed the question of admission of evidence to show intoxication of the accused in a way that is worthy of careful consideration. "There is no question that," says he, "under the common law, intoxication was not deemed a defense for any criminal act, even though done while a person was insensible to his surroundings, unconscious of his acts, and had no memory or understanding; and such was the law in England and America as late as 1835. During the past sixty years there has been a persistent, and in the English and many of the American courts, a successful effort to ingraft upon the common law proposition that drunkenness ought to be admitted in evidence, not to excuse, justify or mitigate the crime, but simply to throw light upon the mental status of the offender, to enable the jury to find out what crime had been committed; or, rather, by proving the absence of the nec-

Sec. 1120. Intoxication reducing grade of homicide—Malice—Premeditation.

While voluntary intoxication is no defense to a charge of crime, yet it may be shown where the offense consists of

essary constituents of the crime, such as malice, premeditation, intent, etc., to show that no crime was committed. At first the proposition was only insisted upon and applied in murder cases, or assaults with intent to murder, but the doctrine was soon pushed out to its logical results, and is now applied by some courts to every species of crime which has an intent. It is now generally held that intoxication is admissible as evidence in all the States where murder is divided into degrees, not to deny the guilt, but to determine the degree. But this innovation on the common law was vigorously opposed by the early judges. It was, indeed, by its advocates admitted to be [a] dangerous doctrine, and one that ought to be received with caution." Justice Simkins then calls attention to vacillating change of views on the question, using the Tennessee cases to illustrate the question, and proceeds thus: "It is difficult for an ordinary mind to understand how drunkenness is admissible to shed light on the mental status of the offender, and yet not mitigate his offense; how it may be a circumstance to be considered by the jury in determining the extent, and yet not be an excuse for crime, if taken into consideration at all. It is claimed there is no inconsistency, because intoxication simply goes to show

that no crime has been committed. It would certainly seem that, if no crime had been committed, it is immaterial whether the defendant was drunk or sober. If all the facts in the case except the drunkenness show a crime was committed, yet the element of drunkenness changes the nature of the offense, and makes it nothing, it must certainly excuse the crime. It unquestionably overturns the common law doctrine; and the naked proposition, divested of its metaphysical distinctions and fine-spun explanations, is boldly asserted, that drunkenness can avoid moral and legal responsibility for crime. Punishment for crime rests upon the theory that the criminal not only has possession of his will, but of the power to control it. It is upon this fact that human responsibility must rest. The drunkard does not lose the power to control his will unless unconscious, but he does lose the desire to do so. So all criminals become such because they lose the desire to control their will; hence the necessity for the strong arm of the law to supply that missing incentive for good behavior which was lost by vicious indulgence. It cannot be denied there is a great difference between a crime deliberately planned and executed by a sober, calculating criminal, and one hastily committed by one whose mind is clouded

several grades, for the purpose of reducing it from a higher to a lower grade. This is particularly true of a case of murder, consisting of first and second degrees. "When a statute establishing different degrees of murder," said Justice Gray, of the Supreme Court of the United States, "requires deliberate premeditation in order to constitute murder in the first degree, the question whether the accused is in such a condition of mind, by reason of drunkenness or otherwise, as to be capable of deliberate premeditation, necessarily becomes a material subject of consideration by the jury."⁷⁴ "A deliberate intent to take life is an essential element of murder," said the Court of Appeals of Kentucky. "Drunkenness as a *fact* may, therefore, be proven as bearing upon its existence or non-existence. It is not admissible upon the ground that it in and of itself excuses or mitigates the crime, because one offense cannot justify or palliate another, but because, under the circumstances of the case, it may tend to show that the less and not the greater offense was committed."⁷⁵ "A deliberate intent to take life is an essential element of that offense," said the Supreme Court of Connecticut, speaking of the offense of murder. "The existence of such an intent must be shown as a fact. Implied malice is sufficient at common law to make the offense murder, and under our statute to make it murder in the second degree; but to constitute murder in the first degree actual malice must be proved. Upon this question the state of the prisoner's

or infuriated by intoxication; but human laws are based upon considerations of public policy, and look rather to the maintenance of the social order and personal security of the citizen than to fine discriminations in the conduct of wrongdoers. Against the ordinary assassin or wrongdoer there may be some check—caution may ward off the crime, or innocence may escape its work; but the drunkard is dangerous to the innocent as well as to the most depraved."

Evers v. State, 31 Tex. Cr. Rep. 318; 20 S. W. 744; 18 L. R. A. 421; 37 Am. St. 811.

If the defense is insanity, the State may show that the accused was drunk when he committed the crime. Porter v. State (Ala.), 33 So. 694.

⁷⁴ Hopt v. People, 104 U. S. 631.

⁷⁵ Buckhannon v. Commonwealth, 86 Ky. 110; 5 S. W. 358; 9 Ky. L. Rep. 411.

mind is material. In behalf of the defense, insanity, intoxication, or any other fact which tends to prove that the prisoner was incapable of deliberation was competent evidence for the jury to weigh. Intoxication is admissible in such cases, not as an excuse for crime nor in mitigation of punishment, but as tending to show that the less and not the greater offense was in fact committed.”⁷⁶ Speaking along the same line, Justice Mitchell said, in what is a leading case on the subject: “Drunkenness cannot be considered as an excuse for crime, but may be taken into consideration for the purpose solely of passing on the fact of premeditation, keeping in view the fact that a man may act with premeditation while under the influence of intoxicating liquor, or he may have harbored the design to commit the crime before becoming intoxicated.”⁷⁷ And the same learned judge continues, in fixing a test upon the question under discussion: “In order that there may be no misapprehension, and to prevent voluntary intoxication from being used as a cloak to shield those who from sheer wickedness of heart, and regardless of consequences, allow themselves to be driven to the commission of crimes, it should be said that mere intoxication, in the absence of such mental incapacity resulting therefrom as renders one who takes the life of another incapable of thinking deliberately and meditating rationally upon the purpose to take human life, and which leaves him with full power to know the quality of his act, and to abstain from it, cannot of itself be regarded as sufficient to reduce a homicide from murder in the first to murder in the second degree.”⁷⁸ In other words, there must be ‘the absence of that self-determining power, which in a sane mind renders it conscious of the real nature of its own purposes and capable of resisting wrong impulses. Where this self-governing power is wanting, whether it is caused by insanity, gross intoxication, or other controlling influences, it cannot be said truthfully

⁷⁶ *State v. Johnson*, 40 Conn. 136.

⁷⁷ *Aszman v. State*, 123 Ind. 347; 24 N. E. 123; 8 L. R. A. 33.

⁷⁸ Citing *Walker v. State*, 85 Ala. 7; 7 Am. St. Rep. 17, and 1 Bishop Criminal Law, § 410.

that the mind is fully conscious of its own purpose and deliberates or premeditates in the sense of the act describing murder in the first degree.' ”⁷⁹ If, therefore, the accused at the time he committed the offense, was so intoxicated, though voluntarily so, as to be incapable of planning the murder or acting with premeditation, he cannot be held to have been guilty of murder in the first degree, and consequently evidence of his intoxication is always admissible to show that fact.⁸⁰ But where a statute provides that if

⁷⁹ Quoting *Jones v. Commonwealth*, 75 Pa. St. 403.

⁸⁰ *Regina v. Davis*, 14 Cox Crim. Cas. 563; 28 Mack Eng. Rep. 657; *Aszman v. State*, 123 Ind. 347; 24 N. E. 123; 8 L. R. A. 33; *Smith v. Commonwealth*, 1 Duv. 224; *State v. Garvey*, 11 Minn. 154; *Cline v. State*, 43 Ohio, 332; 1 N. E. 22; *Pigman v. State*, 14 Ohio, 555; *Lytle v. State*, 31 Ohio St. 196; *Davis v. State*, 25 Ohio St. 369; *Roberts v. People*, 19 Mich. 401; *State v. Welch*, 21 Minn. 22; *Hopt v. People*, 104 U. S. 631; *Commonwealth v. Dorsey*, 103 Mass. 412; *Pirtle v. State*, 9 Humph. 663; *Haile v. State*, 11 Humph. 154; *Jones v. Commonwealth*, 75 Pa. St. 403; *Keenan v. Commonwealth*, 44 Pa. St. 55; *People v. Belencia*, 21 Cal. 544; *State v. Johnson*, 40 Conn. 136; *State v. Johnson*, 41 Conn. 584; *State v. Sopher*, 70 Iowa, 494; 30 N. W. 917; *Buckhannon v. Commonwealth*, 86 Ky. 110; 5 S. W. 358; 9 Ky. L. Rep. 411; *Jones v. State*, 29 Ga. 594; *People v. Williams*, 43 Cal. 344; *State v. Robinson*, 20 W. Va. 713; 43 Am. Rep. 799; *People v. Odell*, 1 Dak. 197; 46 N. W. 601; *Colbath v. State*, 4 Tex. App. 76; *Brown v. State*, 4

Tex. App. 275; *McCarty v. State*, 4 Tex. App. 461; *Payne v. State*, 5 Tex. App. 35; *Pocket v. State*, 5 Tex. App. 552; *Ferrell v. State*, 43 Tex. 503; *Swan v. State*, 4 Humph. 136; *Boswell v. Commonwealth*, 20 Gratt. 860; *State v. Sneed*, 88 Mo. 138; 3 West. Rep. 797; *Cartwright v. State*, 8 Lea, 376; *People v. Walker*, 38 Mich. 156; *People v. Harris*, 29 Cal. 678; *People v. Eastwood*, 14 N. Y. 562; *Barber v. State*, 39 Ohio St. 660; *Rex v. Carroll*, 7 Car. & P. 145; *Rex v. Thomas*, 7 Car. & P. 817; *Malone v. State*, 49 Ga. 210; *State v. Mowry*, 37 Kan. 369; 15 Pac. 282; *State v. Garrand*, 5 Ore. 216; *People v. Mills*, 3 N. Y. Cr. Rep. 184; *Nichols v. Commonwealth*, 11 Bush, 575; *People v. Jones*, 63 Cal. 168; *People v. Haley*, 48 Mich. 495; 12 N. W. 671; *Cornwell v. State*, Mart. & Y. 147; *Willis v. Commonwealth*, 32 Gratt. 929; *People v. Batting*, 49 How. Pr. 392; *Eastwood v. People*, 3 Parker Cr. Cas. 25; affirmed, *People v. Eastwood*, 14 N. Y. 562; *State v. Walker*, 7 N. J. L. Jr. 86; *State v. Agnew*, 10 N. J. L. Jr. 165; *State v. O'Neil*, 51 Kan. 651; 33 Pac. 287; 24 L. R. A. 555; *Upstone v. People*, 109 Ill.

one assail another to rob him, and in doing so unpremeditatedly kill him, he shall be guilty of murder, voluntary

169; *Rodgers v. People*, 15 How. Pr. 557; 3 Park. Cr. Rep. 632; *Tucker v. United States*, 151 U. S. 164; 14 Sup. Ct. 299; 38 L. Ed. 112; *Commonwealth v. Baker*, 11 Phila. 631; 33 Leg. Int. 367; *Marshall v. State*, 59 Ga. 154; *Williams v. State*, 81 Ala. 1; 1 So. 179; 60 Am. Rep. 133; *Cleveland v. State*, 86 Ala. 1; 5 So. 426; *Norfleet v. State*, 4 Sneed, 340; *Commonwealth v. Platt*, 11 Phila. 421; *Commonwealth v. Fletcher*, 33 Phila. Leg. Int. 13; 8 Leg. Gaz. 13; *Commonwealth v. Crozier*, 1 Brewster, 349; *Commonwealth v. Hart*, 2 Brewster, 546; *Commonwealth v. Smith*, 1 Leg. Gaz. 196; *Commonwealth v. Perrier*, 3 Phila. 229; 15 Leg. Int. 333; *State v. Agnew*, 10 N. J. L. 165; *People v. Williams*, 43 Cal. 344; *McGinnis v. Commonwealth*, 102 Pa. 66; *Cook v. State*, 46 Fla. 20; 35 So. 665; *Seaborn v. Commonwealth (Ky.)*, 80 S. W. 223; 25 Ky. L. Rep. 2203; *State v. Hertzog*, 55 W. Va. 74; 46 S. E. 792; *Thomas v. State*, 47 Fla. 99; 36 So. 161; *Henderson v. Commonwealth (Ky.)*, 72 S. W. 781; 24 Ky. L. Rep. 1985; *State v. Davis*, 52 W. Va. 224; 43 S. E. 99; *Porter v. State*, 135 Ala. 51; 33 So. 694; *McCormick v. State*, 66 Neb. 337; 92 N. W. 606; *State v. Hill*, 46 La. Ann. 27; 14 So. 294; *State v. Greer*, 29 Minn. 221; 13 N. W. 140; *Starke v. State*, 49 Fla. 41; 37 So. 850; *State v. Dillard*, 59 W. Va. 197; 53 S. E. 117; *Robb v. Commonwealth (Ky.)*, 101 S. W. 918; 31 Ky. L.

Rep. 246; *Heninburg v. State*, 151 Ala. 26; 43 So. 959; *People v. Hower*, 151 Cal. 638; 91 Pac. 507; *Norman v. Commonwealth (Ky.)*, 104 S. W. 1024; 31 Ky. L. Rep. 1283; *State v. Blodgett*, 50 Ore. 329; 92 Pac. 820; *Atkins v. State (Tenn.)*, 105 S. W. 353; 13 L. R. A. (N. S.) 1031; *State v. Kidwell*, 62 W. Va. 466; 59 S. E. 494; 13 L. R. A. (N. S.) 1024; *Miller v. State*, 52 Tex. Cr. App. 72; 105 S. W. 502; *People v. Pekarz*, 185 N. Y. 470; 78 N. E. 294; *Brennan v. People*, 37 Colo. 256; 86 Pac. 79; *State v. Hogan*, 117 La. 863; 42 So. 352; *State v. Rowell*, 75 S. C. 494; 56 S. E. 23; *State v. Johnny*, 29 Nev. 203; 87 Pac. 83; *People v. Koerner*, 117 N. Y. App. Div. 40; 102 N. Y. Supp. 93; affirmed, 191 N. Y. 528; 84 N. E. 1117; *State v. Adams (Del.)*, 65 Atl. 510; *State v. Faino*, 1 Marv. (Del.) 492; 2 Hardesty, 153; 41 Atl. 134; *People v. Hill*, 123 Cal. 47; 55 Pac. 692; *Gustavenson v. State*, 10 Wyo. 300; 68 Pac. 1006; *People v. Methever*, 132 Cal. 326; 64 Pac. 481; *Hempton v. State*, 111 Wis. 127; 86 N. W. 596; *Wilson v. State*, 60 N. J. L. 171; 37 Atl. 954; *Wilkerson v. Commonwealth*, 88 Ky. 29; 9 S. W. 836; 10 Ky. L. Rep. 656; *Seaborn v. Commonwealth (Ky.)*, 80 S. W. 223; 25 Ky. L. Rep. 2203; *Montgomery v. State (Ala.)*, 49 So. 1902; *Robinson v. State*, 130 Ga. 361; 60 S. E. 1005; *Commonwealth v. Nazarko (Pa.)*, 73 Atl. 210; *State v. Pell (Iowa)*, 119 N. W. 154; *State*

drunkenness is no excuse, especially if he has sufficient capacity to know what he is doing in making the attempt to rob.⁸¹

Sec. 1121. Extent of intoxication to reduce the degree of the offense.

Nearly all the cases lay down the rule that the extent of intoxication to reduce the offense from murder in the first to the second degree must be such at the time of the killing as to render the accused incapable of entertaining a premeditated design, and if he was in such an intoxicated condition that he was incapable of entertaining any design to kill he was in that condition.⁸² The incapacity to entertain a deliberate design to kill may be only a temporary one.⁸³ Whether or not the accused was incapable of premeditation or forming a design to kill is a question for the jury and not the court.⁸⁴ The accused cannot escape conviction on

v. Corrivau, 93 Minn. 176; 100 N. W. 638; *People v. Griffith*, 146 Cal. 339; 80 Pac. 68; *Bleich v. People*, 227 Ill. 80; 81 N. E. 36.

⁸¹ *Commonwealth v. Miller*, 4 Phila. 195, 210; 17 Leg. Int. 276, 285.

⁸² *State v. Corrivau*, 93 Minn. 176; 100 N. W. 638; *King v. State*, 90 Ala. 612; 8 So. 856; *Nichols v. Commonwealth*, 11 Bush, 575; *State v. Douglass*, 28 W. Va. 297; *Hempton v. State*, 111 Wis. 127; 86 N. W. 596; *State v. Truitt*, 5 Pennewill (Del.) 466; 62 Atl. 790; *Gustavenson v. State*, 10 Wyo. 300; 68 Pac. 1006; *Commonwealth v. Gilbert*, 165 Mass. 45; 42 N. E. 336; *People v. Hill*, 123 Cal. 47; 55 Pac. 692; *State v. Sparegrove*, 134 Iowa, 599; 112 N. W. 83; *State v. Johnny*, 29 Nev. 203; 87 Pac. 3; *Atkins v. State* (Tenn.), 105 S. W. 353; 13 L. R. A. (N. S.) 1031; *Mor-*

rison v. State, 84 Ala. 405; *Brown v. State*, 142 Ala. 287; 38 So. 268; *United States v. Cornell*, 2 Mason, 91; Fed. Cas. No. 14868; *McIntyre v. People*, 38 Ill. 514; *Commonwealth v. Perrier*, 3 Phila. 229; 15 Leg. Int. 333; *Commonwealth v. Crozier*, 1 Brewster (Pa.), 349; *State v. Rigley* (Idaho), 62 Pac. 679; *Commonwealth v. Hart*, 2 Brewster (Pa.), 546; *Commonwealth v. Smith*, 1 Leg. Gaz. 196; *Cartwright v. State*, 8 Lea, 376; *Warner v. State*, 56 N. J. L. 686; 29 Atl. 505; 44 Am. St. 415.

⁸³ *State v. Faino*, 2 Hardesty (Del.), 153; 1 Marv. 492; 41 Atl. 134; *Wilson v. State*, 60 N. J. L. 171; 37 Atl. 954.

⁸⁴ *Hempton v. State*, 111 Wis. 127; 86 N. W. 596; *Commonwealth v. Hagenleek*, 110 Mass. 125; 3 N. E. 36; *State v. Adams* (Del.), 65 Atl. 510; *State v. Rowell*, 75

the ground of intoxication because he thought the decedent intended to do him great bodily harm and he killed him in self-defense, if a sober man would not have so thought and acted.⁸⁵ If the accused had sufficient possession of his faculties to form an intent, and voluntarily and purposely did the act, then the jury may presume he intended the actual consequences of his crime,⁸⁶ and mere nervous excitement will not aid him in his defense.⁸⁷ If the accused did not know what he was doing, or was unconscious of it, not knowing why he did it, or that his action and the means he was using were naturally adapted and calculated to endanger life, he did not have sufficient capacity to entertain an intent to kill, and such an intent cannot be inferred from his act.⁸⁸ But a person who is sober enough to force his way into a building, follow his victim from room to room, announce his intentions to kill him, provide himself with a weapon fitted for that purpose, commit the homicide with repeated blows, and plan and execute an immediate escape, is sober enough to have inflicted upon him the sentence of murder in the first degree.⁸⁹ And so is one who puts arsenic in his victim's

S. C. 494; 56 S. E. 23; *Brennan v. People*, 37 Colo. 256; 86 Pac. 79; *McGinnis v. Commonwealth*, 102 Pa. 66; *People v. Jones*, 63 Cal. 168; *Rather v. State*, 25 Tex. App. 623; 9 S. W. 69.

⁸⁵ *Atkins v. State* (Tenn.), 105 S. W. 353; 13 L. R. A. (N. S.) 1031.

An instruction that if accused was too drunk to "coin" a design, the jury might look to his intoxicated condition to determine whether he provoked the difficulties is erroneous, because giving undue prominence to a part of evidence. *Davis v. State* (Ala.), 55 So. 561.

If there be no pretense he was insane from drink when the act was committed, evidence of how

often he got drunk is immaterial, where mere drunkenness is to be relied upon. *Hennberg v. State*, 151 Ala. 26; 43 So. 959.

⁸⁶ *People v. Fish*, 125 N. Y. 136; 26 N. E. 319; *Roberts v. People*, 19 Mich. 401.

⁸⁷ *Casat v. State*, 40 Ark. 511; *People v. Robinson*, 2 Park. Cr. Rep. 235.

⁸⁸ *Roberts v. People*, 19 Mich. 401; *State v. Robinson*, 20 W. Va. 713; 43 Am. Rep. 799; *Jones v. Commonwealth*, 75 Pa. 403; *State v. McDaniel*, 115 N. C. 807; 20 S. E. 622.

⁸⁹ *Kenny v. People*, 31 N. Y. 330; *Territory v. Franklin*, 2 N. M. 307; *State v. Hansen*, 25 Ore. 391; 35 Pac. 976; 36 Pac. 296; *State v. McDaniel*, 115 N. C. 807; 20 S. E.

drink with intent to kill him, though greatly excited.⁹⁰ If the homicide is the result of deliberation, premeditation and malice, and is committed in cold blood, intoxication is of no avail in the reduction of the degree of the offense,⁹¹ and evidence of intoxication should not be considered if the act was done willfully.⁹² So it has been held that if the accused used a deadly weapon his drunkenness furnishes no excuse,⁹³ although if he had used a weapon not deadly in its construction the jury might consider his intoxication.⁹⁴ Thus, if one has mind enough to intentionally shoot at another, although drunk, he has mind enough to intend the consequences of his act.⁹⁵ Yet some of the cases hold where a murder is committed with such an instrument, without provocation, if it be shown the accused was so drunk at the time as to be truly incapacitated from acting from motive, his drunkenness will be available to him in his defense.⁹⁶ A drunken condition which leaves the accused his full power to know the quality of his act and to abstain from doing it, cannot reduce the homicide from murder in the first to that in the second degree, notwithstanding his mental incapacity renders him incapable of thinking deliberately or determining

622; *State v. Tatros*, 50 Vt. 483; *State v. Douglass*, 28 W. Va. 297; *State v. Robinson*, 20 W. Va. 713; 43 Am. Rep. 799; *Honesty v. Commonwealth*, 81 Va. 283.

⁹⁰ *People v. Robinson*, 2 Park. Cr. Rep. 235.

⁹¹ *State v. Hansen*, 25 Ore. 391; 35 Pac. 976; 36 Pac. 296; *State v. McDaniel*, 115 N. C. 807; 20 S. E. 622; *State v. Tatros*, 50 Vt. 483; *State v. Douglass*, 28 W. Va. 297; *State v. Robinson*, 20 W. Va. 713; 43 Am. Rep. 799; *Honesty v. Commonwealth*, 81 Va. 283; *State v. Gut*, 13 Minn. 343.

⁹² *People v. Jones*, 2 Edw. Sel. Cas. 88; *Warner v. State*, 56 N. J. L. 686; 29 Atl. 505; *State v.*

Tatros, 50 Vt. 483; *People v. Hammill*, 2 Park. Cr. Cas. 223; *Keenan v. Commonwealth*, 44 Pa. 55; 84 Am. Dec. 414.

⁹³ *Lanergan v. People*, 50 Barb. 266; *Rex v. Meakin*, 7 Car. & P. 297; *Kenny v. People*, 31 N. Y. 330; *Kelly v. Commonwealth*, 1 Gr. Cas. (Pa.) 484 (a crowbar); *Surber v. State*, 99 Ind. 71.

⁹⁴ *Rex v. Meakin*, 7 Car. & P. 297.

⁹⁵ *Estes v. State*, 55 Ga. 30; *Marshall v. State*, 59 Ga. 154.

⁹⁶ *Kenney v. People*, 27 How. Pr. 202; *State v. Bullock*, 13 Ala. 413; *State v. Sopher*, 70 Iowa, 494; 30 N. W. 917.

rationally upon the purpose of taking life.⁹⁷ But the accused need not have been deprived of all power of volition, nor of all ability to form an intent, nor of all power to deliberate and premeditate to enable the jury to find the absence of the necessary intent or degree of deliberation or premeditation to constitute the crime.⁹⁸

Sec. 1122. Incapacity to deliberate, reducing homicide below second degree.

While voluntary intoxication is no defense to a charge of the commission of a crime, yet it may be an important factor to reduce the grade of a crime consisting of different degrees—as murder from the first to the second degree. “Where a homicide results from the use of a dangerous and deadly weapon,” said Justice Mitchell, of Indiana, “the law implies malice, and an intention to kill from the effective use of the weapon, and, therefore, the crime is presumably murder in the second degree. No degree of mental disturbance produced by voluntary intoxication will, of itself, disconnected from sudden heat or other circumstances, avail to reduce the crime to a lower grade unless such a diseased condition of the mind has followed the habit of intoxication as to render the accused incapable of distinguishing between right and wrong, or of controlling his conduct when free from the

⁹⁷ *Aszman v. State*, 123 Ind. 347; 24 N. E. 123; 8 L. R. A. 33; *State v. Bullock*, 13 Ala. 417; *State v. Davis*, 9 Houst. (Del.) 407; *State v. McDaniel*, 115 N. C. 807; 20 S. E. 622; *Cook v. Territory*, 2 Wyo. 110; 4 Pac. 887; *State v. Dearing*, 65 Mo. 533; *People v. Belencia*, 21 Cal. 544; *People v. Williams*, 43 Cal. 344; *Commonwealth v. Platt*, 11 Phila. 421; *Commonwealth v. Crozier*, 1 Brewster (Pa.), 349; *Territory v. Dana* (Ark.), 6 Lawson Criminal Defenses, 630; *Jones v. Commonwealth*, 75 Pa. 403; *State v. Rob-*

inson, 20 W. Va. 713; 43 Am. Rep. 799; *Hill v. State*, 42 Neb. 503; 60 N. W. 916; *Cartwright v. State*, 8 Lea, 377; *People v. Leonardi*, 143 N. Y. 360; 38 N. E. 372; *Lancaster v. State*, 2 Lea, 575; *McIntyre v. People*, 38 Ill. 514; *People v. Fish*, 125 N. Y. 136; 26 N. E. 319; *Davis v. State*, 25 Ohio St. 369; *Madison v. Commonwealth*, 17 S. W. 164; 13 Ky. L. Rep. 313.

⁹⁸ *People v. Leonardi*, 143 N. Y. 360; 38 N. E. 372; *Haile v. State*, 11 Humph. 154; *Lancaster v. State*, 2 Lea, 575; *McIntyre v. People*, 38 Ill. 514.

influence of intoxicating drink. But in the absence of evidence, either direct or circumstantial, there is no presumption from the mere fact that a homicide was committed, except it be in the perpetration of the offenses mentioned in the statute, that it was done with the deliberation or premeditated malice. Hence, the conclusion logically follows that murder in the first degree, in which, under our statute, premeditated malice is the distinguishing ingredient, can only be committed by one possessed of the mental capacity to deliberate and premeditate, and that a homicide committed by one who at the time, for any reason, is incapacitated to think deliberately, or determine rationally as to the quality, character and consequences of the act, cannot be murder in the first degree.”⁹⁹

Sec. 1123. Specific intent—Assault with intent.

While drunkenness not resulting in insanity is not an excuse for crime, yet “where, however, the essence of a crime depends upon the intent with which an act was done, or where an essential ingredient of the crime consists in the doing of an unlawful act, with a deliberate and premeditated purpose, the mental condition of the accused, whether that condition be occasioned by voluntary intoxication or otherwise, is an important factor to be considered.”¹ Therefore, in all cases of this kind, evidence of mere intoxication is admissible to rebut the presumption of or to show incapacity to form the intent essential to constitute the act done a crime.² The rule applies not only to an assault with intent to kill, but to an assault with intent to wound³ or to rob⁴ or commit

⁹⁹ *Aszman v. State*, 126 Ind. 347; 24 N. E. 123; 8 L. R. A. 33; *Regina v. Davis*, 14 Cox C. C. 563; 28 Mack, 657.

¹ *Aszman v. State*, 126 Ind. 347; 24 N. E. 123; 8 L. R. A. 33; citing *Smith v. Commonwealth*, 1 Duv. (S. C.) 224; *State v. Garvey*, 11 Minn. 154; *Cline v. State*, 43 Ohio St. 332; 1 N. E. 22.

² *Wenz v. State*, 1 Tex. App. 36; *Ferrell v. State*, 43 Tex. 503;

Regina v. Cruse, 8 Car. & P. 541; *Regina v. Monkhouse*, 4 Cox Cr. Cas. 55; *Commonwealth v. Hoganlock*, 140 Mass. 125; *State v. Bowen*, 4 Cranch C. C. 404; *Scott v. State*, 12 Tex. App. 31.

³ *Cline v. State*, 43 Ohio St. 332; 1 N. E. 22; *Nichols v. State*, 8 Ohio St. 425; *State v. Garvey*, 11 Minn. 154.

⁴ *Scott v. State*, 12 Tex. App. 31.

rape.⁵ The incapacity occasioned by drunkenness may be so great as to render the accused incapable of forming an intent to kill.⁶ Mere drunkenness will not reduce the charge to one of mere assault and battery⁷ unless it rendered the accused at the time incapable of holding or having an intent to take life.⁸ If the accused entertains an intent to kill when he made the assault, and he would not have so entertained it if he had not been intoxicated, he is guilty of an assault with intent to kill, notwithstanding his intoxication.⁹ Yet the degree of an accused's intoxication by which he was greatly excited and which rendered his mind unfavorable to deliberation and premeditation, may be taken into consideration, although it was not so excessive as to absolutely render him incapable of a deliberate purpose to kill.¹⁰ If the proof shows the accused was sober enough to understand the nature of his act, and that it was caused by a sudden outburst of passion, it is not error to refuse to instruct the jury concerning intoxication on a charge of assault with intent to kill;¹¹ and no error is committed if he receives the lowest legal punishment for the offense;¹² or, if the incapacity to form an intent would not have reduced the crime lower, if death had resulted, than murder in the second degree.¹³ If the court has instructed the jury that if the accused was so frenzied from the use of liquor as to render him incapable of knowing what he was doing he must be acquitted, it is not error to further instruct them that drunkenness is no

⁵ Reagan v. State, 28 Tex. App. 227; 12 S. W. 601.

⁶ Mooney v. State, 33 Ala. 419 (explaining the error in State v. Bullock, 13 Ala. 413); Roberts v. People, 19 Mich. 401; Regina v. Frances, 4 Cox C. C. 57.

⁷ Jeffries v. State, 9 Tex. App. 598; Pugh v. State, 2 Tex. App. 539.

⁸ Walker v. State, 85 Ala. 7; People v. Odell, 1 Dak. 189.

⁹ Roberts v. People, 19 Mich. 401.

¹⁰ Lancaster v. State, 2 Lea, 575.

¹¹ Carpenter v. Commonwealth, 92 Ky. 452; 18 S. W. 9; 13 Ky. L. Rep. 658; Hernandez v. State, 32 Tex. Crim. Rep. 271; 22 S. W. 972. See Nichols v. State, 8 Ohio St. 425.

¹² Ayres v. State (Tex. Cr. App.), 26 S. W. 396.

¹³ Hernandez v. State, 32 Tex. Cr. Rep. 271; 22 S. W. 972.

excuse for crime,¹⁴ and, of course, if the court has already covered the question of drunkenness rendering the accused incapacitated to have an intention to kill or rob, it may refuse one on the question requested by the accused.¹⁵ An instruction that if intoxication of the accused had been shown to exist at the time of the offense it must be considered, and if it was such that he had lost his reason and intelligence and that the jury have a reasonable doubt whether he was able to form and have a purpose to kill or to know what he was doing, he should be found not guilty of an intent to kill, is as sufficiently favorable to the accused as he can ask.¹⁶ If two defendants be indicted an instruction charging that if "the defendants" were so intoxicated that they were incapacitated to entertain an intent to kill they should be acquitted should be refused, because it tends to mislead the jury into the belief that both defendants must have been so intoxicated before either could be convicted.¹⁷ It is a question for the jury whether the accused was so far intoxicated as to be unable to form an intent to kill or commit the greater offense.¹⁸ In determining whether the accused had such an intent or was too much intoxicated to have had it, the jury should take into consideration the circumstances and nature of the assault, the conduct and actions of the accused, as well as his declarations before, at the time of, and after the assault, and consider the nature of the intent and what degree of mental capacity was necessary to enable him to entertain it.¹⁹

Sec. 1124. Assault with intent to commit rape.

Upon a charge of an assault with intent to commit rape, evidence which tends to show that when the accused made the attempt he was excessively drunk fairly raises the question of his mental capacity to conceive the criminal intent

¹⁴ *Cross v. State*, 55 Wis. 261; 12 N. W. 425.

¹⁵ *State v. Grear*, 29 Mich. 221; *Bramlette v. State*, 21 Tex. App. 611; 2 S. W. 765.

¹⁶ *State v. Fiske*, 63 Conn. 388; *State v. O'Connor*, 11 Nev. 416.

¹⁷ *Crosby v. People*, 137 Ill. 325; 27 N. E. 49.

¹⁸ *Commonwealth v. Hagenlock*, 140 Mass. 125; *Roberts v. State*, 19 Mich. 401.

¹⁹ *Roberts v. People*, 19 Mich. 401.

and demands of the trial court a charge to the effect that, in determining whether he had the specific intent to commit rape at the time he made the attempt, the jury should take into consideration the evidence of his drunkenness and his consequent mental capacity to form such intent. He "is not to be held responsible for the intent if he was too drunk for a conscious exercise of the will to the particular end, or, in other words, too drunk to entertain the intent, and did not entertain it in fact. If he did in fact entertain it, though but for the intoxication he would not have done so, he is responsible for the intent as well as for the acts."²⁰ But the drunkenness is not an excuse for the crime of rape itself, although the defendant's mind was so far overcome as to render him incapable of forming an intent,²¹ or, at least, for the assault alone.²² Evidence of drunkenness three or four hours before the assault is not admissible.²³

Sec. 1125. Conspiracy to commit murder.

Upon a charge of conspiring with others to commit the crime of murder, the accused may show that at the time of the commission of the offense he was so intoxicated as to be incapacitated to enter into the conspiracy, and it is error to refuse to instruct the jury on that point.²⁴ So upon a charge

²⁰ *Reagan v. State*, 28 Tex. App. 227; 12 S. W. 601; *State v. Donovan*, 61 Iowa, 369; 16 N. W. 206.

²¹ *Crow v. State* (Tex. Crim. App.), 23 S. W. 14

²² *Whitten v. State*, 115 Ala. 72; 22 So. 483.

²³ *State v. Alcorn*, 137 Mo. 121; 38 S. W. 548; *State v. Truitt*, 5 Pennewill (Del.), 466; 62 Atl. 790.

²⁴ *Booher v. State*, 156 Ind. 435; 60 N. E. 156; 54 L. R. A. 391. The court held this instruction erroneous: "Voluntary intoxication will not excuse crime. If the defendant, Booher, was drunk, it was his own fault, and he cannot claim any immunity by reason of

his intoxication. It was his duty to keep sober, and if he voluntarily permitted himself to become intoxicated, and while so intoxicated he committed the crime charged, in any form, he is guilty, and should be punished precisely the same as though he had been sober. It is not the law that a man may voluntarily become intoxicated and commit crime, and escape punishment by reason of such intoxication; but, upon the other hand, it is the law that he cannot use his own voluntary intoxication to escape the consequences of his acts while so intoxicated."

of an assault with intent to kill, a charge that if accused was so drunk as to be incapable of forming a specific intent, he was not guilty unless he aided and abetted others therein, is erroneous, and one that if he was so drunk at the time of the alleged conspiracy as to be incapable of understanding its nature and consequences he was not guilty, is correct.²⁵

Sec. 1126. Attempt to commit suicide.

Where suicide is an offense, drunkenness is no excuse for an attempt to commit it, although the mental condition of the accused superinduced by the use of intoxicating liquors is a fact for the jury's consideration in determining whether he really intended to destroy his life,²⁶ and may be sufficient to negative such intent.²⁷

Sec. 1127. Burglary.

As the breaking into a house to constitute burglary involves a specific intent to steal, if the accused was so drunk as not to be able to entertain such an intent, he is not guilty of the crime.²⁸ But if the criminal intent existed he is guilty, notwithstanding his intoxication.²⁹ Evidence to show his condition is admissible for the consideration of the jury,³⁰ and it is a question for them to determine if he possessed sufficient power to entertain the specific intent to steal.³¹ Upon a charge of breaking into a house to steal, if the accused was so drunk as to believe in good faith he was entering another

²⁵ *State v. Pasnau*, 118 Iowa, 501; 92 N. W. 682.

²⁶ *Regina v. Doody*, 6 Cox C. C. 463.

²⁷ *Regina v. Moore*, 6 Car. & K. 319; 16 Jur. 750.

²⁸ *Schwabacher v. People*, 165 Ill. 618; 46 N. E. 809; *State v. Snow*, 3 Penn. (Del.) 259; 51 Atl. 607; *State v. Ford*, 16 S. D. 228; 92 N. W. 18; *People v. Phelan*, 93 Cal. 111; 28 Pac. 855

²⁹ *State v. Bell*, 29 Iowa, 316.

³⁰ *People v. Phelan*, 93 Cal. 111; 28 Pac. 855; *People v. Dowell*, 141 Cal. 493; 75 Pac. 45.

³¹ *State v. Bell*, 29 Iowa, 316.

It may be shown that the defendant, on the same evening he broke into the house, committed the crime of robbery, for the purpose of showing he was not drunk as he claimed he was. *State v. Harris*, 100 Iowa, 188; 69 N. W. 413.

house, where he resides, he cannot be convicted of either phase of the offense.³²

Sec. 1128. Forgery.

If a person is too drunk to entertain the intent to forge a promissory note or other instrument with intent to defraud, he cannot be held guilty of forgery, and, of course, evidence of his condition is admissible in such an instance.³³ And, of course, evidence is admissible to show that he was physically incapacitated by drink at the time it is claimed he committed the forgery to perform the manual act.³⁴

Sec. 1129. Larceny and robbery.

In the crime of larceny there is involved a felonious intent—the taking of goods with an intent to appropriate them to one's self and deprive the owner of their possession—and it therefore follows that if the accused was too drunk to entertain such an intent at the time he took the goods he is not guilty of the crime.³⁵ Evidence of his drunken condition is admissible to enable the jury to determine his intentions in taking the property.³⁶ But the accused must relinquish the goods to their owner before the intent to steal arises, and should do so as soon as his mind is so restored as to be fully conscious of his act.³⁷ An offer to show that the accused was merely drunk at the time is insufficient; it must go farther

³² State v. Snow, 3 Penn. (Del.) 259; 51 Atl. 607. See also People v. Dowell, 141 Cal. 493; 75 Pac. 45.

³³ People v. Blake, 65 Cal. 275; 4 Pac. 1. *Contra*, State v. Peterson, 129 N. C. 556; 40 S. E. 9; citing State v. Kale, 124 N. C. 819; 32 S. E. 896, 897; Howard v. State, 37 Tex. Cr. App. 494; 36 S. W. 475.

³⁴ Jenkins v. State, 93 Ga. 1; 18 S. E. 992.

³⁵ People v. Walker, 38 Mich. 156; People v. Cummins, 47 Mich.

334; 11 N. W. 186; Wood v. State, 34 Ark. 341; Ryan v. United States, 26 App. D. C. 74; Collins v. State, 115 Wis. 596; 92 N. W. 266; Bartholomew v. State, 104 Ill. 605; State v. Hart, 29 Iowa, 268; Keeton v. Commonwealth, 92 Ky. 522; 18 S. W. 359; State v. Kavanaugh, 4 Pennewill (Del.) 131; 53 Atl. 335; Keeton v. Commonwealth, 92 Ky. 522; 18 Ky. L. 359.

³⁶ Loza v. State, 1 Tex. App. 488.

³⁷ Ryan v. United States, 26 App. D. C. 74.

and show that he was so drunk he was not able to entertain an intent to steal.³⁸ Yet it is held that drunkenness may be shown, as any other fact, to throw light upon other facts and circumstances, and as tending to show that, by reason of the intoxication, the accused was physically unable to then commit the offense.³⁹ It is admissible, upon a charge of receiving stolen goods, in order to determine whether the accused knew those in his possession were really stolen.⁴⁰ The accused is entitled to have the jury charged that they might consider whether or not he was so intoxicated at the time as to be incapable of forming the felonious intent which was necessary to constitute the crime, and if he was not they must acquit.⁴¹ But it is proper to say to the jury that if he was so drunk he was incapable of forming an intention to steal he would not be guilty, yet if the liquor prompted him to take the money he was responsible for what he did, although, had he been sober, he would not have done so.⁴² If the evidence does not show the accused was drunk at the time he stole the property he is not entitled to have the jury instructed upon the question of intoxication.⁴³ If the accused had formed the intention to steal the property before he got drunk, then he may be convicted of the crime.⁴⁴ Robbery is only another form of larceny, and the same rules apply to it.⁴⁵ It is not error to instruct the jury that if the accused "was sober when the property was delivered to him and [he] had no

³⁸ *Ryan v. United States*, 26 App. D. C. 74.

³⁹ *Jenkins v. State*, 93 Ga. 1; 18 S. E. 992.

⁴⁰ *Commonwealth v. Ault*, 10 Pa. Super. Ct. 651.

⁴¹ *Collins v. State*, 115 Wis. 596; 92 N. W. 266; *Wright v. State*, 37 Tex. Cr. App. 627; 40 S. W. 491; *Chatham v. State*, 92 Ala. 47; 9 So. 607; *Keeton v. Commonwealth*, 92 Ky. 522; 18 S. W. 359.

But it has been held that an instruction that if the accused was so intoxicated as not to be con-

scious of what he was doing when he committed the acts, he would not be guilty, is all he is entitled to. *Henslie v. State*, 3 Heisk. 202.

⁴² *Commonwealth v. McDonald*, 187 Mass. 581; 73 N. E. 852.

⁴³ *State v. Riley*, 100 Mo. 493; 13 S. W. 1063.

⁴⁴ *State v. Schingen*, 20 Wis. 75.

⁴⁵ *Keeton v. Commonwealth*, 92 Ky. 522; 18 S. W. 359; *Commonwealth v. Miller*, 4 Phila. 195; affirmed, 4 Phila. 210; 17 Leg. Int. 276, 285.

intention to then convert it, but afterwards became so intoxicated that he did not know the consequences of his own acts, and while in this condition offered to dispose of it, then they should find him not guilty, and if he was so drunk as to be unable to form any intention at the time he offered to dispose of the property, he must be acquitted unless they were satisfied he had formed the intention to steal while in the possession of his reasoning powers."⁴⁶ There are cases, however, which hold that intoxication is no excuse, and evidence of drunkenness just before and at the time of the theft is not admissible.⁴⁷ In one case it was said that evidence of drunkenness was admissible, not as a defense, but for the purpose of showing that it was highly improbable that he did in fact commit the theft.⁴⁸ But even in these cases it is held that insanity resulting from the habit of voluntary intoxication long continued, producing a disease which has so perverted or destroyed the accused's mental faculties as to render him incapable of acting from motive or distinguishing right from wrong, should prevent conviction.⁴⁹

Sec. 1130. Self-defense.

Where the accused claims he took the life of the deceased because he was assailed by him and it was necessary to save his own life, he may always show that the deceased was at

⁴⁶ *State v. Schingen*, 20 Wis. 74.

⁴⁷ *Dawson v. State*, 16 Ind. 428; 79 Am. Dec. 439; *State v. Hart*, 29 Iowa, 268; *State v. Stibbens*, 188 Mo. 387; 87 S. W. 460; *State v. West*, 157 Mo. 309; 57 S. W. 1071; *Fisher v. State*, 64 Ind. 435.

"Although there may be no actual criminal intent, the law may hold the party, by construction, guilty of such intent." *O'Herrin v. State*, 14 Ind. 420. In a more recent case it was said: "That the defendant was weak-minded, there being no evidence of mental unsoundness, and that he may have

been voluntarily in a state of intoxication, were matters proper to be considered as bearing upon the intent with which he took the property. Of themselves, however, they furnish no substantive defense against a felonious taking." *Robinson v. State*, 113 Ind. 510; 16 N. E. 184.

⁴⁸ *Ingalls v. State*, 48 Wis. 647; 4 N. W. 785. This case holds that it is admissible to show a total physical incapacity to take the property.

⁴⁹ *Fisher v. State*, 64 Ind. 435.

the time intoxicated, in order to show he was more easily inflamed or angered or was reckless in his conduct, for, as is well known, a drunken man is often more apt to assail another than he would be when sober, being more readily angered by some imaginary or real offense and being regardless of the consequences. But the evidence concerning his drunkenness must relate to the time of the assault, and it is not sufficient to show drinking on the day before, even where the assault took place shortly after midnight of that day.⁵⁰ And evidence that the deceased had a jug of whisky at home, or had carried one home the day of the homicide, is irrelevant, not tending to show he was intoxicated at the time of the trouble.⁵¹

Sec. 1131. Willful drunkenness—Previously formed intent.

If a person purposely get intoxicated in order to carry out an intent to kill another, his intoxication has no effect upon the act and intent carried out under those conditions.⁵² So if he drink liquor to nerve himself up to commit the crime, his intoxication will not avail him.⁵³ So if he forms the purpose to perpetrate the crime and then gets intoxicated, and while in that condition carries out his previously formed intention, he will be guilty, regardless of his condition when he committed the crime.⁵⁴

Sec. 1132. Burden to show incapacity to form a criminal intent.

As all men are presumed to be normal, there is no presumption that the accused was incapable of entertaining the necessary intent to commit the offense charged, or not to have been able to premeditate upon and form the intent to commit the crime with which he stands charged. The burden is, therefore, upon him to produce evidence to show his mental

⁵⁰ *People v. Kloss*, 115 Cal. 567; 47 Pac. 459.

⁵¹ *Gregory v. State*, 140 Ala. 16; 37 So. 259.

⁵² *Garner v. State*, 28 Fla. 113; 9 So. 835; *State v. Truitt*, 5 Pennewill (Del.) 466; 62 Atl. 790.

⁵³ *Willis v. Commonwealth*, 32 Gratt. 929; *Smith v. Commonwealth*, 1 Duv. (Ky.) 224; *Blimm v. Commonwealth*, 7 Bush, 320; *O'Grady v. State*, 36 Neb. 320; 54 N. W. 556.

⁵⁴ *State v. Schingen*, 20 Wis. 74.

condition at the very time it is charged he committed the offense.⁵⁵ But his evidence is not necessarily confined to that specific moment, for he may show his condition immediately before and even after the act.⁵⁶ Thus, drinking several days prior to the commission of the offense may be shown when it is of such a consecutive character as to lead up to the time of the offense charged,⁵⁷ and the State may rebut the inference of intoxication thus sought to be raised by showing on the day or night of the homicide he was not intoxicated or appeared to be the same as when he was in a normal condition.⁵⁸ Proof of his intoxicated condition may arise out of the prosecutor's evidence.⁵⁹ It is not error to charge the jury that the burden is on the accused to show that he was so intoxicated he was incapable of forming a criminal intent.⁶⁰ It has been held that the accused must establish his intoxication by a pre-

⁵⁵ *State v. Hill*, 46 La. Ann. 27; 14 So. 294; *State v. Gear*, 29 Minn. 221; 13 N. W. 140; *Porter v. State*, 135 Ala. 51; 33 So. 694; *McCormick v. State*, 66 Neb. 337; 92 N. W. 606; *State v. Davis*, 52 W. Va. 224; 43 S. E. 99; *State v. Pasnau*, 118 Iowa, 501; 92 N. W. 682; *Starke v. State*, 49 Fla. 41; 37 So. 850; *State v. Sewell*, 3 Jones L. (N. C.) 245.

⁵⁶ *People v. Hill*, 123 Cal. 47; 55 Cal. 692; *People v. Griffith*, 146 Cal. 339; 80 Pac. 68; *State v. Rowell*, 75 S. C. 494; 56 S. E. 23.

⁵⁷ *McCormick v. State*, 66 Neb. 337; 92 N. W. 606. But proof of a habit to drink is not admissible, unless confined to a period within a few days of the homicide. *Real v. People*, 42 N. Y. 270; affirming 55 Barb. 551; 8 Abb. Prac. (N. S.) 314.

⁵⁸ *McCormick v. State*, 66 Neb. 337; 92 N. W. 606.

⁵⁹ *State v. Davis*, 52 W. Va.

224; 43 S. E. 99; *Starke v. State*, 49 Fla. 41; 37 So. 850.

Under the code in force in the Philippine Islands, in the absence of proof to the contrary, it will be presumed that intoxication is not habitual, and the fact that the accused was drunk at the time of the commission of the crime must then be considered as a mitigating circumstance. *United States v. Fitzgerald*, 2 Philippine, 419; *United States v. Guillermo*, 3 Philippine, 329; *United States v. Recano*, 4 Philippine, 91; *United States v. Odita*, 4 Philippine, 309; *United States v. Highhill*, 4 Philippine, 384; *United States v. Dalasay*, 5 Philippine, 41; *United States v. Yape*, 10 Philippine, 204. But it is not if the habit is habitual. *United States v. Abigan*, 1 Philippine, 83; *United States v. Git*, 3 Philippine, 414.

⁶⁰ *State v. Sparegrove*, 134 Iowa, 599; 112 N. W. 83

ponderance of the evidence,⁶¹ but the usual rule is that if the evidence raises a reasonable doubt whether he was so intoxicated as not to have the ability to entertain that degree of intent necessary to render him guilty of the higher crime, he is entitled to be acquitted in that respect.⁶² A mere offer to show that the accused was intoxicated when he committed the offense may be overruled if it does not include an offer to show the degree of intoxication.⁶³

Sec. 1133. Instructions concerning the reduction of the degree of the offense.

If there be evidence of the intoxication of the defendant at the time, or near thereto, of the commission of the homicide, then he is entitled to have the jury specifically instructed upon its effect to reduce the grade of his offense, and a refusal to do so will be error. In discussing this question Justice Mitchell, of the Supreme Court of Indiana, used the following language: "The court gave full recognition to the fact that the subject of voluntary intoxication of the accused was before the jury for consideration. The jury were told, correctly enough, with what abhorrence the law looked upon frenzy, arising solely from jealousy and anger, and from which wicked and ungovernable passions, which did not result from mental lesion [arise]. They were also told, with eminent propriety, that the condition of mind which usually and immediately follows the excessive use of alcoholic liquors is not the unsoundness of mind meant by our law, and that voluntary drunkenness did not excuse or palliate crime. These instructions were all well enough as far as they went, but the question back of all that was whether drunkenness, if it existed to the extent of depriving the accused of the power of deliberation, might be considered by the jury as disproving an essential ingredient in the crime of murder in the first degree, viz., the deliberate intention to take human life.

⁶¹ State v. Yates, 132 Iowa, 475;
109 N. W. 1005.

⁶² Commonwealth v. Snyder
(Pa.), 73 Atl. 910.

⁶³ Booher v. State, 156 Ind. 435;
60 N. E. 156; 54 L. R. A. 391.

When the accused asked the court to instruct the jury that voluntary intoxication might, in a case where a mental condition had resulted therefrom which incapacitated him from deliberate thought or rational determination, reduce the crime from the highest to a lower grade of murder, the court refused. The jury were thus left without the means of distinguishing between voluntary intoxication as an excuse for crime and intoxication as affecting that particular condition of mind necessary to constitute the crime of murder in the first degree. After admitting evidence tending to show that the accused was in the habit of drinking alcoholic stimulants, and that he had drunk to excess on the day of the homicide, the jury were not only told that drunkenness was not only no excuse or palliation for crime, but without any explanation they were left to infer that if it had any effect it was to aggravate the offense. Either the jury must have excluded the evidence of intoxication from their minds altogether or they must have given it an effect prejudicial to the accused. The jury may have believed, as did the court, that although the accused may not have had mental capacity to think deliberately or determine rationally, yet, if his incapacitated condition resulted from voluntary intoxication, he might be guilty of murder in the first degree, nevertheless. In the absence of any claim of preconceived design, it was, therefore, prejudicial error to refuse the instruction asked which contains an accurate statement of the law."⁶⁴ But an instruction that if the accused, at the time of the offense, though not insane, was so drunk as to be incapable of forming a specific intent to kill or do the act he did do, the grade of his crime would be reduced to manslaughter, covers an instruction requested that if he at the time was so drunk as to render the formation of any specific intent to take life impossible on

⁶⁴ *Aszman v. State*, 123 Ind. 347; 24 N. E. 123; 8 L. R. A. 33; *People v. Corey*, 148 N. Y. 476; 42 N. E. 1066; *State v. Bennett*, 128 Iowa, 713; 105 N. W. 324; *People v. Lane*, 100 Cal. 379; 34 Pac. 856; *People v. Hower* (Cal.),

91 Pac. 507; *Cook v. State*, 46 Fla. 20; 35 So. 665; *Brennan v. People*, 37 Colo. 256; 86 Pac. 79; *Burton v. State*, 46 Tex. Cr. App. 493; 81 S. W. 742; *Rodgers v. People*, 15 How. Pr. 557; *Rogers v. People*, 3 Park. Cr. Rep. 632.

his part, and before becoming drunk he entertained no malice and no intention to take life, he cannot be convicted.⁶⁵ The fact of drunkenness should not be singled out from the other proof and the jury told it mitigates the offense,⁶⁶ and a charge that would authorize an acquittal if the accused was so drunk as to have been incapable of forming an intent, although the offense was committed voluntarily and maliciously, should not be given.⁶⁷ The court cannot instruct upon the weight and sufficiency of the evidence,⁶⁸ but it should designate the effect of intoxication to a degree sufficient to render the defendant incapable of forming a premeditated design to kill.⁶⁹ If there be some evidence from which it may be inferred that the accused was drunk, it is not error for the court to charge the jury that drunkenness is no excuse for a crime.⁷⁰ If there be no evidence of intoxication, the accused is not entitled to an instruction that if he was too drunk to form an intent to commit the homicide he cannot be found guilty of murder in the first degree.⁷¹ The fact that the proof shows the accused was drunk on the morning of the homicide which occurred between two and four o'clock in the afternoon, and also as late as twelve or one o'clock, does not require the court to charge that "it is a matter of common knowledge that a man who is so drunk that he cannot scarcely walk cannot become perfectly sober in two hours, or in two hours and a half,

⁶⁵ *Tucker v. United States*, 151 U. S. 164; 14 Sup. Ct. 299; 38 L. Ed. 112; *State v. Smith*, 49 Conn. 376; *People v. Kemmler*, 119 N. Y. 580; 24 N. E. 9; *State v. Bowen*, *Houst. Cr. Rep. (Del.)* 91; *Bernhardt v. State*, 82 Wis. 23; 51 S. W. 1009.

⁶⁶ *Shannahan v. Commonwealth*, 8 Bush, 464; 8 Am. Rep. 465.

⁶⁷ *Tidwell v. State*, 70 Ala. 33.

⁶⁸ *Gwatkin v. Commonwealth*, 9 Leigh, 678; 33 Am. Dec. 264.

⁶⁹ *Garner v. State*, 28 Fla. 113; *People v. Williams*, 43 Cal. 344;

State v. Johnny, 29 Nev. 203; 87 Pac. 3.

⁷⁰ *Keady v. People*, 32 Colo. 57; 74 Pac. 892; *Bleich v. People*, 227 Ill. 80; 81 N. E. 36.

⁷¹ *Henderson v. Commonwealth (Ky.)*, 72 S. W. 781; 24 Ky. L. Rep. 1985; *Lanergan v. People*, 50 Barb. 266; 34 How. Pr. 390; 6 Park. Cr. Rep. 209; *State v. Bowen*, 1 *Houst. Cr. Cas. (Del.)* 91; *Commonwealth v. Gilbert*, 165 Mass. 45; 42 N. E. 336; *Commonwealth v. McNamee*, 112 Mass. 285; *State v. Sneed*, 88 Mo. 138.

without artificial aid of some description.”⁷² Where the evidence showed that the accused was so drunk he did not know what he was doing and had no intention of shooting, an instruction as to manslaughter committed in sudden passion was held misleading and not sustained by any evidence.⁷³

Sec. 1134. Drunken insane person.

Since an insane person cannot be held responsible for his act, he cannot be held responsible if his voluntary indulgence in intoxicating liquor immediately before the act caused him to commit the alleged crime, for, since he is not responsible for the commission of the crime itself, he cannot be held responsible for taking the liquor that put him in motion and caused him to commit the act upon which it is sought to hold him responsible.⁷⁴

Sec. 1135. Voluntary use of drugs.

It is beyond the scope of this chapter somewhat, but we here state shortly the rule with reference to the voluntary use of drugs. The voluntary use of a drug—as cocaine, chloroform or morphine—habitually indulged in, producing habitual intoxication, does not make the person a common drunkard and expose him to the penalties prescribed by law therefor, nor for disorderly conduct.⁷⁵ And if the accused was in a frenzy when he committed the offense, produced by an overdose of morphine, that will be a complete defense.⁷⁶ And this is true

⁷² *Gater v. State*, 141 Ala. 10; 37 So. 692.

⁷³ *Wyatt v. Commonwealth*, 2 Ky. L. Rep. 61.

An instruction requested must relate to the time of the offense; and if it do not, it may be refused. *State v. Wilson*, 124 La. 82; 49 So. 986.

⁷⁴ *Choice v. State*, 38 Ga. 424; *Roberts v. People*, 19 Mich. 401. As to instructions in a case where

the brain of the accused has been injured and the effect of drink upon it, see *People v. Cummins*, 47 Mich. 334; 11 N. W. 184.

⁷⁵ *Commonwealth v. Whitney*, 11 Cush. 477.

⁷⁶ *State v. Rippey*, 104 N. C. 752; 10 S. E. 259; *Edwards v. State*, 38 Tex. Cr. App. 386; 43 S. W. 112; 39 L. R. A. 262; *Rogers v. State*, 33 Ind. 543; *State v. Mahn*, 25 Kan. 182.

although the accused was also at the time he committed the offense under the influence of intoxicating liquors.⁷⁷

Sec. 1136. Texas statute—Use of drugs.

A statute in Texas provides that: "Neither intoxication nor temporary insanity of mind produced by the voluntary recent use of ardent spirits, shall constitute any excuse in this State for the commission of crime, nor shall intoxication mitigate either the degree or penalty of crime; but evidence of temporary insanity produced by such use of ardent spirits may be introduced in mitigation of the penalty attached to the offense for which he is being tried, and, in case of murder, for the purpose of determining the degree of murder of which the defendant may be found guilty."⁷⁸ Under this statute mere intoxication is not a defense, and the statute prevents it as such, regardless of the constituent elements of the crime; nor is temporary insanity produced by the use of ardent spirits a defense to a charge of any crime; but evidence of intoxication may be introduced in murder cases to determine the degree of the offense, and in all other criminal prosecutions to mitigate or lessen the penalty.⁷⁹ The construction placed upon this statute is: "*First*, that mere intoxication from the recent use of ardent spirits should not excuse nor mitigate the degree of penalty of crime. *Second*, that intoxication must go to the extent of producing temporary insanity before it can mitigate the penalty in any crime, or be considered in murder cases to determine the degree of murder."⁸⁰ "Yet the statute, wisely conceding

⁷⁷ *Edwards v. State*, 38 Tex. Crim. Rep. 386; 43 S. W. 112; 39 L. R. 262.

⁷⁸ Texas Penal Code, Art. 40a.

⁷⁹ *Evers v. State*, 31 Tex. Cr. Rep. 318; 20 S. W. 744; 18 L. R. A. 421; 37 Am. St. 811; *Lyle v. State*, 31 Tex. Cr. Rep. 103; 19 S. W. 903.

"The history of this statute is well known. Some ten years ago

one Porter, a traveling actor, was shot down without provocation in an eastern town in this State. The defendant was tried and acquitted on the ground of temporary insanity, caused by drunkenness. The Legislature, assembling shortly after, passed this act." *Evers v. State*, *supra*.

⁸⁰ *Evers v. State*, 31 Tex. Cr. Rep. 318; 20 S. W. 744; 18 L. R.

something to modern thought, permits the intoxicated person, when it is so excessive as to render a person unconscious that the act he is doing is wrong and will subject him to punishment, to plead his condition, and if it appears the design to kill was not previously formed or premeditated, or arising out of a previous difficulty, or from revenge, or executed with cool, deliberate and passional action indicating malice, but was the result of a sudden, rash and unpremeditated design, springing out of inconsiderate or irrational action or excitement, and originating in a mind so inflamed by intoxication as to be wholly incapable of reflection or self-control, the jury should find the defendant guilty of murder in the second degree but nothing less, and may also reduce the penalty they would otherwise attach to the crime for his condition. It is to be observed that it is only in murder cases he can plead temporary insanity as a reduction of the degree of crime. In no other character of crime is it admissible to charge its nature for want of constituent elements. It was so at common law. * * * Hence, the court erred in not instructing the jury that, if the defendant, while temporarily insane, formed the design to slay Richter, and immediately

A. 421; 37 Am. St. 811; *Clore v. State*, 26 Tex. App. 624; 10 S. W. 242; *Ex parte Evers*, 29 Tex. App. 539; 16 S. W. 343.

"The difficulty, however, seems not to be so much in the terms of the statute as in the reluctance of the courts to hold that one grossly intoxicated, or temporarily insane from intoxication, is any more liable for punishment for crime than one insane from any other cause." *Evers v. State*, 31 Tex. Cr. Rep. 318; 20 S. W. 744; 18 L. R. A. 421; 37 Am. St. 811.

"The object of the statute was to prevent parties from pleading their own wrong, after voluntarily placing themselves under the influence of drink, and becoming a

terror to the community, or a menace to other citizens, whose feelings are often outraged, and their lives endangered or destroyed by the insolence and recklessness of such intoxicated persons. The underlying principle of the statute is that laid down by common-law writers, to-wit: that a sane man, who voluntarily puts himself in such a condition as to have no control over his will or actions, must be held to intend the consequences springing therefrom." *Evers v. State*, 31 Tex. Cr. Rep. 318; 20 S. W. 744; 18 L. R. A. 421; citing *Puff de Jur. Nat. lib. 3, chap. 6, § 4*; 2 *Coke Litt.* 247a, and 1 *Hale P. C.* 32, and 4 *Bl. Com.* 20.

carried his design into execution, they could take into consideration his condition, both in determining the degree of murder, and in fixing the penalty to be assessed by them. The jury, without instructions, having found the offense to be murder in the second degree, may have found a lower penalty had they been so instructed.”⁸¹ “The next question is, What does the statute mean by the term ‘temporary insanity’? Whatever be the form or cause of insanity, it is settled by all authorities that the law will not consider it in a criminal case unless it deprives a person of the capacity and power to distinguish between right and wrong as to the particular act charged as an offense. If a person has knowledge and consciousness that the act he is doing is wrong and will deserve punishment, whatever be his mental or physical weakness, he is in the eye of the law of sound mind and memory, and consequently the subject of punishment. But if a person is incapable of having a knowledge and a consciousness that the act he is doing is wrong and criminal and will subject him to punishment, he is insane and not responsible for the crime committed by him.”⁸² Though it is a general rule that insanity is an excuse for crime, there is one exception to the rule, and that is where the crime is committed by a party in a fit of intoxication, though the party is bereft of his reason by drunkenness, and, therefore, is as insane as from any other cause. All authorities recognize drunkenness to be a species of insanity that may attend, when carried far enough, with loss of reason and self-control while under the direct effects of the intoxicant; but this effect is voluntary and brought about by the acts of the party, and thereby differs from ordinary insanity, which is the act of Providence, and the sufferer is not responsible.”⁸³ But this statute has no appli-

⁸¹ *Evers v. State*, 31 Tex. Cr. Rep. 318; 20 S. W. 744; 18 L. R. A. 421; 37 Am. St. 811.

⁸² Citing 5 Lawson, *Defenses to Crime, Insanity*, 231; Whart. & S. Med. Jur. 45.

⁸³ *Evers v. State*, 31 Tex. Crim. Rep. 318; 20 S. W. 744; 18 L. R. A. 421; 37 Am. St. 811.

The cases construing and applying this statute since the case just quoted from and which announces an interpretation of the statute as followed in Texas, are: *De'Alberts v. State*, 34 Tex. Crim. Rep. 508; 31 S. W. 391; *Delgado v. State*, 34 Tex. Crim. Rep. 157; 29 S. W. 1076; *Gonzales v. State*,

cation where the insanity is produced by the recent use of cocaine, morphine *and* whisky. "We understand our statute to regulate insanity produced by the recent voluntary use of intoxicating liquors," said the Texas court, "but it does not undertake to prescribe the rule with reference to insanity produced by cocaine or morphine. And, in our opinion, the court committed an error in instructing the jury that, if they believed that the appellant was insane from the voluntary use of cocaine and morphine, it would constitute no defense to the crime alleged, and would go only to the mitigation of the penalty. In our opinion, if appellant was rendered insane from the voluntary recent use of cocaine and morphine, and on account of that did not understand the nature and quality of the act he was doing, and was incapable of forming the intent, then he would not be guilty of an assault with intent to murder. And we go further and hold that, if his mind was rendered insane by the combined recent use of cocaine and morphine and intoxicating liquors, and that on such account he was not capable of forming the intent necessary to constitute an assault with intent to murder, he would not be guilty of said offense."⁸⁴

31 Tex. Crim. Rep. 508; 21 S. W. 253; Kelley v. State, 31 Tex. Crim. Rep. 216; 20 S. W. 357; Hall v. State, 31 Tex. Crim. Rep. 565; 21 S. W. 368; Phillips v. State, 50 Tex. Cr. Rep. 481; 98 S. W. 868; Hierholzer v. State, 47 Tex. Cr. Rep. 199; 83 S. W. 836; Little v. State, 42 Tex. Cr. Rep. 551; 61 S. W. 483; Miller v. State, 52 Tex. Cr. Rep. 72; 105 S. W. 502; Holloway v. State, 45 Tex. Cr. Rep. 303; 77 S. W. 14; McLeod v. State, 31 Tex. Cr. Rep. 331; 20 S. W. 749

The following are cases decided prior to Evers v. State: Lyle v. State, 31 Tex. Crim. Rep. 103; 19 S. W. 903, in part overruled by Evers v. State; Williams v. State, 25 Tex. App. 76; 7 S. W. 661;

Clore v. State, 26 Tex. App. 624; 10 S. W. 242; Ward v. State, 19 Tex. App. 664; *Ex parte* Evers, 29 Tex. App. 539; Sherar v. State, 30 Tex. App. 349; 17 S. W. 621; Ward v. State, 19 Tex. App. 664; Rather v. State, 25 Tex. App. 623; 9 S. W. 69; Reagan v. State, 28 Tex. App. 227; 12 S. W. 601; Fisher v. State, 20 Tex. App. 502; Houston v. State, 26 Tex. App. 657; 14 S. W. 352; Burkhard v. State, 18 Tex. App. 599; Scott v. State, 12 Tex. App. 31; Hunter v. State, 18 Tex. App. 444; 51 Am. Rep. 319; Gaiten v. State, 11 Tex. App. 544.

⁸⁴ Edwards v. State, 38 Tex. Crim. Rep. 386; 43 S. W. 112; 39 L. R. A. 262.

Sec. 1137. Miscellaneous.

Intoxication is no defense for carrying concealed weapons;⁸⁵ nor for gambling;⁸⁶ nor for disturbing the peace by cursing and swearing at the time and just before the accused's arrest; and a conviction for being drunk at the time is no bar to the prosecution, the offenses being distinct.⁸⁷ The rule concerning drunkenness as a defense does not apply to a charge of committing a misdemeanor.⁸⁸

⁸⁵ Fielding v. State, 135 Ala. 56; 33 So. 677.

⁸⁷ Mitchell v. State, 48 Tex. Cr. App. 533; 89 S. W. 645.

⁸⁶ White v. State (Tex. Cr. Rep.), 30 S. W. 556. It may mitigate the offense, however.

⁸⁸ Carney v. United States, 7 Ind. T. 247; 104 S. W. 606.

CHAPTER XXXVI.

CONTRACTS OF A DRUNKEN MAN.

SECTION.	SECTION.
1138. Mere drunkenness as a ground for a rescission of a contract.	1149. Intoxication of maker of note.
1139. Voluntary intoxication.	1150. Marriage.
1140. Intoxication produced by the other party.	1151. Family settlements.
1141. Taking advantage of intoxicated party.	1152. Replevin bail or bail bond.
1142. Fraud of other party.	1153. Contract void or voidable.
1143. Habitual drunkards.	1154. Ratification.
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1145. Knowledge of drunken condition of party.	1156. Time of drunkenness.
1146. Inadequacy of consideration—Unfair contract.	1157. Burden to show drunkenness.
1147. What kind of contracts may be avoided.	1158. Rescinding contract and restoring consideration.
1148. Implied contracts.	1159. Who may show intoxication of party.
	1160. Obtaining relief.

Sec. 1138. Mere drunkenness as a ground for a rescission of a contract.

Drunkenness, aside from the question of fraud, may be a good cause for setting aside a contract entered into by the drunkard. But where no imposition has been practiced by the opposite party, mere drunkenness will not avoid the contract unless it be such for the time being as to deprive the contracting party of his reason. If the contracting party relies upon the naked fact of drunkenness to avoid the contract, then to succeed he must show that his drunkenness was so great at the time he entered into the contract as to have produced absolute privation of understanding, similar to cases of idiocy or insanity.⁸⁹ Mere dullness of intellect,

⁸⁹ Harbison v. Lemon, 3 Blackf. 51; 23 Am. Dec. 376; Jenners v. Howard, 6 Blackf. 240; Gore v. Gibson, 13 M. & W. 623; 14 L. J. Exch. 152; Reinskop v. Rogge, 37

Ind. 207; Henry v. Ritenour, 31 Ind. 136; Cole v. Robbins, Bull. N. P. 172a; Cummings v. Henry, 10 Ind. 109; Pett v. Smith, 3 Campb. 33; Harlan v. Brown, 4

from whatever cause, does not amount to incapacity to contract."⁹⁰ The fact that the person entering into the contract was "too much intoxicated to realize fully what he was doing" is not sufficient to avoid the contract.⁹¹ Thus, where it was shown that the complainant had had a severe attack of illness before entering into the contract, that after such illness he was less active as an enterprising business man than before, that he was of intemperate habits and subject to occasional fits arising from his intoxication, and that his mind was less vigorous when his habits were correct, it was held not sufficient to avoid his contract.⁹² To avoid the contract it is not necessary that the obligee should have induced or procured its execution.⁹³ In one case it is held that a contract executed

Ind. App. 319; 30 N. E. 928; *Fenton v. Holloway*, 1 Stark. 126; *Joest v. Williams*, 42 Ind. 565; 13 Am. Rep. 377; *Hamilton v. Grainger*, 5 H. & N. 4; *Musselman v. Cravens*, 47 Ind. 1; *Dorr v. Munsel*, 13 Johns. 430; *Nance v. Kemper*, 35 Ind. App. 605; 73 N. E. 937; *Owing's Case*, 1 Bland, 371; *Foot v. Tewksbury*, 2 Vt. 97; *Seymour v. DeLancey*, 3 Cow. 445; *Duncan v. McCullough*, 4 S. & R. 484; *Caulkins v. Fry*, 35 Conn. 170; *Prentice v. Achorn*, 2 Paige, 30; *Reinicker v. Smith*, 2 Harr. & J. 421; *Cameron-Barkley Co. v. Thornton, etc., Co.*, 138 N. C. 365; 50 S. E. 695.

⁹⁰ *Henry v. Ritenour*, 31 Ind. 136; *Cameron-Barkley Co. v. Thornton, etc., Co.*, 138 N. C. 365; 50 S. E. 695; *Doughty v. Doughty*, 3 Halst. (N. J.) 643; *Cavender v. Waddingham*, 5 Mo. App. 457.

⁹¹ *Nance v. Kemper*, 35 Ind. App. 605; 73 N. E. 937.

"If he realized what he was doing, although intoxicated, he was bound, in the absence of fraud. His failure fully to realize what he was doing could result from intoxi-

cation that produced no more than mere dullness of intellect."

⁹² *Doughty v. Doughty*, 3 Halst. (N. J.) 643.

⁹³ *Hutchinson v. Tindall*, 2 Green (N. J. Eq.), 357; *Conant v. Jackson*, 16 Vt. 335; *Bowen v. Clark*, Fed. Cas. No. 1721; 1 Biss. 128; *Drummond v. Hopper*, 4 Harr. 327; *Belcher v. Belcher*, 10 Yerg. 121; *Bush v. Breing*, 113 Pa. St. 310; 6 Atl. 86; 57 Am. Rep. 469; *White v. Cox*, 3 Hayw. (Tenn.) 79; *Lacy v. Garrard*, 2 Ham. (Ohio) 7; *Hyman v. Moore*, 3 Jones L. (N. C.) 416; *Hutchinson v. Brown*, 1 Clarke Ch. 408; *French v. French*, 8 Ohio, 214; 31 Am. Dec. 441; *Williams v. Mabrecht*, 1 Bailey, 343; *Menkins v. Lightner*, 18 Ill. 282; *Johnson v. Phifer*, 6 Neb. 401; *Commonwealth v. McAnany*, 3 Brewster, 292; *Wilcox v. Jackson*, 51 Iowa, 208; 1 N. W. 513; *Johns v. Fritchey*, 39 Md. 258; *Longhead v. B. F. Coombs & Bro. Commission Co.*, 64 Mo. App. 559; 2 Mo. App. Rep'r. 1017; *Mitchell v. Kingman*, 5 Pick. 431; *Curtis v. Hall*, 4 N. J. Law (1 Southard)

when the obligor is in such a state of intoxication as to be deprived of a "consenting understanding," may be set aside.⁹⁴ And where an intoxicated person was able to sign a note, and the next morning recalled he had done so, as well as for what he gave the note, it was held that a defense of complete intoxication had not been made out.⁹⁵ But where

412 [1832]; *Burroughs v. Richman*, 13 N. J. Law (1 J. S. Green) 233; 23 Am. Dec. 717; *Wade v. Colvert*, 2 Mill Const. 26; 12 Am. Dec. 652 [1833]; *Lee v. Ware*, 1 Hill, 313; *Seaver v. Phelps*, 11 Pick. 304; *Rice v. Peet*, 16 Johns. 503; *Birdsong v. Birdsong*, 39 Tenn. (2 Head) 289; *Barrett v. Buxton*, 2 Aiken, 167; 16 Am. Dec. 691; *Freeman v. Dwiggins*, 55 N. C. 162; *Reynolds v. Waller*, 1 Wash. 164; *Pickett v. Sutter*, 5 Cal. 412; *Bates v. Ball*, 72 Ill. 108; *Loehheim v. Gill*, 17 Ind. 139; *Mansfield v. Watson*, 2 Clarke (Ia.), 111; *Newell v. Fisher*, 11 S. & M. (Miss.) 431; 49 Am. Dec. 66; *Wright v. Fisher*, 65 Mich. 384; 32 N. W. 605; *Carpenter v. Rogers*, 61 Mich. 384; 28 N. W. 156; *Clifton v. Davis*, 1 Pars. Eq. Cas. 31; *Cavender v. Waddingham*, 5 Mo. App. 457; *Cavender v. Waddingham*, 2 Mo. App. 551; *Crane v. Conklin*, 1 Saxt. Eq. (N. J.) 346; 22 Am. Dec. 519; *Hutchinson v. Tindall*, 2 Gr. (N. J.) 357; *Shackelton v. Seebree*, 86 Ill. 616; *Dulany v. Green*, 4 Harr. 285; *Ralston v. Turpin*, 25 Fed. 7; *Donelson v. Posey*, 13 Ala. 752; *Phelan v. Gardner*, 43 Cal. 306; *Foot v. Tewksbury*, 2 Vt. 97; *McClure v. Mansell*, 4 Brewst. 119; *McGowan v. Brooks*, 16 So. 436; *Morris v. Nixon*, 7 Humph. 579; *Belcher v. Belcher*, 10 Yerg. 121; *Wade v.*

Colvert, 2 Mill Const. (S. C.) 27; 12 Am. Dec. 652; *Appeal of Ritter*, 59 Pa. St. 9; *Wood v. Pindall*, *Wright*, 507; *Warnock v. Campbell*, 25 N. J. Eq. 485; *Adams v. Ryerson*, 4 Halst. Eq. 814; 91 Stock (N. J.), 816; *Wright v. Waller*, 127 Ala. 557; 29 So. 57; *Power v. King* (N. D.), 120 N. W. 543; *Bing v. Bank* (Ga.), 63 S. E. 652; *Berkley v. Cannon*, *Rich L.* (S. C.) 136; *Miller v. Finley*, 2 Mich. (N. P.) 231; *Hunter v. Tolberd*, 47 W. Va. 258; 34 S. E. 737; *Burnham v. Burnham*, 119 Wis. 509; 97 N. W. 176.

⁹⁴ *French v. French*, 8 Ohio, 214; 31 Am. Dec. 441.

⁹⁵ *Caulkins v. Fry*, 35 Conn. 170; *Miller v. Finley*, 26 Mich. 249; 12 Am. Rep. 306; *Bates v. Ball*, 72 Ill. 108; *Lightfoot v. Heron*, 3 Younge & C. Exch. 586; *Taylor v. Patrick*, 1 Bibb, 168; *Guckavan v. Kenny*, 4 Kulp, 411; *Foot v. Tewksbury*, 2 Vt. 97; *Lang v. Ingalls Zinc Co.* (Tenn. Ch. App.), 49 S. W. 288; *Reynolds v. Dechaums*, 24 Tex. 174; 76 Am. Dec. 101; *Martin v. Pycroft*, 2 De G. M. & G. 785; 22 L. J. Ch. (N. S.) 94; 16 Jur. 1125; *Morris v. Nixon*, 7 Humph. 579; *Rutherford v. Ruff*, 4 Desaus. Eq. (S. C.) 365; *Loftus v. Maloney*, 89 Vt. 576; 16 S. E. 749; *Hutchinson v. Brown*, *Clarke Ch.* 408; *Combe v. Carthew* (N. J. L.), 43 Atl. 1057.

a person was reduced to such extreme debility by intoxication that he was unable to rise or sit up even in bed unless supported, or to hold a pen and make a mark unless the pen and hand were held for him, he was held unable to execute a conveyance of his property, which is merely another form of contract.⁹⁶ The theory in such an instance, and in the case of extreme drunkenness, is that the party is wanting in capacity to give the necessary assent to render the contract valid;⁹⁷ so much so, it has been said, as to drown memory, reason and judgment,⁹⁸ or he is *non compos mentis* for the time being.⁹⁹ The fact that the grantor in a deed had previously, when sober, expressed an intention to execute it, and that he carried out that intention afterwards when drunk, is practically sufficient

⁹⁶ Wilson v. Brigger, 7 Watts & S. 111; McCraw v. Davis, 2 Ired. Eq. 618.

⁹⁷ Wade v. Colvert, 2 Mill Const. (S. C.) 27; 12 Am. Dec. 652; Wright v. Waller, 127 Ala. 557; 29 So. 57; Power v. King (N. D.), 120 N. W. 543; Bing v. Bank (Ga.), 63 S. E. 652.

⁹⁸ Dahlann v. Gaugeiste, 238 Ill. 222; 88 N. E. 287; Benton v. Skytler (Neb.), 122 N. W. 61; Arnold v. Hickman, Munf. (Va.) 15; Miller v. Finley, 2 Mich. N. P. 231; Waldron v. Angleman, 71 N. J. L. 166; 58 Atl. 568; Fowler v. Meadow Brook Water Co., 208 Pa. 473; 57 Atl. 959; Burroughs v. Richman, 13 N. J. Law, 233; 23 Am. Dec. 717; Warnock v. Campbell, 25 N. J. Eq. 485; O'Conner v. Rempt, 29 N. J. Eq. 156; Eaton v. Eaton, 37 N. J. Law, 108; 18 Am. Rep. 716; Lynde v. Lynde, 64 N. J. Eq. 736-749; 52 A. 694; 58 L. R. A. 471; Schomp v. Schenck, 40 N. J. Law, 195-200; 29 Am. Rep. 219; Weller v. Jersey City, H & P. St. Ry. Co.,

57 A. 730; Kuhlman v. Weiber, 129 Iowa, 188; 105 N. W. 445; Spoonheim v. Spoonheim, 14 N. D. 380; 104 N. W. 845; Irvin v. Maloney, 6 Can. L. Jr. 285; Swan v. Talbott, 152 Cal. 142; 94 Pac. 238.

⁹⁹ Martin v. Harsh, 231 Ill. 384; 83 N. E. 164; 13 L. R. A. (N. S.) 1000; J. I. Case, etc., Co. v. Meyers, 78 Neb. 685; 111 N. W. 602; 9 L. R. A. (N. S.) 970.

In Burroughs v. Richman, 13 N. J. Eq. 233; 23 Am. Dec. 717, the court said: "There are respectable authorities on both sides of this question. Lord Coke observes that, although he who is drunk is for the time being *non compos mentis*, yet his drunkenness does not extenuate his act or offense, nor turn to his avail; but it is a great offense in itself, and therefore aggravates his offense, and doth not derogate from the act which he did at that time, and that as well in cases touching his life, his lands, his goods or anything that concerns him. Beverley's Case, 4 Coke, 124."

to sustain it, although he might have been much intoxicated.¹

¹ Freeman v. Staats, 4 Halst. Eq. (N.J.) 814; 1 Stock Eq. (N.J.) 816.

"To render the transaction voidable, he should have been so drunk as to have drowned reason, memory and judgment, and impaired his mental faculties to an extent that would have rendered him *non compos mentis* for the time being, especially as there is no pretense that any person connected with the transaction aided or procured his drunkenness. The rule has never, so far as our knowledge extends, been announced that mere drunkenness is sufficient to release a party from his contracts." Bates v. Ball, 72 Ill. 108.

"Intoxication so deep as to take away the agreeing mind—in other words, to disqualify the mind to comprehend the subject of the contract and its nature and probable consequences—impairs such contract, if made while it lasts, the same as insanity. But mere drunkenness, or being a drunkard, or simply being drunk at the time, where intoxication does not extend to the degree thus stated, will not impair the contract. To have this effect, it must render the party *non compos mentis* for the occasion." Bish. Contr. §§ 980, 981.

"The contract of a * * * drunken person is voidable, at his option, if it can be shown that at the time of making the contract he was absolutely incapable of understanding what he was doing." Anson Contr. p. 150.

"An express contract, entered into when the obligor is in a state of intoxication, so as to deprive

him of the exercise of his understanding, is voidable." 11 Am. & Eng. Enc. Laws, p. 773.

Drunkenness must "be such as to incapacitate the party from the proper exercise of his judgment, and prevent him from understanding his contract." Story, Contr. p. 15.

"A drunkard, when in a state of complete intoxication, so as not to know what he is doing, has no capacity to contract." 1 Benjamin, Sales, § 30.

"It is evident that drunkenness, when it goes so far as absolutely to destroy the reason, renders a person in this state, so long as it continues, incapable of contracting, since it renders him incapable of consent." 1 Pothier, Obligation on Contracts, 49.

"Where a party, when he enters into a contract, is in such a state of drunkenness as not to know what he is doing * * * his contract is wholly void; i. e., if he elects to avoid it." 1 Chitty, Contr. 192.

"Drunkenness is a species of insanity, but the law is not quite clear respecting this disability. Perhaps it stands thus: One cannot defend by proving his drunkenness, unless he can show that the drunkenness was known to the payee [of a note or bill], and taken advantage of by him, or that it was complete, and suspended all use of the mind at the time." 1 Parsons, Notes and Bills, 151.

The following instruction is erroneous in the part italicized: "If the defendant was so much under

Sec. 1139. Voluntary intoxication.

The fact that the intoxication was voluntary on the part of the person rescinding the contract and seeking relief does

the influence of strong drink or intoxicating liquor that his reason was dethroned to an extent that he could not give that attention to the signing of the note *that a reasonably prudent man would be able to give*, then the note would be void." "If the jury find from the evidence that the defendant signed the note under such intoxication *that he could not give proper attention to it*, then the note is not evidence in the case, but void."

The court said of them: "One may well be unable, from intoxication, to give 'proper attention' to a transaction, and yet know what the transaction involves, and be capable of understanding the terms and effect of a contract issuing out of it, so as to be as fully bound by it as if he was under no degree of intoxication." "Many perfectly sane and sober men could not bind themselves by contract at all, if the rule laid down there [in the first instruction] is a sound one. The law does not gauge contractual competency by the standard of mental capacity possessed by reasonably prudent men. A man is not incapacitated because of intellectual limitations arising from intoxication or what not, which prevent him from giving to a proposed contract all the consideration that a reasonably prudent man would be able to give it. Indeed, that test has no relation to mental capacity. Competency to contract may well exist in as high a degree in a reckless, careless man as in one of the high-

est prudence and care [perhaps more so], and the inability of the former to give a certain degree of attention to a business matter results, not from mental incapacity to know and understand the matter in hand, but from indifference as to it, or his habit or disposition to drunkenness. And one may sufficiently understand a contract, and the nature and effect of his entering into it, to be fully bound by it, though he be capable of only a very much less consideration of it than would be bestowed by a man of ordinary prudence." Wright v. Waller, 127 Ala. 557; 29 So. 57; 54 L. R. A. 440.

Necessarily the degree of intoxication stated in the opinion of the courts differ, although, perhaps they are a unit upon the point in meaning, but different expressions being used to indicate it. Thus: Intoxicated to such a degree as to render the contracting party incapable of assenting. Longhead v. B. F. Combs, etc. Co., 64 Mo. App. 559; as to be deprived of the exercise of his understanding. Barrett v. Buxton, 2 Aik. (Vt.) 167; 16 Am. Dec. 691, produces a deprivation of reason and understanding. Clifton v. Davis, 1 Pars. Sel. Eq. Cas. 31, could not comprehend what were the terms and conditions of the written contract. Harmon v. Johnston, 1 Mac. Arthur 139; as to be without reason and understanding, so destitute of reason as not to know the consequences of his contract. Bush v. Breining, 113 Pa. 310; 6 Atl.

not prevent him avoiding the contract.² And this right to rescind extends to the drunken man's personal representa-

86; 57 Am. Rep. 469, as to be unable to perceive or assent to the conditions of the contract. *Wade v. Colvert*, 2 Mill Const. (S. C.), 27; 12 Am. Dec. 652; carried so far that his reasoning power is destroyed. *Birdsong v. Birdsong*, 2 Head 289; deprived of the use of his reason, so that he is not able to give his serious, deliberate consent to the act of making the contract. *Donelson v. Posey*, 13 Ala. 752; absolute drunkenness, and consequently deprived of the exercise of reasoning. *Pitt v. Smith*, 3 Camp. 34, *note*; *Hale v. Story*, 7 Colo. App. App. 165; 42 Pac. 598; *Drummond v. Hopper*, 4 Harr. (Del.) 327, utterly deprived of the use of reason and understanding. *Johnson v. Phifer*, 6 Neb. 401, wholly devoid of judgment and discretion. *Cavender v. Waddingham*, 2 Mo. App. 551; *French v. French*, 8 Ohio 214, incapable of comprehending what he was doing. *Bursinger v. Bank*, 67 Wis. 75; 30 N. W. 290; 58 Am. Rep. 848, did not know what he did. *Cole v. Robbins*, Bull. N. P. 172a, as to render him incompetent to contract. *Reynolds v. Waller*, 1 Wash. (Va.) 164, as not to know the nature of the act he is doing. *Hawkins v. Bone*, 4 F. & F. 311, in a constant state of intoxication (*Staats v. Freeman*, 6 N. J. Eq. 490) or complete intoxication. *Phelan v. Gardner*, 43 Cal. 306, so weak, unsound and diseased as to be incapable of understanding the nature and quality of the act to be performed or its consequences, he is incompetent to

assent to the terms and conditions of the contract. *Johnson v. Harmon*, 94 U. S. 371; 24 L. ed. 271, to such a degree as to deprive him of his power to distinctly perceive and assent to a contract. *Lee v. Ware*, 1 Hill L. (S. C.) 313, as to deprive him of his reason and understanding. *Commonwealth v. McAnany*, 3 Brewster (Pa.) 292; *Harbison v. Lemon*, 3 Blackf. 51; 23 Am. Dec. 376; so excessive as to render the person incapable of consenting, or to incapacitate him from exercising his judgment. *Reynolds v. Deschaunus*, 24 Tex. 174; 76 Am. Dec. 101, understanding clouded or reason dethroned by actual intoxication. *Wright v. Fisher*, 65 Mich. 275; 32 N. W. 605, as not to know what he is doing. *Johns v. Fritchey*, 39 Md. 258; *Houston, etc. R. Co. v. Tierney*, 72 Tex. 312; 12 S. W. 586, so completely intoxicated as to be incapable of knowing what he is doing or of understanding the consequences of his acts. *Taylor v. Purcell*, 60 Ark. 606; 31 S. W. 567, deprived of his right reason or incapable of managing his affairs and business. *Doughty v. Doughty*, 7 N. J. Eq. 643, as to be incapable of knowing the effect of what he was doing. *Shackleton v. Seebree*, 86 Ill. 616; *Foot v. Tewksbury*, 2 Vt. 97, to such an extent as to seriously impair the reasoning faculties at the time. *Pickett v. Sutter*, 5 Cal. 412, incapable of understanding the nature of the transaction. *Watson v. Doyle*, 130 Ill. 415; 22 N. E. 613; *Rodman*

tives,³ but not to third persons.⁴ The contract may be rescinded, although the drunkenness was not produced through the agency of the opposite party.⁵

Sec. 1140. Intoxication produced by the other party.

"Although the intoxication was only partial [yet] if the other party produced it, and then took advantage of it and made it the opportunity for acts of imposition, unfairness, and *a fortiori* fraud, equity will grant full affirmative relief."⁶ Of course, the degree of intoxication in cases of this kind need not be so great as where total drunkenness is relied upon, and possibly not so great as where the intoxica-

v. Zilley, 1 N. J. Eq. 320, was at the time in fact *non compos mentis*. Davidge v. Crandall, 23 Ill. App. 360; incapable of executing the contract by reason of intoxication. Conley v. Nailor, 118 U. S. 127; 6 Sup. Ct. 1001; 30 L. ed. 112; drunkenness so excessive as to utterly deprive him of his reason and understanding. Belcher v. Belcher, 10 Yerg. 121; excessive and absolute, so as to suspend the reason and create impotence of mind at the time. Cavender v. Waddingham, 5 Mo. App. 457.

² Bush v. Breining, 113 Pa. St. 310; 6 Atl. 86; 56 Am. Rep. 469; White v. Cox, 3 Hayw. (Tenn.) 79; Mankins v. Leightner, 18 Ill. 282; Hutchinson v. Tindall, 2 Gr. Eq. (N. J.) 357.

³ Wigglesworth v. Steers, 1 Hen. & M. 70; 3 Am. Dec. 602.

⁴ Eaton v. Perry, 29 Mo. 96; Lacy v. Mann, 59 Kan. 777; 53 Pac. 754.

⁵ Berkley v. Cannon, Rich L. (S. C.), 136.

⁶ Pomeroy Eq., sec. 949, citing Cory v. Cory, 1 Ves. Sr. 19;

Cooke v. Clayworth, 18 Vis. 12; Say v. Berwick, 1 Ves. & B. 195; Butler v. Mulvihill, 1 Bligh 137; Leightfoot v. Heron, 3 Youge & Coll 586; Shaw v. Thackray, 1 Sm. & Giff. 537; Nagle v. Baylor, 3 Dr. & War. 60; Addis v. Campbell, 4 Beav. 401; Martin v. Pycroft, 2 DeG. M. & G. 785; O'Connor v. Rempt, 29 N. J. Eq. 156; Crane v. Conklin, 1 Saxt. Eq. (N. J.) 346; Prentice v. Achorn, 2 Paige 30; Lavette v. Sage, 29 Conn. 577; Calloway v. Wither-spoon, 5 Ired. Eq. 128; Freeman v. Dwiggin, 2 Jones Eq. 162; Griffith v. Fred. Co. Bk., 6 Gill & J. 424; Phillips v. Moore, 11 Mo. 600; Schrem v. O'Connor, 98 Ill. 539, and criticising Pittenger v. Pittinger, 2 Green Ch. 156. See also Wood v. Pindall, Wright 507; Dahlman v. Gautente, 238 Ill. 224; 87 N. E. 287; Hutchinson v. Tindall, 3 Gr. Eq. (N. J.) 357; Willoughby v. Molton, 47 N. H. 205; Birdsong v. Birdsong, 2 Head 280; Lacy v. Garrard, 2 Ham. (Ohio) 7; Keough v. Foreman, 33 La. Ann. 1434.

tion had not been procured by the other party, though that cannot be positively asserted, the fact of actively getting the complaining party drunk being rather evidence of a fixed and determined purpose on the part of the other party to take advantage of his intoxicated condition and indicating a greater desire to defraud.⁷ "If the defendant," said the Supreme Court of Wisconsin, "with fraudulent intent, had caused or produced intoxication of the plaintiff, and so had obtained the conveyances on the same terms, no one would doubt that equity would relieve against them."⁸ Such a contract is void at the option of the person executing it, in an action to enforce it.⁹ Where it was shown that the grantor in a deed was an habitual drunkard, in an Ohio *nisi prius* case the court said: "You may prove fraud in obtaining the deed, as that would make it void. The general habit of intoxication, unless it is expected to connect it with the plaintiff's lessor will not avail. We suppose the plaintiff will admit the defendant generally drunk if desired, as that will save time, and then, if there be evidence that he was made so by the lessor of the plaintiff, and executed the deed under such influence, it may avail. Unless it is proposed to do that it will be useless to proceed, as we must instruct the jury that under the circumstances the drunkenness will be of no avail."¹⁰ Where a publican or saloon keeper brought suit against a man of seventy years to recover the price of drinks he had furnished him and others on his orders, and it appeared that on one day he had ordered eighty-six pints of ale besides spirits, and on another day one hundred and thirty-four pints of ale, the court said that if a man when rational gives beer to others there is no doubt he must pay for it, but

⁷ "Here is an unreasonable contract obtained from one in drink. Here is a contract obtained from one drawn into drink by the person who deals with him." White v. Cox, 3 Hayw. (Tenn.) 79.

⁸ Knekamp v. Hidding, 31 Wis. 503; Whitesides v. Greenlee, 2 Dev. Eq. (N. C.) 152; Lyon v. Phillips, 106 Pa. 57.

⁹ Willeox v. Jackson, 51 Iowa 208; 1 N. W. 513; Lacy v. Garard, 2 Ohio 7; Curtis v. Hall, 4 N. J. L. 361; Knott v. Tidyman, 86 Wis. 164; 56 N. W. 632.

¹⁰ Woods v. Pindall, Wright (Ohio) 507; Maxwell v. Pittinger, 3 N. J. Eq. 156.

if he does so when drunk he will not be liable, for a publican in such an instance would be taking advantage of an offense which he himself had been instrumental in producing.¹¹ And so where a person possessed a power of attorney to sell and convey a farm, and a would-be purchaser got him drunk and then purchased the farm from him for thirty-three dollars and the transfer, without recourse, of a worthless contract and mortgage, it was held that the deed could be avoided, having been obtained by fraud.¹²

Sec. 1141. Taking advantage of intoxicated party.

Where a person contracting with an intoxicated person takes advantage of his drunken condition—becomes active in availing himself of his condition, as distinguished from a mere passiveness—a very different question is presented from an instance of mere drunkenness when the contract is executed. The one is an active fraud, the other can scarcely be said to be a passive fraud. In all these instances the fact that the drunken person was overreached by the other is a weighty fact to be considered. Far less intoxication than a mere drowning of the senses will authorize the court to set aside or hold the contract not binding. Thus, in one case the court said that “the evidence presented a fair question to the jury, whether plaintiff was not overreached by the alleged settlement whilst in such mental condition from the use of

¹¹ Brandon v. Old, 3 C. & P. 440.

¹² Dunn v. Amos, 14 Wis. 107.

Where the payee in a note had gotten the maker drunk and then sold him some horses and took his note in payment, it was held that the maker had a good defense for that reason. Curtis v. Hall, 4 N. J. L. 361.

In an English case the action was to recover the price of liquors sold the defendant, who pleaded never indebted, and also payment; that the liquors were

excisable, to be sold on plaintiff's premises without a license, and that they were wine to be supplied defendant to be consumed in a brothel kept by plaintiff, the court refused to allow a plea that the defendant was so intoxicated as plaintiff well knew, as to be deprived of understanding, and that the liquors were supplied to increase his intoxication, and that he derived no benefit from them. Hamilton v. Graninger, 5 Hurlst. & N. 40; 65 Jur. 1108.

ardent spirits as made him an easy victim.”¹³ And in another case it was said that, “Contracts made by persons under the influence of liquor, without being completely intoxicated, are governed by the same principles which apply in other cases, where one party is in a position to expose him to the exercise of an improper influence by the other,” and “if a party has been led into a hard and disadvantageous bargain whilst excited by liquor, equity avoids it. And the same rule applies to persons whose minds are enfeebled by habitual intoxication, although not actually intoxicated.”^{13*} In all such instances inadequacy of consideration is a potent factor,¹⁴ and so is the age of the drunken man, whether just becoming of age¹⁵ or old and naturally enfeebled,¹⁶ as well as enfeeblement of his mind by long and continued indulgence in the use of liquor.¹⁷ In an early case in Kentucky, which states the law for this day accurately, the court said: “The law seems well settled that drunkenness *per se* is no substantive cause for men to plead in avoidance of their own acts, for this were to encourage drunkenness.”¹⁸ But if any unfair

¹³ Murray v. Carlin, 67 Ill. 286.

^{13*} Birdsong v. Birdsong, 2 Head 289; Lavette v. Sage, 29 Conn. 577; Cooke v. Clayworth, 18 Ves. Jr. 12; Crane v. Conklin, 1 N. J. Eq. 346; 22 Am. Dec. 519; Maxwell v. Pittinger, 3 N. Y. Eq. 156.

¹⁴ Nielson v. Lafflin, 50 N. Y. St. Rep. 277; 21 N. Y. Supp. 731; Say v. Barwick, 1 Ves. & B. 195; Adams v. Ryerson, 6 N. J. Eq. 328; Harvey v. Pecks, 1 Munf. 518; Warnock v. Campbell, 25 N. J. Eq. 485.

¹⁵ Say v. Barwick, 1 Ves. & B. 195.

¹⁶ Harvey v. Pecks, 1 Munf. (Va.) 518; Adams v. Ryerson, 6 N. J. Eq. 328.

¹⁷ Adams v. Ryerson, 6 N. J. Eq. 328; Lavette v. Sage, 22 Conn. 577.

¹⁸ “At all events, drunkenness, short of a deprivation of reason or insanity, will not do, for then everyone will counterfeit intoxication to get clear of his contract, and which will lead to the investigation in every case, first, whether the party was really intoxicated, and what was the degree of intoxication, and whether it should prevail to exonerate the person from his engagement, producing the greatest uncertainty, difficulty and variety of decision upon cases similarly circumstanced, and subjecting everything to the control and fluctuating opinion of juries.” Woodson v. Gordon, Peck (Tenn.) 196; 14 Am. Dec. 743.

advantage was taken of such a situation, as, if the party seeking to avoid his act was drawn into drinking by the person with whom he contracted, or by his contrivance, and an unreasonable or unconscientious bargain, deed or instrument was procured from the person in that situation, equity would relieve."¹⁹ But it must be borne in mind that if the intoxication is not complete or absolute, although it materially interfered with and affected the person's understanding, reason and judgment, and the drunkenness has neither been procured nor the drunkard taken advantage of unfairly by the other party, a court of equity will not interfere in aid of either of the parties to a contract which is made while one of them is intoxicated.²⁰

Sec. 1142. Fraud of other party.

A contract procured by fraud from a drunken man will be set aside, even though he was not so intoxicated as not to know what he was doing, if he be so drunk as to be an easy prey to the other party.²¹ And if he has been induced, when intoxicated so as not to be able to perceive their falsity, by the false statements of the other party, to enter into a contract, he may avoid it.²² So it is a fraud to take an obligation from

¹⁹ *Campbell v. Ketcham*, 1 Bibb 406; *Stirling v. Hinckley* (Pa.), 4 Atl. 358; *Cooke v. Clayworth*, 18 Ves. Jr. 12; *Johnson v. Medlicott*, 3 P. Wms. 131, note [a]; *Hall v. Moreman*, 3 McCord L. (S. C.) 477; 4 McCord L. 283 (explained in *Barkley v. Cannon*, 4 Rich. L. [S. C.] 136).

²⁰ *Johnson v. Medlicott*, 3 P. Wms. 131, note [a]; *Cory v. Cory*, 1 Ves. Sr. 19; *Say v. Barwick*, 1 Ves. & Beame, 195; *Cooke v. Clayworth*, 18 Ves. Jr. 12; *Futrill v. Futrill*, 5 Jones Eq. 61; *Clifton v. Davis*, 1 Pars. Eq. 31; *Selah v. Selah*, 23 N. J. Eq. 185; *Maxwell v. Pittenger*, 2 Green's Ch. N. J.

156; *Lavette v. Sage*, 29 Conn. 577; *Bates v. Ball*, 72 Ill. 108; *Schramm v. O'Connor*, 98 Ill. 539; *Shackleton v. Sebree*, 86 Ill. 616; *Morrison v. McLeod*, 2 Dev. & Bat. Eq. 221; *Harbison v. Lemon*, 2 Blackf. 541; 23 Am. Dec. 376; *Dunn v. Amos*, 4 Wis. 106.

²¹ *Pitts v. Smith*, 1 Campb. 35, note; *Erskine Institute*, 814, 815; *Jenner v. Howard*, 6 Blackf. 240; *Calloway v. Witherspoon*, 5 Ired. Eq. (N. C.) 128; *Foss v. Hildreth*, 10 Allen 76.

²² *Stiring v. Hinckley* (Pa.), 4 Atl. 358; 2 Cont. Rep. 824; *Butler v. Mulvihill*, 1 Bligh 137.

another knowing at the time that he is too drunk to be able to comprehend its meaning, or at least to know what he is doing.²³ Thus, where a creditor of a firm knew a partner giving him a preferential assignment for the firm was at the time intoxicated, it was held that equity would not aid him to secure its carrying out, the court refusing to favor it.²⁴ In all instances where intoxication is shown and an active attempt made to overcome the obligor, resulting in the execution of the contract, the obligee must show that there was a fair consideration and fair and honest dealing on his part.²⁵

Sec. 1143. Habitual drunkards.

The contract of an habitual drunkard, where no inquisition has been had, stands upon the same footing as the contract of any other drunkard. If the party entering into a contract by a long course of drinking has so impaired his mind as not to understand the nature of the contract into which he is entering—if he is *non compos mentis*—he is in the same position as if he had become such by the immediate use of intoxicating liquor. A court of equity will set aside his contract, especially if it be unfair and shows on its face evidence of imbecility and undue influence, even though made during his sober moments.²⁶ To set aside such a contract actual “madness” need not be shown.²⁷ In one case the court said, in describing the condition of the drunkard: “His habit was that of habitual drunkenness for a course of years, before the first sale. There is no contradiction of the alleged

²³ *Gore v. Gibson*, 13 Mes. & W. 623; 14 L. J. Exch. (N. S.) 151; 9 Jur. 140; *King v. Bryant*, 2 Hayw. (N. C.) 394; *Thackrah v. Haas*, 119 U. S. 499; 7 Sup. Ct. 311; 30 L. ed. 486.

²⁴ *Bowen v. Clark*, 1 Biss. 128; Fed. Cas. No. 1721.

²⁵ *Holland v. Barnes*, 53 Ala. 83; 25 Am. Rep. 595.

If the charges in the bill are fully, distinctly and unequivocally denied by the answer, then they

must be clearly proved, and not left to presumption or conjecture. *Freeman v. Staats*, 9 N. J. Eq. 818.

²⁶ *Conant v. Jackson*, 16 Vt. 335; *Hale v. Brown*, 11 Ala. 87; *Adams v. Ryerson*, 4 Halst. Eq. (N. J.) 814; 1 Stockt. Eq. (N. J.) 816.

²⁷ *Wiltshire v. Marshall*, 14 Wkly. Rep. 602; 14 L. T. (N. S.) 396.

fact that, when drunk and when drinking, he was a fool and crazy. One so far gone as to bring on the stage of *delirium tremens* or *mania a potu*, may hardly be called sane simply upon becoming sober.”²⁸ The last sentence, perhaps, lays down too strong a rule and goes too far, for, as is well known, an habitual drunkard when sober, though he has had *delirium tremens*, is capable of making a contract beneficial to himself, often as beneficial as a man who had never indulged in the use of intoxicating liquor or drugs. To hold, therefore, merely because it is shown that the obligor had had *delirium tremens* his contract is voidable at his election, without a showing that he had them at the time the contract was executed is error.²⁹ And where a physician agreed for one hundred dollars to cure a man then sober of his drunken habitual habits, it was held that the contract was binding.³⁰

Sec. 1144. Habitual drunkenness.

Habitual drunkenness of one party to a contract, not procured by the other party, will not vitiate it.³¹ Although such a person's mental faculties may be so far prostrated by long-continued habits of intoxication as to render him, for a considerable part of the time, incompetent to make a contract, yet those contracts made by him when he appears sober and rational cannot be avoided on the ground of imbecility alone unless so unreasonable and unequal as to show that his

²⁸ *Menkins v. Lightner*, 18 Ill. 282.

²⁹ See *Van Wyck v. Brasher*, 81 N. Y. 262.

³⁰ *Fisk v. Townsend*, 7 Yerg. 146.

In this case it was shown in defense that the “cured” man had become drunk after the physician had pronounced him cured, and it was held it should be left to the jury as to whether a recurrence of his habit had been brought on by him with the fraudulent purpose to defeat the phy-

sician's claim under the contract to cure.

See also *Coombe v. Carthew* (N. J. L.), 43 Atl. 1057.

³¹ *Woods v. Pindall*, Wright 507; *Keough v. Foreman*, 33 La. Ann. 1434; *Schramm v. O'Connor*, 98 Ill. 539; *Ralston v. Turpin*, 25 Fed. 7; *Appeal of Ritter*, 59 Pa. St. 9; *Van Wyck v. Brasher*, 81 N. Y. 260; *Curtis v. Kirkpatrick*, 9 Idaho, 629; 75 Pac. 760. See *Hutchinson v. Brown*, 1 Clarke Ch. 408.

intellect was really clouded and confused.³² But a long course of drunkenness may so reduce him in strength and will-power as to render his contracts voidable. Thus, where a person executed a conveyance of his property when he was reduced to such extreme debility by intoxication as to be unable to rise, or even sit up in bed unless supported, nor to hold a pen and make a mark unless the pen and hand were held for him, he was held no more competent to execute it than if he were intoxicated.³³

Sec. 1145. Knowledge of drunken condition of party.

Aside from the question of fraud, all the cases hold that in order to avoid a contract entered into when the contracting party was drunk, the opposite party must have known at the time of the execution of the contract of the drunkenness of the contracting party.³⁴ Of course, if such opposite party was instrumental in bringing about the drunkenness that

³² *Conant v. Jackson*, 16 Vt. 335; *Birdsong v. Birdsong*, 2 Head 280; *Morris v. Nixon*, 7 Humph. 579; *Fish v. Townsend*, 7 Yerg. (Tenn.) 146; *Eaton v. Perry*, 29 Mo. 96; *Ralston v. Turpin*, 25 Fed. 7; *Appeal of Ritter*, 59 Pa. St. 9; *Dixon v. Dixon*, 22 N. J. Eq. 91; *Coombe v. Carthew* (N. J. L.), 43 Atl. 1057; *Freeman v. Staats*, 4 Halst. Eq. (N. J.) 814; 1 Stockt. Eq. (N. J.) 816.

³³ *Wilson v. Bigger*, 7 Watts & S. 111; *Rutherford v. Ruff*, 4 Desaus. (S. C.) 365; *Schramm v. O'Connor*, 98 Ill. 539.

But where the signature was firm and steady, evidence of general intemperate habits was held not to be sufficient to set it aside. *Guckavan v. Kenney*, 4 Kulp 411; and so where the signature was firm and steady, evidence that seven months after the execution

of the mortgage the mortgagor was adjudged insane, and that at the time of executing the mortgage he was in the habit of getting drunk and had acted indiscreetly, was held not sufficient to set aside the mortgage. *O'Neill v. Nolan*, 50 N. Y. St. Rep. 641; 21 N. Y. Supp. 222.

³⁴ *Gore v. Gibson*, 13 M. & W. 623; 14 L. J. Exch. 152; *Youn v. Lamont*, 56 Minn. 216; 57 N. W. 478; *Schaps v. Lehner*, 54 Minn. 208; 55 N. W. 911; *Bowen v. Clark*, 1 Biss. 128; Fed. Cas. No. 1721; *State Bank v. McCoy*, 69 Pa. St. 204; 8 Am. Dec. 246; *Pittsburgh Nat. Bank v. Palmer*, 22 Pa. Leg. J. (O. S.) 189; *Warnock v. Campbell*, 10 N. J. Eq. 485; *Cole v. Robbins*, Bull. N. P. 172a; *Pett v. Smith*, 3 Camp. 33; *Fenton v. Holloway*, 1 Stark. 126; *Hamilton v. Grainger*, 5 H. & N. 4.

would be knowledge of the fact, and usually this is purely an academical question, for it is practically impossible for a man to be so drunk that he has no capacity to enter into the contract without the other party knowing that fact.³⁵

Sec. 1146. Inadequacy of consideration—Unfair contract.

The inadequacy of the consideration, or its manifest unfairness, is a weighty factor in securing the annulment of a drunkard's contract, for if the contract have an adequate consideration, or it be a fair one, the court will require strong evidence before it will set it aside.³⁶ Thus, where an intoxicated person sold personal property of the value of about twelve thousand dollars for two hundred dollars it was said equity would aid him in setting aside the sale and restoring him to his rights.³⁷ So equity will afford relief if there be no consideration for a conveyance.³⁸ Thus, A, an habitual drunkard, requested B to accept a deed of his farm and pay his debts. A was in the habit of buying liquors of B at his store. He sometime thereafter, without B's knowledge, procured a deed to be drawn, signed and acknowledged it, and then delivered it to him, and requested him to put it on record, leaving it in his hands. Eight years afterwards B conveyed the land back to A, who all this time had remained in possession, and inserted in the deed a clause to the effect that A should pay him annually, during his natural life, eighteen dollars. B then caused the deed to be recorded. A never saw nor heard B's deed read, but the person who drew up B's deed testified that, before it was drawn, A consented that it should be made and requested him to keep it. It was held that the deed was void.³⁹ But contracts may be fair,

³⁵ *Youn v. Lamont*, 56 Minn. 216; 57 N. W. 478.

³⁶ *Birdsong v. Birdsong*, 2 Head 280.

³⁷ *Swan v. Talbott*, 152 Cal. 142; 94 Pac. 238.

³⁸ *Warnock v. Campbell*, 25 N. J. Eq. 485; *McCraw v. Davis*, 2 Ired. Eq. (N. C.) 618; *Dumage v.*

White, 1 Swanst. 137; *Cooke v. Clayworth*, 18 Ves. Jr. 12, 17; *Hutchinson v. Tindall*, 2 Gr. Eq. (N. J.) 357.

³⁹ *Adams v. Ryerson*, 4 Halst. Eq. (N. J.) 814; 1 Stockt. Eq. (N. J.) 816.

^{39*} *Morris v. Nixon*, 7 Humph. 579.

though not supported by a consideration, and yet be upheld. Such are instances of family settlements, where a grantor, for instance, is under obligation to make provision for the support of his family. Such conveyances are usually upheld.^{39*} And so are conveyances to pay creditors, or in trust for creditors, if there be no unjust preferences;⁴⁰ but if there be an unjust preference, equity will not assist the beneficiary to avail himself of his security.

Sec. 1147. What kind of contracts may be avoided.

The solemnity with which a contract has been entered into is no protection against its avoidance, and all kinds of contracts, if the facts justify it, may be avoided. Thus, a deed may be avoided;⁴¹ a compromise agreement;⁴² an ordinary written contract;⁴³ a promissory note;⁴⁴ an exchange of property;⁴⁵ a chattel mortgage;⁴⁶ a bond executed in place of

^{39*} *Morris v. Nixon*, 7 Humph. 579.

⁴⁰ *McGowan v. Brooks*, 16 So. 436; *Morris v. Nixon*, *supra*.

⁴¹ *Spoonheim v. Spoonheim*, 14 N. D. 380; 104 N. W. 845; *Freeman v. Staats*, 4 Halst. Eq. (N. J.) 814; 1 Stockt. Eq. (N. J.) 816; *Combe v. Carthew*, 59 N. J. Eq. 638; 43 Atl. 1057; *Dahlman v. Gauntlet*, 238 Ill. 224; 87 N. E. 287; *Adams v. Ryerson*, 4 Halst. Eq. (N. J.) 814; 1 Stockt. Eq. (N. J.) 816; *Dixon v. Dixon*, 7 Green Eq. (N. J.) 91; *Warnock v. Campbell*, 25 N. J. Eq. 485; *O'Connor v. Rempt*, 29 N. J. Eq. 156; *Wood v. Pindall*, *Wright* 507; *Belcher v. Belcher*, 10 Yerg. 121; *Morris v. Nixon*, 7 Humph. 579; *McGowan v. Brooks*, 16 So. 436; *Dulany v. Green*, 4 Har. 285; *Harbison v. Lemon*, 3 Blackf. 51; 23 Am. Dec. 376; *Hutchinson v. Tindall*, 2 Gr. Eq. (N. J.) 357; *Crane v. Conklin*, *Saxt. Eq.* (N. J.) 346;

22 Am. Dec. 519; *Wilson v. Bigger*, 7 Watts & S. 111.

⁴² *Long v. Ingalls Zinc Co.* (Tenn. Ch. App.), 49 S. W. 288; *McClure v. Mansell*, 4 Brewst. 119; *Phelan v. Gardner*, 43 Cal. 306.

⁴³ *Hunter v. Tolbard*, 47 W. Va. 258; 34 S. E. 737; *Benton v. Skyltes* (Neb.), 122 N. W. 61; *Bing v. Bank*, 56 Ga. App. 578; 63 S. E. 652; *McCraw v. Davis*, 2 Ired. Eq. (N. C.) 618; *Willoughby v. Moulton*, 47 N. H. 205; *State Bank v. McCoy*, 69 Pa. St. 204; 8 Am. Dec. 246.

⁴⁴ *Miller v. Finley*, 26 Mich. 249; 12 Am. Rep. 306; *Miller v. Finley*, 2 Mich. N. P. 231; *Sentance v. Poole*, 3 C. & P. 1; *McClure v. Mansell*, 4 Brewst. 119; *Newell v. Fisher*, 11 Sm. & M. 431; 49 Am. Dec. 66.

⁴⁵ *Carpenter v. Rogers*, 61 Mich. 384; 28 N. W. 156.

⁴⁶ *Lonchheim v. Gill*, 17 Ind. 139.

a receipt;⁴⁷ an assignment for benefit of creditors;⁴⁸ a settlement;⁴⁹ a contract to convey land;⁵⁰ a transfer of stock;⁵¹ and a marriage.⁵²

Sec. 1148. Implied contracts.

A drunkard may become bound by an implied contract which he cannot avoid and which he could avoid if it was an express one. Thus, it has been held that intoxication was no defense to an action on an implied contract for borrowed money.⁵³ So an habitual drunkard may become bound for necessities or nursing furnished him.⁵⁴ Thus, where an habitual drunkard's brother made a contract in his behalf with an attorney to secure the appointment of a guardian for him, it was held that the contract was binding upon him, at least to the extent of the value of the services rendered.⁵⁵ In an English case it was said: "Where the right of action is grounded upon a specific, distinct contract, requiring the assent of both parties, and one of them is incapable of assenting, in such a case there can be no binding contract; but in many cases the law does not require an actual agreement between the parties, but implies a contract from the circumstances; in fact, the law itself makes the contract for the parties. Thus, in an action for money had and received to the plaintiff's use, the action may lie against the defendant, even though he may have protested against such a contract.

⁴⁷ Hyman v. Moore, 48 N. C. 416; Lacy v. Garrard, 2 Ham. (Ohio) 7.

⁴⁸ Bowen v. Clark, 1 Biss. 128; Fed. Cas. No. 1721.

⁴⁹ Murray v. Carlin, 67 Ill. 286.

⁵⁰ Hotchkiss v. Fortson, 7 Yerg. 67.

⁵¹ Thackrah v. Haas, 119 U. S. 499; 7 Sup. Ct. 311; 30 L. ed. 466.

⁵² Prine v. Prine, 36 Fla. 676; 18 So. 781; 34 L. R. A. 86; Roblin v. Roblin, 28 Grant Ch. (U. C.) 439; Clement v. Mattison, 3 Rich.

L. (S. C.) 93; Legeyt v. O'Brien, Milw. Eccl. Rep. 325; Scott v. Paquett, 17 Low. Can. Rep. 283; Elzey v. Elzey, 1 Houst. (Del.) 308; Imhoff v. Witmer, 31 Pa. 243; McCleary v. Barcalow, 6 Ohio C. C. 481; Johnston v. Brown, 2 Shaw & D. 437.

⁵³ Haneklau v. Felchlin, 57 Mo. App. 602.

⁵⁴ Brockway v. Jewell, 52 Ohio St. 187; 39 N. E. 470; Darby v. Cabanne, 1 Mo. App. 126.

⁵⁵ Darby v. Cabanne, 1 Mo. App. 126.

So a tradesman who supplies a drunken man with necessities may recover the price of them if the party keeps them when sober, although a count for goods bargained and sold would fail. In this case the defendant is still liable for the consideration for his endorsement,⁵⁶ although the endorsement itself can give the plaintiff no title."⁵⁷ Of course, it is necessary to allege and prove that the articles furnished were actual necessities, and also show their value.⁵⁸ But if the action be brought upon the contract, then a recovery must be had upon it, and there cannot be a recovery of the value of the articles purchased under it.⁵⁹

Sec. 1149. Intoxication of maker of note.

As between the maker and payee of a note the rule with respect to the avoidance of the note is the same as the avoidance of any other contract, and so the defense of complete intoxication may be set up as to any endorsee taking the note with a knowledge of the circumstances under which it was executed.⁶⁰ And it has been held that a bill of exchange or a promissory note, indorsed or accepted or made by a person in a complete state of intoxication, cannot be enforced as against the drunkard, by a *bona fide* holder who received and gave value for it on the credit of the acceptance or indorsement or signature in ignorance of the drunkenness and of the fraudulent circumstances under which the instrument was obtained.⁶¹ This is upon the theory that the mind of the maker was completely overpowered by liquor so that he could not give any assent, and, therefore, the note was absolutely void in its inception. Perhaps a few other authorities have adopted or impliedly indorsed this rule.⁶² But, of course, it

⁵⁶ An endorsee had sued an endorser on his endorsement on a bill of exchange.

⁵⁷ *Gore v. Gibson*, 13 Mees. & W. 623; 14 L. J. Exch. (N. S.) 151; 9 Jur. 140.

⁵⁸ *Devin v. Scott*, 32 Ind. 67.

⁵⁹ *Reinskopf v. Rogge*, 37 Ind. 207.

⁶⁰ *Gore v. Gibson*, 13 Mees. & W. 623; *State Bank v. McCoy*, 69 Pa. St. 204.

⁶¹ *Sentance v. Poole*, 3 C. & P. 1.

⁶² See *Miller v. Finley*, 26 Mich. 249; 12 Am. Rep. 306; *Miller v. Finley*, 2 Mich. N. P. 231; *Caulkins v. Fry*, 35 Conn. 170.

would be otherwise under even these authorities if the maker was aware, though intoxicated, of what he was doing and was not deceived as to the identity of the paper he was signing, though if he had been completely sober he would not have executed it.⁶³ But there are authorities that such a note is valid in the hands of an innocent endorsee, regardless of the drunken condition of the maker when he executed it. "The note of an insane person," said the Supreme Court of Pennsylvania, "or of one perfectly imbecile, which he has been induced to sign by fraud and imposition, is void in the hands of an innocent endorsee; it does not follow that a note given by a person in a state of intoxication is void in the hands of a holder for value without notice of the maker's condition when it was given. There is this difference between the cases. Insanity or total imbecility is a permanent state or condition of the mind, disabling one from taking care of himself. Drunkenness is a temporary disability, voluntarily produced.

* * * And when men thus temporarily deprive themselves of the use of their reason, and voluntarily expose themselves to fraud and imposition, the law may wisely refuse to treat them with the same tenderness that it does those unfortunate beings who are deprived of their understanding by some providential dispensation; and it may properly hold them to a different measure of responsibility for the consequences of their acts. If a man voluntarily deprives himself of the use of his reason by strong drink, why should he not be responsible to an innocent party for the act which he performs when in that condition? It seems to me that he ought, on the principle that where a loss must be borne by one of two innocent persons it should be borne by him who occasioned it. * * * But there is another and a controlling reason for holding the maker liable to the endorsee in such case, founded on principles of public policy and the necessities of commerce. The exigencies of trade require that there should be no necessary impediments to the ready circulation and currency of the negotiable paper, but that it should be left free to pass from

⁶³ Miller v. Finley, 29 Mich. Thackrah, 17 Jur. 1045; Caulkins 249; 12 Am. Rep. 306; Shaw v. v. Frey, 35 Conn. 170.

hand to hand like bank notes, and perform the functions of money untrammelled by any equities or defenses between the original parties. If then it should be held that the drunkenness of the maker avoids the note in the hands of the endorsee, it is obvious that such a rule would greatly clog and embarrass the circulation of commercial paper, for no man could safely take it without ascertaining the condition of the maker or drawer when it was given, although there might be nothing suspicious in its appearance or unusual in the character of the signature. It is evident that it would be a less evil to exclude the defense of drunkenness, though it might occasionally work individual hardship than to clog the circulation of commercial paper to the great inconvenience of the public, by admitting such a defense. If fraud and imposition in obtaining a note will not avoid it in the hands of an innocent endorsee, because such a rule would render commercial paper less valuable and convenient as a medium of exchange, why should the drunkenness of the maker? Why should drunkenness be a defense if there has been no fraud or imposition? And if there has, and this is the ground of the defense, why should it not avoid the note in the one case as well as in the other?"⁶⁴ So where one acts upon a guaranty addressed to him, not knowing of the intoxication of the person who gave it, he is in the same position as that of an innocent endorsee for value. "While it has been quite uniformly held here," said the court. "that an instrument procured by fraud, trick or artifice, executed by a party in such

⁶⁴ *State Bank v. McCoy*, 69 Pa. St. 206; *McSparran v. Neely*, 91 Pa. St. 17; *State v. Williamson*, 8 Utah 219; 30 Pac. 753.

In this last case it was said: "It may be said that a person who executes a proposed negotiable paper while deprived of reason by insanity may avoid it in the hands of an innocent endorsee, and that the same rule should apply when the person is deprived of reason by intoxication. The considera-

tions upon which the rules stand are dissimilar. Insanity is involuntary; it is a disease, and is a more permanent state, and usually is not the result of the act of the person imposed upon, while drunkenness is voluntary, and is a temporary state, and is regarded as a vice—the helpless condition of the drunkard is his own fault." See also *Pittsburgh Nat. Bank v. Palmer*, 22 Phila. Legal Int. 189.

a state of intoxication as to be incapable of consenting or contracting, is invalid as between the parties to the transaction, these facts do not always constitute a defense as against an innocent person who is himself free from any fraud or negligence, and who has advanced money or property to another upon the credit afforded by an instrument like this.”⁶⁵ And where a drunken man executed notes and a mortgage to a supposed friend who had supplied the whisky to him and played on his fears concerning the action of supposed creditors, and threatened and cajoled him into a state of intoxication, so that, without a realization of what he was doing, the drunkard at various times signed them without any consideration whatever, such notes were held void in the hands of a third party who was not an innocent party.⁶⁶

Sec. 1150. Marriage.

A civil marriage is nothing more, as between the parties, than a contract; and like all other contracts the parties entering into it must have capacity to execute it. Therefore, if a party to it be so drunk as not to comprehend what he is doing the marriage may be avoided on his coming to his senses and being informed of what had taken place. But if he, on becoming sober, cohabit with his alleged wife he will thereby ratify the contract, and cannot thereafter avoid it. “As to the law applicable to the facts,” said the Supreme Court of Florida, “it cannot be doubted that if the party at the time of entering into the contract was so much intoxicated as to be *non compos mentis*, and does not know what he is doing, and is for the time deprived of reason, the marriage is invalid; but it is not invalid if the intoxication is of a less degree than that stated.”⁶⁷ On the other hand, it

⁶⁵ Page v. Krekey, 137 N. Y. 307; 33 N. E. 311; 21 L. R. A. 409.

See also Bing v. Bank of Kingston, 5 Ga. App. 578; 63 S. E. 652.

⁶⁶ Knott v. Tidyman, 86 Wis. 164; 56 N. W. 632.

The court said the notes “were conceived in sin and born in iniquity.”

⁶⁷ Citing 1 Bishop Mar. Div. & Sep., sec. 607; Brown, Divorce and Alimony, p. 197.

is equally well established that a marriage invalid at the time for want of mental capacity, may be ratified and made valid afterwards by any acts or conduct which amounts to a recognition of its validity. A lunatic, on regaining his reason, may affirm a marriage celebrated while he was insane, and this without any new solemnization."⁶⁸ Insanity from *delirium tremens* at the time is sufficient to avoid a marriage;⁶⁹ and so is such drunkenness as deprives a party of all sense of volition and renders him incapable of knowing what he is about.⁷⁰ But drunkenness which does not render a person *non compos mentis* for the time being does not disqualify him for marriage;⁷¹ and a marriage entered into during a lucid period, even though one of the parties is suffering from *delirium tremens* at the time, is valid, as where he is able to discuss and arrange the terms of the marriage settlement.⁷² The finding of an inquisition that a person is an habitual drunkard and the appointment of a guardian for him, does not, of itself, render him incapable thereafter to enter into a marriage, though it does so far as to the execution of an antenuptial contract.⁷³ However, it has been held that it is *prima facie* evidence of incapacity to enter into the marriage relationship.⁷⁴ The marriage is not void, but voidable, and may be ratified.⁷⁵ To avoid the marriage the drunkenness

⁶⁸ *Prine v. Prine*, 36 Fla. 676; 18 So. 781; 34 L. R. A. 87, citing *Cole v. Cole*, 5 Sneed (Tenn.) 57; 70 Am. Dec. 275; *Savalot v. Populus*, 31 La. Ann. 854; 1 Bishop Mar. Div. & Sep., secs. 614, 624, and Brown, Divorce and Alimony, pp. 206, 207.

⁶⁹ *Clement v. Mattison*, 3 Rich. L. (S. C.) 93.

⁷⁰ *Roblin v. Roblin*, 28 Grant Ch. (U. C.) 439; *Legeyt v. O'Brien*, Milw. Eccl. Rep. 325; *Scott v. Paquitt*, 17 Low. Can. Rep. 283; *Johnston v. Brown*, 2 Shaw & D. 437.

⁷¹ *Legeyt v. O'Brien*, Milw. Eccl. Rep. 325.

⁷² *Scott v. Paquitt*, 17 Low. Can. Rep. 283.

⁷³ *Imhoff v. Witmer*, 31 Pa. 243. Note given in consideration of marriage. *McClure v. Mansell*, 4 Brewster (Pa.) 119.

⁷⁴ *McCleary v. Barcalow*, 6 Ohio C. C. 481.

⁷⁵ *Roblin v. Roblin*, 28 Grant Ch. (U. C.) 439.

In this case an action was brought against the defendant for necessities furnished his alleged wife and for expenses incurred in her burial. The validity of the marriage was put in issue. To show the defendant's ratification subsequent to the mar-

must be shown to have existed at the very time the ceremony is pronounced.⁷⁶

Sec. 1151. Family settlements.

Family settlements made by an intoxicated man are looked upon with much more favor than contracts made by him with strangers. Such contracts, if proper in themselves, will not be set aside on the ground of undue influence, if there be no actual fraud, at the instance of the party who seeks it. Thus where an habitual drunkard made a conveyance of all his property, in trust for his wife and children, the court refused to set it aside, largely upon the ground that he had not done an improper thing.⁷⁷ So if family compromises be reasonable and upon a doubtful right, they will be favored, even if the complaining party was drunk at the time.⁷⁸

Sec. 1152. Replevin bail or bail bond.

Where a drunken man became replevin bail for the stay of an execution, and a statute gave the entrance of the stay the same effect as a judgment confessed in a court of record, the court said: "It [the entry] stands upon higher ground than if it had been an entry *in pais*. It is to be inferred that the judges, or other proper officer of the court, would not have permitted a recognizance to be entered by a drunken person absolutely deprived of his understanding by drunkenness. If, by any means, a recognizance entered into by a

riage there was put in evidence a memorandum endorsed by him on record in which he admitted its existence and validity, and consented to a verdict for the plaintiff. This was held to be a sufficient ratification and confirmation of the marriage.

⁷⁶ *Legeyt v. O'Brien*, Milw. Eccl. Rep. 325.

A statute authorizing a court to decree a marriage void on the ground that one of the parties was insane at the time it was entered

into does not authorize it to declare it void because a party was so drunk he did not know what he was doing when the marriage ceremony was performed. *Elzey v. Elzey*, 1 Houst. (Del.) 308.

⁷⁷ *Birdsong v. Birdsong*, 2 Head 289.

⁷⁸ *Stockley v. Stockley*, 1 Ves. & B. 23; *Cory v. Cory*, 1 Ves. Sr. 19; *Hutchinson v. Tindall*, 3 Gr. Eq. (N. J.) 357; *Gardner v. Gardner*, 22 Wend. 526; 49 Am. Dec. 340.

person in such condition should get upon the records of a court, it would, no doubt, be set aside on proper proceedings for that purpose; but, while standing in full force, a recognition cannot be impeached collaterally for the want of capacity of the person by whom it was acknowledged.”⁷⁹ In another case where sureties sought to avoid a bail bond given for the appearance of a defendant to a criminal charge, it was held that they could not do so, upon two grounds: *First*, because they knew his condition when they went on the bond; and, *second*, because they thereby received the friendly custody of him, the full consideration for their going upon his bond.⁸⁰

Sec. 1153. Contract void or voidable.

There are many cases which contain the statement that the contract of a drunken man is void;⁸¹ but we take it that this word has been used inadvertently. Such a contract is not void, but only voidable.⁸² Yet it has been held that upon a bill alleging the contract was entered into when the plaintiff was in such a state of intoxication as not to know its true intent and meaning, that the contract was not only

⁷⁹ Doe v. Harter, 1 Ind. 427; Doe v. Harter, 2 Ind. 252. See State v. Osborn, 155 Ind. 385; 58 N. E. 491.

⁸⁰ Weldon v. Colquitt, 62 Ga. 449, 35 Am. Rep. 128.

Such an obligation is practically one of necessity, for thereby the drunken man secures his personal liberty, and he ought not, therefore, be permitted to avoid it.

⁸¹ Jenners v. Howard, 6 Blackf. 240; Reinskopf v. Rogge, 37 Ind. 207; Cameron-Barkley Co. v. Thornton, etc. Co., 138 N. C. 365; 50 S. E. 695; State Bank v. McCoy, 69 Pa. St. 204; 8 An. Dec. 246; Cavender v. Waddingham, 2 Mo. App. 551.

⁸² McGuire v. Callahan, 19 Ind. 128; Joest v. Williams, 42 Ind. 565; 13 Am. Rep. 377.

“His drunkenness did not render the contract void, but rendered it voidable.” Harlan v. Brown, 4 Ind. App. 319; 30 N. E. 928; Lochheim v. Gill, 17 Ind. 139; McClain v. Davis, 77 Ind. 419; Bursinger v. Watertown, 67 Wis. 75; English v. Young, 10 B. Mon. 141; Broadwater v. Darne, 10 Mo. 277; Cummings v. Henry, 10 Ind. 109; White v. Cox, 3 Hayw. (Tenn.) 79; Carpenter v. Rogers, 61 Mich. 384; 28 N. W. 186; Benton v. Skytler (Neb.), 122 N. W. 61; Matthews v. Baxter, L. R. 8 Exch. 132; Bates v. Ball, 72 Ill. 108.

voidable, but void, upon demurrer to the bill.⁸³ And where a guardian has been appointed for a drunkard, his contracts thereafter are not voidable, but void.⁸⁴ So much so is this the case that it has been held by a *nisi prius* court that a judgment entered against a defendant on a note signed by him after an inquisition had found him to be an habitual drunkard, and a guardian or committee appointed for him, did give the plaintiff a priority of lien, and no execution could be issued upon it.⁸⁵

Sec. 1154. Ratification.

Since the contract of a drunkard is only voidable, it may be ratified by him after he becomes sober, and it will then be binding on him.⁸⁶ Thus where a plaintiff brought an action to recover damages because of a breach of contract in not completing the purchase of houses and land bought by the plaintiff at an auction sale, and the defendant pleaded complete intoxication at the time of making the alleged contract, a reply setting up a ratification of the contract after the defendant became sober, was held to be sufficient. "I am of the

⁸³ Hunter v. Tolbard, 47 W. Va. 258; 34 S. E. 737.

In this case, however, the bill alleged that the contract was void, and the demurrer thereto admitted it. The ruling was on the demurrer.

⁸⁴ Cockrill v. Cockrill, 79 Fed. 143; Brockway v. Jewell, 52 Ohio St. 187; 39 N. E. 470; Cockrill v. Cockrill, 92 Fed. 811; 34 C. C. A. 254.

⁸⁵ Boner v. Meyer, 11 York Leg. Rec. (Pa.) 58.

Where a reply of ratification was filed to avoid an answer of complete intoxication when the contract sued upon was entered into, it was held sufficient. Baron Martin saying: "The judges in Gore v. Gibson [13 Mees & W. 623] use

the word 'void,' it is true, but I cannot think that they meant absolutely void. They simply meant to say that a drunken man's contract could not be enforced against his will. But it by no means follows that it is incapable of ratification. The case is an authority that this plea is good, but no authority for holding the replication bad. I think the drunken man when he recovers his senses might insist on the fulfillment of his bargain, and therefore that he can ratify it, so as to bind himself to a performance of it." Matthews v. Baxter, L. R. 8 Exch. 132.

⁸⁶ Matthews v. Baxter, L. R. 8 Exch. 132; Benton v. Skyltes (Neb.), 122 N. W. 61; Taylor v. Patrick, 1 Bibb (Ky.) 168.

opinion," said Kelly, C. B., "that our judgment must be for the plaintiff. It has been argued that a contract made by a person who was in the position of the defendant was absolutely void. But it is difficult to understand this contention. For surely the defendant upon coming to his senses, might have said to the plaintiff, 'True, I was drunk when I made this contract, but still I mean, now that I am sober, to hold you to it.' And if the defendant could say this, there must be a reciprocal right in the other party. The contract cannot be voidable only as regards one party, but void as regards the other; and if the drunken man, upon coming to his senses, ratifies the contract, I think he is bound by it."⁸⁷ If the drunken party should keep the proceeds obtained under his contract, he will be bound thereby; and so if he does not repudiate it within a reasonable time upon the gaining of his senses, his passiveness will be construed into a ratification of the contract.⁸⁸

Sec. 1155. Inquisition—Prior contracts—Finding as evidence—Administrator.

If there has been an inquisition held, and the drunkard adjudged to be an habitual drunkard, then his contracts stand upon a very different ground from those of a person shown to have been an habitual drunkard or shown to have been drunk at the time he entered into the contract. An inquisition is usually held for the purpose of securing the appointment of a guardian for the drunkard, to take charge of his property and preserve it. The finding that a guardian should be appointed for him and the appointment of one renders him incapable of entering thereafter into a contract so long as the finding is not revoked, and his contracts while it remains in force are void, not voidable. It is not necessary

⁸⁷ *Matthews v. Baxter*, L. R. 8 Exch. 132.

⁸⁸ *Doe v. Harter*, 1 Ind. 427.

Where the defendant was induced by fraud and a contrivance to sign a note when he was so drunk as to be incapable of trans-

acting business, a subsequent promise made by him when sober to pay the note, in consideration of forbearance, was held to be void, and the note not capable of enforcement. *Newell v. Fisher*, 11 Sm. & M. 431; 49 Am. Dec. 66.

that any statute should declare them void to enable the courts to so hold. "The judicial finding that the person was of unsound mind, and incapable of making contracts, and the appointment of a guardian, are conclusive evidence that all subsequent contracts are void, and *prima facie* evidence that prior contracts are void."⁸⁹ In a Pennsylvania case the court said: "As to contracts made after the inquisition, our statute contemplates a complete transfer of the property to the custody of the law, and the committee is substituted for the lunatic or drunkard, and a lucid interval can avail nothing, for he has nothing in respect to which to contract. This is always the case where the proceeding is perfected. Where it is suspended or abandoned or suspended in mid-course, as it seems to have been the case here, it may be doubted whether any stronger presumption is furnished by an inquisition as to contracts made after it was found, than as to such as were made previously, but within the ascertained period of incompetency. If no stronger, then it is not conclusive, and may be rebutted by such evidence as was offered here."⁹⁰ And where a drunkard, after inquisition found, car-

⁸⁹ Devin v. Scott, 34 Ind. 67; Wadsworth v. Sherman, 14 Barb. 169; Imhoff v. Witmer, 31 Pa. 243; Clark v. Coldwell, 6 Watts 139 (void by statute); L'Amoureux v. Crosby, 2 Paige, 422; 22 Am. Dec. 655; Stirling v. Hinckley, 4 Atl. (Pa.) 358; 2 Cent. Rep. 824.

⁹⁰ Tozer v. Saturlee, 3 Grant Cas. (Pa.) 162.

Thus where the inquisition was confirmed in October, 1829, but the commissioners never acted, and the drunkard acted as if no proceedings had ever been held, and bought and sold property in 1831, and saw it levied upon in 1843, making no objection to the levy; and three days before this the inquisition was superseded, and a short time after the sheriff's deed

was acknowledged without any objection being made to it, it was held that a statute making the contracts of an habitual drunkard void after an inquisition held did not apply. Bixler v. Gilleland, 4 Pa. 156, distinguishing Clark v. Coldwell, 6 Watts (Pa.) 139.

It has been held that one found to be an habitual drunkard, upon inquisition held, cannot thereafter waive notice of non-payment and protest of a note, and that evidence that at the time of the alleged waiver he was sober, is not admissible. Wodsworth v. Sherman, 14 Barb. 169.

So it has been held that such a person cannot enter into an antenuptial contract. Imhoff v. Witmer, 31 Pa. 243.

So it has been held that con-

ried on his business, did work and received pay therefor, his receipt in discharge of a debt was held valid.⁹¹ So where a saloon keeper who had no notice of the inquisition proceedings, and sold liquors to the drunkard before the decree was filed, it was held that he could recover the price of the liquors, the purchaser appearing at the time to be able to transact business.⁹² The fact of an inquisition having been held does not bar a drunkard from binding himself for actual necessities furnished him.⁹³ Thus where a statute provided that from the date of notice given that a person was an habitual drunkard all his contracts should be invalid, it was held that the fact of notice given did not prevent a drunkard from thereafter purchasing necessities before a guardian for him was appointed; and that he was liable for services of a nurse, rendered him when he was in a fit of drunkenness.⁹⁴ So a decree finding a person to be an habitual drunkard is admissible in evidence upon the issue that he was insane at the time he had entered into a prior contract, together with proof of other facts tending to show his actual condition at the time of the contract, even though the contract antedate the inquisition as much as a year.⁹⁵ "An inquisition," said the Pennsylvania Supreme Court, "finding a party either a lunatic or habitual drunkard is *prima facie* evidence of incompetency to make a contract at any time covered or overreached by the finding, and imposes upon the party introducing a contract executed by a lunatic or habitual drunkard the burden of proving him to have been of sound mind at the time of the

tracts made after the inquisition found, and before its confirmation, are void. *Clark v. Coldwell*, 6 Watts (Pa.) 139.

So it has been likewise held that a bond and warrant to confess judgment given two days before the jury had found on an inquisition that the person giving it was an habitual drunkard was void. *L'Amoureux v. Crosby*, 2 Paige 422; 22 Am. Dec. 655

⁹¹ *Black's Estate*, 8 Pa. Ct. Rep. 266.

⁹² *In re McGarvey*, 64 How. Pr. 135.

⁹³ *Brockway v. Jewell*, 52 Ohio St. 187; 39 N. E. 470.

⁹⁴ *Brockway v. Jewell*, 52 Ohio St. 187; 39 N. E. 470.

⁹⁵ *Stirling v. Hinckley*, 4 Atl. (Pa.) 358; 2 Cent. Rep. 824.

execution thereof.”⁹⁶ But where the adjudication of habitual drunkenness only covers the period from the date of filing the petition for an adjudication, a decree that the alleged drunkard was habitually such does not raise a presumption that a prior contract⁹⁷ was entered into when he was incapacitated to contract; and in order to avoid such a contract it must be shown by evidence that at the time it was entered into he was incapacitated to execute it.⁹⁸ And the finding that a person is an habitual drunkard does not avoid his acts as an administrator or executor performed thereafter, where a statute provides that an administrator or executor may be removed if he become an habitual drunkard, it being presumed he would have been removed by the court if he had in fact become incapacitated to act.⁹⁹

Sec. 1156. Time of drunkenness.

It is the time the contract is entered into that is to be considered in determining whether or not it can be avoided on account of drunkenness. Thus where a sober person agreed upon the terms of a contract which was afterwards reduced to writing and signed by the obligor when drunk, it was held that he could not avoid it because of his drunken condition at the time he affixed his signature to it.¹ But evidence of the party's condition several hours after the contract is executed is admissible, as tending to show his condition when he entered into it.²

⁹⁶ Noel v. Karper, 53 Pa. 97; Klohs v. Klohs, 61 Pa. 245; Donehoo's Appeal, 2 Mon. (Pa.) 213; 15 Atl. 924.

⁹⁷ In this case fifteen days before.

⁹⁸ Van Wyck v. Brasher, 81 N. Y. 262.

⁹⁹ Sill v. McKnight, 7 Watts & S. 244.

Where the defendant had been adjudged as an habitual drunkard, and he afterwards signed a note after a guardian for him had been appointed, it was held that the

plaintiff obtained by his judgment no priority of lien, nor could he issue an execution thereon. Boner v. Meyer, 11 York Leg. Rec. 58.

¹ Page v. Krekey, 63 Hun 629; 17 N. Y. Supp. 764; 21 L. R. A. 409; Ralston v. Turpin, 25 Fed. 7; Power v. King (N. D.), 120 N. W. 543; Combe v. Carthew (N. J. L.), 43 Atl. 1057; Freeman v. Staats, 4 Halst. (N. J.) 814; 9 Stockt. Eq. (N. J.) 816.

² Phelan v. Gardner, 43 Cal. 306.

Sec. 1157. Burden to show drunkenness.

The burden to show incapacity to enter into a binding contract by reason of drunkenness is upon him who asserts the drunkenness; and the burden is upon him to show that it existed at the time the contract was executed; and if he relies upon fraud, the burden is upon him to show that, or that undue advantage had been taken of him when he was in an intoxicated condition.³ As drunkenness is only of a temporary character, it is not enough to show a previous intoxication, like in the case of insanity; but the drunkenness must be shown to have existed at the time the contract was consummated.⁴ To avoid the contract the party alleging his intoxication must produce clear and satisfactory proof that he was at the time in such a state of drunkenness as not to know what he was doing.⁵ In the case of a written instrument, where it is sought to set it aside, the signature of the drunken man is a very potent piece of evidence; and if it be clear, firm and steady, evidence of his intoxication will usually not avail; for a man so drunk as not to be able to bind himself by contract is not, except very rarely, able to write his own signature, at least in a firm, steady and readable hand.⁶ But where drunkenness is shown, though not necessarily extreme intoxication, accompanied by false statements on the part of the obligee and attempts to deceive and mislead the obligor, the burden is on the obligee to show a fair consideration and fair and honest dealing on his part when he seeks to en-

³ *Youn v. Lamont*, 56 Minn. 216; 57 N. W. 478; *Maxwell v. Pittenger*, 3 N. J. Eq. 156; *Ralston v. Turpin*, 25 Fed. 7; *Guckavan v. Kenney*, 4 Kulp 411; *O'Neil v. Nolan*, 50 N. Y. St. R. 641; 21 N. Y. Supp. 222; *Conley v. Nailor*, 118 U. S. 127; 6 Sup. Ct. 1001; 30 L. ed. 112; *Elkinton v. Brick*, 44 N. J. Eq. 154; 1 L. R. A. 161; *Lang v. Ingalls Zinc Co.* (Tenn.), 49 S. W. 288.

⁴ *Musselman v. Cravens*, 47 Ind.

1; *Gardner v. Gardner*, 22 Wend. 526; 34 Am. Dec. 340; *In re Lee*, 46 N. J. Eq. 193; *Noel v. Karper*, 53 Pa. 97.

⁵ *Johns v. Fritchey*, 39 Md. 258; *Phelan v. Gardner*, 43 Cal. 306.

⁶ *Guckavan v. Kenney*, 4 Kulp (Pa.) 411; *O'Neill v. Nolan*, 50 N. Y. St. Rep. 641; 21 N. Y. Supp. 222; *Lightfoot v. Heron*, 3 Yonge & Col. Exch. 586; *Martin v. Pycroft*, 3 DeG. M. & G. 785; 22 L. J. Ch. (N. S.) 94; 16 Jur. 1125.

force the obligation.⁷ Yet if the charges of the bill to set aside a contract be fully, distinctly and unequivocally denied by the answer, they must be clearly proven and not left to presumption or conjecture.⁸

Sec. 1158. Rescinding contract and restoring consideration.

As a contract entered into when a party to it was drunk is only voidable, then to defend against it he must rescind it by restoring whatever he received as the consideration for it. "He cannot treat the instrument as void, and, at the same time, as good. If the instrument is good, he can maintain no action to recover the value of the property thus sold if the other party has performed the stipulation to be by him performed. If the instrument is voidable, either on the ground of fraud or drunkenness, he, before he can avoid it and maintain an action for the value of the property thus transferred, must place the other party in *statu quo*, by refunding to him what he has advanced in pursuance of the contract."⁹ Thus, where a married woman purchased a real estate, received a conveyance for and entered into possession of it, and in payment gave her note and mortgage to secure it, signed by herself and drunken husband, it was held, in an action to foreclose the mortgage that they could not successfully set up as a defense the intoxication of the husband, because their remedy was to tender back the real estate by a duly executed conveyance, and then bring a separate action or one by cross-bill to cancel the note and mortgage. To permit them to defend directly against the note and mortgage would have left them in possession of the real estate if they were successful; so that the plaintiff would have lost his security and been out of possession of the land upon which it was given.¹⁰ But there are cases which hold that a formal

⁷ Holland v. Barnes, 53 Ala. 83; 25 Am. Rep. 595.

⁸ Freeman v. Staats, 9 N. J. Eq. 818.

⁹ McGuire v. Callahan, 19 Ind. 128; Joest v. Williams, 42 Ind. 565; Youn v. Lamont, 56 Minn. 216; 57 N. W. 478; Lancaster etc.

Bank v. Moore, 78 Pa. St. 407; Harlan v. Brown, 4 Ind. App. 319; 30 N. E. 928; Carpenter v. Rogers, 61 Mich. 384; 28 N. W. 156; Mansfield v. Watson, 2 Iowa, 111.

¹⁰ Matter v. Card, 18 Fla. 761. In Dulany v. Green, 4 Har. 285, it is said that a deed executed by

rescission of the contract by the drunkard is not necessary before bringing an action to set it aside. Thus where a person obtained possession of property from a drunken person by contract with him, it was held that the latter, without a formal rescission, could regard the possession of the opposite party as wrongful, and if the possessor claimed, or exercised dominion over such property, to the exclusion of the right of the drunken man, the latter, at his election, could treat the transaction as a conversion of the property, and institute an action to recover its value, the bringing of the action being such an election. In such an instance if the consideration has been paid in whole or in part to the party deprived of his property, no offer to return it is necessary to enable him to maintain an action, he being entitled to recover the difference between the actual value of the property delivered and the consideration received.¹¹ In one instance a plaintiff when

a drunken grantor is void as to third persons; and in *Hickman v. Glazebrook*, 18 Ind. 210, that where one of the parties to a contract is under mental incapacity to contract, the contract is void as an entirety and as to all the parties.

The grantee in a deed cannot set up that the grantor was drunk. *Morris v. Nixon*, 7 Humph. 579.

¹¹ *Baird v. Howard*, 51 Ohio St. 57; 36 N. E. 732; 22 L. R. A. 846. The court said: "It thus appeared not merely that a contract had been made, but that the defendant had secured the possession of the plaintiff's property by knowingly taking advantage of the latter's temporary incapacity. Had possession been taken while the plaintiff's senses were overcome by sleep, no one would deny that such a possession was wrongful. The difference between the character of a possession secured by the

latter method and one deliberately obtained through the medium of an invalid contract, made with one whose senses the former knew at the time were stupefied by excessive intoxication, is one of degree rather than principle. That in the former case the transaction would involve a trespass, and present none of the features peculiar to contracts, while in the latter case it took the form of a contract, is a distinction possessing little if any materiality in this connection. The fraud inhering in the one should be deemed a substantial equivalent to the force involved in the other method of obtaining possession. Each is wrongful. To secure the possession of property by means of a contract made with its owner, by one who at the time knew him incapable of entering into a contract, constitutes a fraud.

"In such a case, it is true, a con-

drunk had made an assignment of an insurance policy, receiving nothing for the transfer or sale of the policy; and it was held that his demand for its return was all that was necessary to a rescission of the contract, and that he could maintain an action to recover its value without first having instituted an action in equity to cancel the assignment.¹² And so where a drunken man made a conveyance of his land, it was held that he could maintain an action to set it aside with-

tract exists which the incapacitated party has an option to affirm or rescind. But because the one party may exercise this option, it does not follow that the other party may compel its exercise as a condition precedent to obtaining any relief. If, when restored to capacity, the former is satisfied with the contract, and wished to enforce its provisions, he can affirm and maintain an action upon it; if he had, in fact, received a substantial part of the consideration secured to him by the contract, and wished to recover possession of the property with which he had been induced to part, he should be required to rescind the contract and restore that part of the consideration which had been paid him, for he should not be allowed to retain the latter and at the same time recover possession of the former.

"Where one person, ignorant of the incapacity of another person deals with the latter and obtains possession of his property, the possession of the former should not be deemed wrongful until the contract was rescinded and a demand for the property made upon him. The mutual rights or liabilities of persons thus situated, however, should not be the measure of the

rights and liabilities of parties, where the possession of the property of one has been wrongfully obtained by the other. The wrongful acts by which possession was secured become material factors in determining the question. If a possession thus obtained is continued under circumstances from which it may be fairly inferred that the party in possession is exercising dominion over the property to the exclusion of the right of the party wrongfully dispossessed, the latter may regard such acts as constituting a conversion of the property.

"We have found no case in all respects similar to the one under consideration, but in a number of well-considered cases, courts have held that where the purchase of goods has been effected by false representations the vendor may maintain trover against the vendee without demand."

Thurston v. Blanchard, 22 Pick. 18; 33 Am. Dec. 700; *Green v. Russell*, 5 Hill 183; *Thompson v. Rose*, 16 Conn. 71; 41 Am. Dec. 121; *Noble v. Adams*, 7 Taunt. 59; *Bristol v. Wilsmore*, 2 Dowl. & R. 755.

¹² *Bursinger v. Bank of Watertown*, 67 Wis. 75; 30 N. W. 290; 58 Am. Rep. 848.

out first tendering back the purchase money, and that it was not necessary to first tender it back in order to enable him to bring and maintain the action,¹³ in cases of a rescission of a conveyance of real estate the court having the power to enter a conditional decree that a reconveyance of the property shall be made, either by the defendant or a commissioner appointed by the court for that purpose, upon a tender of the amount of purchase money found to have been received by the plaintiff.¹⁴ And where the vendor of shares of stock was unable to restore the consideration, it was held that equity would make provision for its repayment in the final decree.¹⁵ And where the court found a note given for a chattel was wholly void, and not merely voidable, the doctrine of rescission was held not to apply, and that in an action upon it the jury could not award the plaintiff the value of the chattel sold the defendant and for which such note was given.¹⁶ It may be remarked, however, that rescission and restoration of the consideration in cases of this kind do not materially differ from the usual instances of voidable contracts; and the principles and practices applicable to them are applicable to these contracts.¹⁷

¹³ Dunn v. Amos, 14 Wis. 107.

¹⁴ Harvey v. Peck, 1 Munf. (Va.) 518; Nielson v. Lafflin, 50 N. Y. St. Rep. 277; 21 N. Y. Supp. 731.

¹⁵ Thackrah v. Haas, 119 U. S. 499; 7 Sup. Ct. 311; 30 L. ed. 486. See also Getty v. Devlin, 54 N. Y. 403.

¹⁶ Berkley v. Cannon, 4 Rich. L. (S. C.) 136.

¹⁷ In Tennessee it has been held the placing of a party in *statu quo* on a rescission does not apply where one party has obtained an advantage over another by fraud, and the rescission would further the ends of justice, where the court can still reach and enforce the equities between the parties;

or if fraud or the act of the parties prevent such placing in *statu quo*. Coffee v. Ruffin, 4 Cold. 487. See Turner v. Clay, 3 Bibb 52; Conlan v. Roemer, 52 N. J. L. 53; 18 Atl. 858; Golden v. Maupin, 2 J. J. Marsh 236; Downer v. Smith, 32 Vt. 1; 76 Am. Dec. 148; Hendrickson v. Hendrickson, 51 Iowa, 68; Edwards v. Hanna, 5 J. J. Marsh 18; Baker v. Ziegler, 56 Hun 405; Preston v. Reeve, 65 N. H. 6.

And it has been held that a return of the money received on a contract of sale induced by fraud is not a condition precedent to the commencement of a suit in replevin for the property thus sold. In such an instance the court will

Sec. 1159. Who may show intoxication of party.

Under the modern rule, the intoxicated person seeking to avoid his contract for that reason, may always show his condition in order to escape an obligation or contract he had entered into when incapacitated to bind himself. "It was once supposed," said the Supreme Court of Ohio, "to be the law that a deed obtained from a drunken man could not for that cause be avoided. But a more rational rule now prevails; and the law now regarding the fact of intoxication, and not the cause or author of it, and regarding that fact as affording proof of a want of capacity to contract, which is one of the elements of every agreement, will interfere to relieve. Thus, if a deed is obtained by the exercise of an

require the plaintiff to repay as a condition of relief any excess of money received over the damage to his property and the value of any that is not recovered. "The fraudulent vendee is in no position to demand anything more than protection that the vendor at the same time that he obtained justice shall do justice. A return or tender of the consideration, especially when it consists merely of money or promissory notes or like securities, before the bringing of the suit, is not necessary to the protection of the vendee, since the court in which the action is pending can compel such return, so far as may be necessary to do justice to the vendee, by making it a condition of its judgment, or by withholding its judgment or staying execution on it, until a compliance with its order for such return." *Sisson, Potter & Co. v. Hill*, 18 R. I. 212; 26 Atl. 196; 21 L. R. A. 266; *Duval v. Mowry*, 6 R. I. 479.

Several cases have adopted the rule thus laid down by the Rhode

Island court (and which commends itself to our judgment). *Ladd v. Moore*, 3 Sandf. 589; *Schoonmaker v. Kelly*, 42 Hun 299; *Doane v. Lockwood*, 115 Ill. 490; but the great majority of the cases require a tender back of the property or consideration received, before a suit can be brought and maintained. *Parish v. Thurston*, 87 Ind. 437; *Thompson v. Peek*, 115 Ind. 512; 18 N. E. 16; *Mattewan Co. v. Bentley*, 13 Barb. 641; *Weed v. Page*, 7 Wis. 512; *Farwell v. Hanchett*, 19 Ill. App. 620; *Cahn v. Reid*, 18 Mo. App. 115; *Moriarity v. Stefferan*, 89 Ill. 528; *Vanliew v. Johnson*, 4 Hun 415; *Haase v. Mitchell*, 58 Ind. 213; *Thayer v. Turner*, 8 Met. 552; *Wilbur v. Flood*, 16 Mich. 40; 93 Am. Dec. 203; *Kimball v. Cunningham*, 4 Mass. 502; 3 Am. Dec. 230.

An exception is sometimes made where the rights of all the parties cannot be restored, when the incapacity to contract is produced by drunkenness. *Menkins v. Lightner*, 18 Ill. 282.

undue influence over a man whose mind is incapable of acting freely and voluntarily, such deed will be decreed to be cancelled.”¹⁸ It is therefore well established that a party to a contract may avoid it if he is not in some wise estopped doing so. So his personal representatives may avoid his contract. Thus where a drunkard gave a bond for an exchange of his land for other land, and the grantee got possession, but never conveyed his own land to the drunken party, it was held that the latter’s administrator could avoid the bond.¹⁹ So where the owner of land entered into a contract to convey land and then died, in a suit against his heirs to enforce a conveyance, they were permitted to set up his incapacity to contract by reason of his intoxication.²⁰ So the heirs of a drunkard were allowed to maintain a bill to set aside a conveyance of their drunken ancestor.²¹ And even under the early English rule, which would not permit a party to stultify himself, the rule “never extended to his heirs, executors or administrators.”²² But a deed of a drunken man cannot be avoided by a third person, nor his incapacity to execute it be set up by such person,²³ nor can a defendant in a replevin suit show that a bill of sale of another party given the plaintiff was made while such party was drunk.²⁴ Nor can a surety upon a bail bond given to secure the liberty of the drunken man set up his intoxication.²⁵

Sec. 1160. Obtaining relief.

In the early days of the history of English jurisprudence a man was not allowed to set up the invalidity of a contract

¹⁸ French v. French, 8 Ohio 214; 31 Am. Dec. 441.

¹⁹ Wigglesworth v. Steers, 1 Hen. & M. 70; 3 Am. Dec. 202; Donelson v. Posey, 13 Ala. 752.

²⁰ Hotchkiss v. Fortson, 7 Humph. 67.

²¹ Crane v. Conklin, 1 N. J. Eq. 346; 22 Am. Dec. 519.

²² Lazell v. Pinnick, 1 Tyler (Vt.) 247; 4 Am. Dec. 722.

²³ Eaton v. Perry, 29 Mo. 96;

Lacy v. Mann, 59 Kan. 777; 53 Pac. 754; Doe v. Harter, 1 Ind. 427; Doe v. Harter, 2 Ind. 252.

²⁴ Broadwater v. Doane, 10 Mo. 277.

²⁵ Weldon v. Colquitt, 62 Ga. 449; 35 Am. Rep. 128. The court seems to have regarded this to be a contract binding upon the principal, because by it he escaped imprisonment, and therefore a contract of necessity.

procured from him when drunk; he was not allowed, it was said, to stultify himself. Such is not the modern rule.²⁶ The rule with reference to contracts of this character has been stated as follows: "Courts of equity, as a matter of public policy, do not incline, on the one hand, to lend their assistance to a person who has obtained an agreement or deed from another in a state of intoxication, and on the other hand, they are equally unwilling to assist the intoxicated party to get rid of his agreement or deed merely on the ground of his intoxication at the time. They will leave the parties

²⁶ "1. That the court will hear any person who seeks relief on this ground. Formerly such hearing was denied. The party setting up such defense could not be heard. *Johnson v. Medicott*, 3 P. Wms. 130, note [a]. 2 That the fact of intoxication is not of itself sufficient to avoid a contract. *Cory v. Cory*, 1 Ves. Sr. 19. 3. That to avoid the contract it must be shown, either that the intoxicant was produced by the act or connivance of the person against whom the relief is sought, or that an undue advantage was taken of the party's situation." *Hutchinson v. Tindall*, 3 N. J. Eq. 357, citing *Cooke v. Clayworth*, 18 Ves. Jr. 12; *Wilmurt v. Morgan*, Opinion of Chancellor Williamson, March, 1827 (N. J. Eq.); *Crane v. Conklin*, 1 N. J. Eq. 346; 22 Am. Dec. 519, and *Maxwell v. Pittinger*, 3 N. J. Eq. 156.

"In 1747 the question came before Lord Hardwicke, whether it was sufficient to set aside an agreement that one of the parties was drunk at the time. That learned chancellor thought it was not, unless some unfair advantage was taken which did not appear in that case. *Cory v. Cory*, 1 Ves. Sr. 19.

This decision was a departure from the old rule, and grew out of better conceptions of equity. Instead of saying to the wretched victim of intemperance that the avenues not only of law, but of equity, were closed against him, and that he was to be left as an outlaw in society, a prey to the cunning and cupidity of the spoiler, it extended to him the just protection of the court, not for the purpose of setting aside the contract on the ground of his infirmity or crime, but for the purpose of looking into his transaction, to see whether any advantage had been taken of his unhappy situation. It would not favor inebriety, but at the same time would permit it to be taken advantage of with impunity. The good sense of this principle has commended itself to every court, and especially the courts of equity. Hence it has become the settled rule of the court that it will not interfere to assist a person on the ground of intoxication merely, but if any unfair advantage has been taken of his situation, it will render him all proper aid." *Crane v. Conklin*, 1 Saxt. Ch. (N. J.) 346; 22 Am. Dec. 519.

to their ordinary remedies at law, unless there is some fraudulent contrivance or some imposition. It is upon this special ground that courts of equity have acted in cases where a broader principle has sometime been supposed to have been upheld. They have, indeed, indirectly by refusing relief, sustained agreements which have been fairly entered into, although the party was intoxicated at the time. And especially they have refused relief where the agreement was to settle a family dispute, and was in itself reasonable. But they have not gone the length of giving a positive sanction to such agreements so entered into by enforcing them against the party or in any other manner than by refusing to interfere in his favor against them.”²⁷ The practice in reference to cases of this character, however, very much depends upon the local practice. Thus in an early case it was said that “intoxication is a good defense upon a plea of *non est factum* to a deed, of *non con assent* to a grant, and of *non assumpsit* to a promise.”²⁸ Where the facts warrant it, the grantor in a deed may bring a suit in equity to set it aside,²⁹ or to set aside a contract to purchase lands.³⁰ So an action of *assumpsit* may

²⁷ Story's Equit. Jurisprudence, secs. 231, 232.

“A court of equity ought not to give assistance to a person who has obtained an agreement or deed from another in a state of intoxication; and, on the other hand, ought not to assist a person to get rid of an agreement or deed merely upon the ground of his having been intoxicated at the time;” but “if there was any unfair advantage made of his situation, or any contrivance or management to draw him into drink, he might be a proper subject of relief in a court of equity. As to that extreme state of intoxication that deprives a man of his reason, I apprehend that even at law it would invalidate a deed obtained

from him while in that condition.” Cooke's Case, 18 Ves. Jr. 12.

²⁸ Pitt v. Smith, 3 Campb. 33.

²⁹ French v. French, 8 Ohio 214; 31 Am. Dec. 441; Johnson v. Phifer, 6 Neb. 401; Donelson v. Posey, 13 Ala. 572; Crane v. Conklin, 1 N. J. Eq. 346; 22 Am. Dec. 519; Lovette v. Sage, 22 Conn. 577; Clifton v. Davis, 1 Pars. Sel. Eq. Cas. 31.

³⁰ Hotchkiss v. Fortson, 7 Yerg. 67; Calloway v. Witherspoon, 5 Ired. Eq. 128; Reynolds v. Waller, 1 Wash. (Va.) 164; Warnock v. Campbell, 25 N. J. Eq. 485; Harvey v. Peck, 1 Munf. 518; Nielson v. Lafflin, 50 N. Y. St. Rep. 277; 21 N. Y. Supp. 731; Dunn v. Amos, 14 Wis. 107.

be brought by a drunken purchaser to recover the money he has paid.³¹ So where a drunken man sold a note, it was held that he could tender back the purchase money, demand a return of the note, and then maintain his action of conversion against the purchaser.³² And it is clear, under the modern codes, that when suit is brought upon an obligation obtained while the maker of it is intoxicated, he may set up as a defense his intoxication; and in order to do this he is not bound to first bring an action to rescind it before interposing the defense of his intoxication.³³ An injunction against waste has been allowed where the grantor in a deed was intoxicated when he executed it.³⁴ Yet where a married woman purchased real estate, and with her husband gave notes and a mortgage to secure part of the purchase money, and the husband was so drunk he did not know what he was doing when he signed the notes and mortgage, in a suit on the notes and to foreclose the mortgage it was held that the fact of the husband's intoxication could not be set up as a defense to the action, but the remedy was by a separate action or a cross-bill to first cancel the notes and mortgage.³⁵

³¹ *Bush v. Breinig*, 113 Pa. 310; 6 Atl. 86; 57 Am. Dec. 469.

³² *Harlan v. Brown*, 4 Ind. App. 319; 30 N. E. 928.

³³ *Lazell v. Pinnick*, 1 Tyler (Vt.) 247; 4 Am. Dec. 722; *Bur-*

singer v. Bank of Watertown, 67 Wis. 75; 30 N. W. 290; 58 Am. Rep. 848.

³⁴ *Staats v. Freeman*, 6 N. J. Eq. 490.

³⁵ *Mattair v. Card*, 18 Fla. 761.

CHAPTER XXXVII.

WILLS.

SECTION.

- 1161. Present intoxication.
- 1162. Habits of intoxication—
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Sec. 1161. Present intoxication.

Necessarily the question whether intoxication will render a person incapable of executing a will assumes two phases: The one of present intoxication or temporary intoxication at the time of the execution of the will, and the other of habitual intoxication. Where the former is relied upon, of course it must be shown that the alleged testator was actually intoxicated at the time he executed the alleged will, and that the degree of intoxication was practically such as to incapacitate him for knowing what he was doing. "It is not to be understood that a will made by one who is at the time under the influence of intoxicating liquor is for that reason void," said Justice Denio, of New York. "Intoxication is said to be temporary insanity. The brain is, at the time, incapable of performing its proper functions. but that species of a derangement ceases when the exciting cause is removed and sobriety brings with it a return of reason. In order to avoid a will by an intemperate person, it must be proved that he was so ex-

cited by liquor, or so conducted himself during the particular act as to be at the moment legally disqualified from giving effect to it.¹ The same learned writer [Shelford] says that incapacity arising from intoxication differs from ordinary lunacy in this, that the effects of drunkenness only subsists while the cause—the excitement—visibly lasts. There is, he adds, scarcely such a thing as latent ebriety; so that a case of incapacity from mere drunkenness, and yet the man be capable to all outward appearance, can hardly arise; ‘consequently, in cases of this description, all which is required to be shown is the absence of such excitement at the time of the act done as would vitiate it; for, under a slight degree of excitement from liquor the memory and understanding may be as correct as in the total absence of any exciting cause.’² A similar rule was laid down by Sir John Nicholl, sitting in the prerogative court,³ where the validity of the will of an habitual drunkard was in question. After stating the difference between derangement from intoxication and ordinary lunacy, he adds: ‘Whether, where the excitement in some degree is proved to have actually subsisted at the time of the act done, it did or did not subsist in the requisite degree to vitiate the act done, must depend in each case upon a due consideration of all the circumstances of that case itself in particular, it belonging to a description of cases that admits of no definite rule.’” In a subsequent part of the same case he says: “Keeping in mind, then, that in order to vitiate the act of the testator he must, at the time of executing the paper, have been under the influence of intoxicating liquor, and to such a degree as to disorder his faculties and pervert his judgment, I proceed to an examination of the evidence.” He then proceeds to examine the evidence at length, and adds: “Upon the evidence I do not think it can be affirmed that there is any real foundation for the position that the deceased was so disordered in his mental faculties when the will was

¹ Citing Shelford on Lunacy,
276.

³ *Ayrey v. Hill*, 2 Add. Ecc.
206.

² Citing Shelford on Lunacy,
304.

signed as to be incompetent to execute it. It is not the law that a dissipated man cannot make a contract or execute a will, nor that one who is in the habit of excessive indulgence in strong drink must be wholly free from its influence when performing such acts. If fixed mental disease has supervened upon intemperate habits, the man is incompetent and irresponsible for his acts.⁴ If he is so excited by present intoxication as not to be master of himself, his legal acts are void, though he may be responsible for his crimes."⁵ The capacity that is requisite for a testator to enable him to make a valid will is that he can comprehend the property he is about to dispose of, the natural and other objects of his bounty, the meaning of the business he is engaged in, the relation of each of those factors to the others, and the distribution that is made by his will. If a drunken testator possesses these powers his will is valid.⁶ Excessive indulgence in liquor does not necessarily incapacitate one from executing a valid will;⁷ nor is one whose mind is partly clouded by drink,⁸ and who is not so intoxicated as to prevent him from knowing what he is about.⁹ And it has been held by a *nisi prius* court that there is no standard of drunkenness which will defeat a will short of shown imbecility.¹⁰ It is a question for the jury to determine whether he was so incapacitated as not to know what he was doing, even though he was quite drunk at the time, and even though near the time he was so drunk he could not stand up nor understand anything, nor talk,¹¹ and it is not a fact to be determined by experts, but one within the common observation, depending upon the facts of

⁴ Citing *People v. Drew*, 5 Mason 28.

⁵ *Peck v. Cary*, 27 N. Y. 9; 84 Am. Dec. 220.

⁶ *In re Lee*, 46 N. J. Eq. 193; 18 Atl. 525; *In re Halbert*, 15 N. Y. Misc. Rep. 308; 37 N. Y. Supp. 757; *In re Convey*, 52 Iowa, 197; 2 N. W. 1084; *In re Connolly* (N. Y.), 403.

⁷ *Peck v. Cary*, 27 N. Y. 9; 84 Am. Dec. 220.

⁸ *In re Johnson*, 7 N. Y. Misc. Rep. 220; 27 N. Y. Supp. 649.

⁹ *Pierce v. Pierce*, 38 Mich. 412; *Key v. Holloway*, 7 Baxt. 576.

¹⁰ *Dimond's Estate*, 3 Pa. Dist. Rep. 554; *Belcher v. Belcher*, 10 Verg. 121.

¹¹ *Best v. Best*, 11 Ky. L. Rep. 215.

each particular case and to be determined upon those facts.¹²

Sec. 1162. Habits of intoxication—Habitual drunkard.

It by no means follows that because a man is an habitual drunkard he cannot make a valid will. As is well known, an habitual drunkard when not in his "cups" is often as capable a man mentally as one who has never been addicted to the use or has never used intoxicating liquors.¹³ But a long-continued use of intoxicating liquors may so impair a man's mind and destroy his memory and other faculties as to produce insanity, or render him *non compos mentis*, which will invalidate his will.¹⁴ And weakness of intellect occasioned by intemperance to the extent of disqualifying a testator from knowing and comprehending the nature, effect and consequences of his act, is sufficient to incapacitate him to make a valid will.¹⁵ If intoxication alone

¹² *Pierce v. Pierce*, 38 Mich. 412; *Ball v. Kane*, 1 Pennewell (Del.), 90; 39 Atl. 778.

The will of a confirmed drunkard has been upheld, though he had drunk whisky several times during the day on which he executed his will, it appearing that his mind had not been so excited by the liquor as to disorder his faculties and pervert his judgment. *Peck v. Cary*, 27 N. Y. 9; 84 Am. Dec. 220; *In re Miller*, 179 Pa. 645; 36 Atl. 139; 39 L. R. A. 220. This case is an interesting one, in that it sets forth an analysis of the evidence, and so is the case of *Miller's Estate*, 179 Pa. 645; 36 Atl. 139; 39 L. R. A. 220.

¹³ *In re Johnson*, 57 Cal. 529; *In re Schusler's Estate*, 198 Pac. 81; 47 Atl. 966; *Wiseman's Estate*, 5 Pa. Co. Ct. Rep. 561; *In re Taskers' Estate*, 205 Pa. 455; 55 Atl. 24; *In*

re Dugan's Estate, 6 Pa. Dist. Rep. 222; *Bush v. Lisle*, 89 Ky. 393; 12 S. W. 762; *Turner v. Cheesman*, 15 N. J. Eq. 243; *Whiteneck v. Stryker*, 2 N. J. Eq. 8; *Gardner v. Gardner*, 22 Wend. 526; 34 Am. Dec. 340; *Peck v. Cary*, 24 N. Y. 9; 84 Am. Dec. 220; *Houster v. Leightner*, 42 Phila. Leg. Int. 289; *In re McLaughlin*, 2 Redf. 504; *Philadelphia, etc., Co. v. Drinkhouse*, 17 Phil. 23.

¹⁴ *Starrett v. Douglas*, 2 Yeates (Pa.), 48; *Gardner v. Gardner*, 22 Wend. 526; 34 Am. Dec. 340; *In re Halbert*, 15 N. Y. Misc. Rep. 308; 37 N. Y. Supp. 757; *Stedham v. Stedham*, 32 Ala. 525; *Leech v. Leech*, 5 Clark (Pa.), 86; 1 Phila. 244; 4 Am. L. Jr. 174.

¹⁵ *Leech v. Leech*, 5 Clark (Pa.), 86; *In re Johnson*, 7 N. Y. Misc. Rep. 220; 27 N. Y. Supp. 649.

is relied upon, not combined with a general weakness of intellect, then it must have been carried to the extent of intoxication generally or at the time of making the will.¹⁶ But if the testator retain sufficient capacity to understand the business in which he is engaged—in the execution of his will—he will have sufficient capacity to execute a valid will, although he may be aged, his memory weak and he be addicted to liquor and under its influence at the time.¹⁷ This is especially true if the testator can comprehend what property he is giving or willing away, the objects of his bounty, the meaning of the business in which he is engaged, the relation of each of these factors to the others and the distribution that he is making by his will, notwithstanding he is addicted to the excessive use of intoxicating liquors, and to some extent his indulgence in them has impaired his mental and physical powers and contributed to the degradation of his moral character.¹⁸

¹⁶ O'Neil v. Murray, 4 Bradf. 311; McLaughlin's Will, 2 Redf. Sur. 504.

¹⁷ Whiteneck v. Stryker, 2 N. J. Eq. 8; *In re McLaughlin*, 2 Redf. 504; Peck v. Cary, 27 N. Y. 9; 84 Am. Dec. 220; Houser v. Lightner, 42 Phila. Leg. Int. 289; *In re Halbert*, 15 N. Y. Misc. Rep. 308; 37 N. Y. Supp. 757; Gardner v. Gardner, 22 Wend. 526; 34 Am. Dec. 340; Philadelphia, etc., Co. v. Drinkhouse, 17 Phila. 23; Herbert v. Winn, 24 La. Ann. 385; Bannister v. Jackson, 45 N. J. Eq. 702; 17 Atl. 692; affirmed, 46 N. J. Eq. 593; 21 Atl. 753; Ayrey v. Hill, 2 Add. Eccl. Rep. 206; Handley v. Stacey, 1 Fost. & F. 574.

¹⁸ Bannister v. Jackson, 45 N. J. Eq. 702; 12 Atl. 692; affirmed, 45 N. J. Eq. 593; 21 Atl. 753; Taylor v. Kelly, 31 Atl. 59; 68 Am. Dec. 150; *In re Johnson*, 15 N. Y. Misc. Rep. 220; 27 N. Y. Supp.

649; Hennessey v. Woulfe, 49 La. Ann. 1376; 22 So. 394; Miller Estate, 179 Pa. 645; 36 Atl. 139; 39 L. R. A. 220; Ayrey v. Hill, 2 Add. Eccl. Rep. 206; Kohl v. Schober, 35 N. J. Eq. 461; Handley v. Stacey, 1 Fost. & F. 574; *In re Harper's Will*, 4 Bibb, 244; McIntire v. McConn, 28 Iowa, 480; *In re Tift's Will*, 55 N. Y. Misc. Rep. 151; 106 N. Y. Supp. 362; *In re Hewitt's Will*, 31 N. Y. Misc. Rep. 81; 64 N. Y. Supp. 571; *In re Glockner's Will*, 2 N. Y. Supp. 97; *In re Underhill's Will*, Prob. Rep. (N. Y.) 196; *In re Lang's Est.*, 65 Cal. 19; 2 Pac. 491; *In re Cochran's Will*, 1 T. B. Mon. 263; 15 Am. Dec. 116; *In re Hubbard*, 6 J. J. Marsh. 58; Hart v. Thompson, 15 La. 88; Pierce v. Pierce, 38 Mich. 412; McSorley v. McSorley, 2 Bradf. Sur. 188; Stebbins v. Hart, 4 Dem. Sur. 501; *In re Hatten's Will*, 3 N. Y. St. Rep.

Sec. 1163. Drunkenness as evidence of incapacity.

Although drunkenness of itself does not destroy mental capacity to make a will, yet as a matter of evidence it is ad-

213; *In re Tracy*, 11 N. Y. St. Rep. 103; *In re Wisenan's Estate*, 5 Pa. Co. Ct. Rep. 561; *Andress v. Weller*, 2 Green Eq. (N. J.) 604; *Elkinton v. Buick*, 44 N. J. Eq. 154; 15 Atl. 391; 1 L. R. A. 161; *In re Lee's Will*, 46 N. J. Eq. 193; 18 Atl. 525; *Black v. Ellis*, 3 Hill, 68; *Riley*, 73; *In re Reed's Will*, 2 Con. Sur. 403; 20 N. Y. Supp. 649; *Lewis v. Jones*, 50 Barb. 645; *Leckey v. Cunningham*, 56 Pa. 370; *Hannun v. Worrell*, 2 Del. Co. Rep. 49; *Frost v. Wheeler*, 43 N. J. Eq. 573; 12 Atl. 612; *Bannister v. Jackson*, 45 N. J. Eq. 702; 17 Atl. 692; *Pan-coast v. Graham*, 2 McCart. (N. J.) 294; *Hebert v. Winn*, 24 La. Ann. 385; *Turner v. Cheesman*, 2 McCart. Eq. (N. J.) 243.

The following instruction was held to be correct: "A man may have sufficient mind to know and comprehend that he is making a will and thereby disposing of his property, giving it to some of the natural objects of his bounty to the exclusion of others, and have an object in so doing which he fully comprehends, and yet be prompted so to dispose of his property by some form of monomania. And if the monomania affect in any way or entered in the making of the will, such will would be invalid and should be set aside." *Swygart v. Willard*, 166 Ind. 25; 76 N. E. 755; *Young v. Miller*, 145 Ind. 652; 44 N. E. 757.

"The jury were instructed that

if a testator was sober and in possession of all his mental faculties at the time of making the will, the fact that he was drunk at other times would not of itself be sufficient evidence to invalidate the will. It is argued that the court invaded the province of the jury by the assumption in his instruction that drunkenness was some evidence of insanity. There was much evidence in this case of the excessive use of intoxicating liquors by the testator. It was admitted without objection, and rightly so, as tending to show mental incapacity to make the will in suit. The next instruction advised the jury that if drunkenness was so long continued as to produce unsoundness of mind, the same rules as to testamentary capacity would apply as in cases of mental unsoundness from other causes. Those two instructions correctly stated and applied the law to the evidence upon the subject of the testator's drunkenness; and the instruction complained of did not invade the province of the jury." *Swygart v. Willard*, 166 Ind. 25; 76 N. E. 655.

For instances where wills were held valid, although excessive drinking had been shown, extending over a long period of time, see *Miller's Estate*, 179 Pa. 645; 36 Atl. 139; 39 L. R. A. 220; *Pan-coast v. Graham*, 2 McCart. Eq. (N. J.) 294; *Bannister v. Jackson*, 45 N. J. Eq. 702; 17 Atl.

missible upon the question of the existence or non-existence of such capacity.¹⁹ But proof of occasional fits of intoxication are not sufficient to show want of incapacity in the testator to execute his will,²⁰ nor is evidence sufficient which merely shows an excessive use of liquors.²¹ Under the general allegation of unsoundness of mind, evidence of the use of intoxicating liquors may be given, where it is claimed at the time it is offered that their use produced unsoundness;²² and whether or not such use of liquors produced such an unsoundness of mind is a question for the jury.²³ Yet where it was shown that the testator originally possessed a strong mind which might have been weakened by disease and dissipation; that he was frequently drunk and generally ill-natured and stubborn, it was held that there was not sufficient evidence of incapacity to execute the will contested to submit the case to the jury.²⁴ So evidence that the testator was very nervous, weak and suffering from mental and physical prostration at the time of executing his will, due to over-stimulation, and there was no evidence of an inability on his part to comprehend the nature and character of the testamentary power or its exercise, but there was evidence that shortly afterwards he said he had changed his will, stating the change accurately, it was held that there was not sufficient evidence to send the case to the jury.²⁵ But where undue influence was claimed to have been exercised upon the testator, and it

692; *In re Hatten's Will*, 3 N. Y. St. Rep. 213; *Bush v. Lisle*, 89 Ky. 393; 12 S. W. 762; *McIntire v. McCann*, 28 Iowa, 480; *In re Hewitt's Will*, 31 N. Y. Misc. Rep. 81; 64 N. Y. Supp. 571; *Peck v. Cary*, 27 N. Y. 9; 84 Am. Dec. 220; *In re Tasker's Estate*, 205 Pa. 455; 55 Atl. 24.

For cases where the wills are held invalid, see *McSorley v. McSorley*, 2 Bradf. Sur. 188; *In re Underhill's Will*, Prob. Rep. 196.

¹⁹ *Swygart v. Willard*, 166 Ind. 25; 76 S. E. 655; *In re Harrigan*,

Myr. Prob. 135; *Ball v. Kane*, 1 Pennewill (Del.), 90; 39 Atl. 778.

²⁰ *Violet's Will*, 1 Bibb, 617.

²¹ *Weisman's Estate*, 45 Phila. Leg. Int. 274; *In re Johnson*, 57 Cal. 529.

²² *In re Gharky*, 57 Cal. 274.

²³ *In re Johnson*, 57 Cal. 529; *In re Gharky*, 57 Cal. 274.

²⁴ *McPherson's Appeal*, 9 Cent. Rep. (Pa.) 408.

²⁵ *Harmony Lodge I. O. O. F.'s Appeal*, 127 Pa. 269; 18 Atl. 10. See also *In re Tasker's Estate*, 205 Pa. 455; 55 Atl. 24.

was shown that some time before he had been addicted to the use of intoxicating liquors to an unusual degree; that the son to whom he gave three-fourths of his property was always with him when he was intoxicated, and had said there was boodle in it for him; and that he had deliberately prejudiced his father against his other children and ingratiated himself in his favor, it was held that the question of undue influence must be submitted to the jury, although the son was not actually present when the will was executed.²⁶

Sec. 1164. Drunkenness in connection with conduct and condition—Sufficiency of evidence.

Proof that a testator's intellect was greatly impaired by the use of intoxicating liquors and opium, in consequence of which he was frequently incapable of transacting business, is not sufficient to overcome the presumption of his sanity, in the absence of proof that such was his condition at the time he executed his will.²⁷ Nor is it sufficient to show frequent sleepiness, flightiness and violent outbursts of passion, occasioned by excessive drinking, even though it be also shown he used narcotics,²⁸ and much less does proof of occasional or even habitual fits of drunkenness, want of domestic management and generally bad conduct on his part,²⁹ even though it be shown that he was old, weak in body, short in memory, and that he had used a few incoherent expressions.³⁰ Nor is it sufficient to show, to prevent the probate of a will or set aside its probate, that the testator drank liquors, was occasionally wild and violent from their effect, his mind undoubtedly impaired and weakened, and capacity possibly temporarily suspended.³¹ Proof of fits of levity occasioned by drinking, of course, will not be sufficient, especially if it be

²⁶ Miller's Estate, 179 Pa. 645;
36 Atl. 139; 39 L. R. A. 220.

²⁷ Temple v. Temple, 1 Hen. &
M. 476.

²⁸ McCullough's Will, 35 Pitts.
L. Jr. 169.

²⁹ Harper's Will, 4 Bibb, 244.

³⁰ Hight v. Wilson, 1 Dall. 94;
1 L. Ed. 51; Keating's Appeal, 19
Pitts. L. Jr. (N. S.) 283; White-
neck v. Stryker, 2 N. J. Eq. 8;
Philadelphia, etc., Co. v. Drink-
house, 17 Phila. 23.

³¹ Julke v. Adam, 1 Redf. 454.

shown that he has acted with a firm, collected and efficient mind in executing his will.³² So a testator who was drunk and played drunken pranks was held competent to execute a will, it being shown he transacted his own business, kept his own accounts and made his own returns for assessment of taxes.³³ Where the evidence showed that the testator had indulged in a drunken debauch for five days before the date on which he executed his will, on the date of its execution indulged in improper and profane language as intoxicated men frequently do; but it was not shown he exhibited any insane conduct or committed any extravagance on that day; and the persons who were present at the very time of the execution of the will saw nothing in him indicating a want of ordinary intelligence or entire sanity, one of whom was from previous knowledge and present observation eminently competent to speak, it was held that the will was valid, and incapacity to execute it had not been shown.³⁴ Nor is it sufficient to set aside a will to show that the testator was intemperate and accustomed to paroxysms of great intoxication, becoming insensible, and that his death was probably caused by exposure while intoxicated, and by the effects of his intoxication, even if accompanied by the testimony of experts that he was insane, it appearing that he would remain sober for a considerable length of time, and was considered a man of good mind when sober, the experts not having made a personal examination of him, and others that knew him intimately expressly stating that his mind had not been impaired.³⁵ Where the testimony of incapacity was extremely biased and sometimes false, and part of the property was bequeathed pursuant to a contract that if the legatee would live with and take care of him for life he would will her his property, and his neighbors who had known him for years testified he was of sound mind and memory, it was held not sufficient to overthrow the will to show long-continued habits

³² Violet's Will, 1 Bibb, 617.

³³ Billingham v. Vickers, 1
Phillim. Eccl. Rep. 193.

³⁴ Peck v. Cary, 27 N. Y. 9; 84

Am. Dec. 220.

³⁵ McIntire v. McConn, 28 Iowa,
480.

of intoxication on his part, irrational conduct, and that for two years previous to his death he had been paralyzed on one side, and later had lost the power of speech.³⁶ So where the evidence showed that a testator's mind was clear at the time he executed his will, it was not sufficient to overthrow it to show that he was recovering at the time from an attack of *mania a potu*, and that the day after the date of his will he committed suicide.³⁷ So proof that the testator had told his wife and priest during his intoxication that he believed his only son was illegitimate, based upon stories and reports he had heard shortly after his marriage, was held not such an insane delusion as will invalidate his will disinheriting such son.³⁸ So where it appeared that at the time the testator was not intoxicated, and had testamentary capacity, it was held that the inference of want of testamentary capacity was not justified by evidence that he drank intoxicating liquors excessively for some years prior to his death, and was intoxicated most of the last year of his life.³⁹ Where the evidence showed that the testatrix led an irregular life, concealed her identity as much as possible, had periodic attacks of drunkenness, but during an interval of three or four weeks of sobriety executed her will, and during such period she was rational, conversed intelligently on many subjects, gave intelligent directions concerning the repair of her house, and the principal beneficiary under her will was her paramour, and another beneficiary her servant, and no fraud had been practiced upon her, and the will was not otherwise unnatural in its terms, it was held that it was not invalid for a want of testamentary capacity.⁴⁰ So where by the excessive use of liquors a testator had become insane and had been confined in an asylum for the insane, but his inquisition had been set

³⁶ *In re Tacke*, 17 N. St. Rep. 805.

³⁷ *McElwee v. Ferguson*, 43 Md. 479; *Koegel v. Egner*, 54 N. J. Eq. 623; 35 Atl. 394; *Bush v. Lisle*, 89 Ky. 393; 12 S. W. 762

³⁸ *In re Smith*, 53 N. Y. St. Rep. 658.

³⁹ *In re Schusler's Estate*, 198 Pa. 81; 47 Atl. 966; *In re Tasker's Estate*, 205 Pa. 455; 55 Atl. 24; *McIntire v. McConn*, 28 Iowa, 480.

⁴⁰ *In re Hewitt's Will*, 31 N. Y. Misc. Rep. 81; 64 N. Y. Supp. 571.

aside, and during the next two years, and before he made his will he judiciously carried on his farm, making improvements on it, employing workmen, collecting rents, keeping his account books neatly and accurately, buying and selling property on good bargains, exhibiting much intelligence concerning his assessment for taxes, and at the execution of his will showed good recollection of his kindred and relations in life, comprehended the will in all its bearings, although he never recovered the full mental vigor he possessed before his confinement, and after his restoration there were intervals in which he was incompetent to make a will, it was held that such a will was valid.⁴¹

Sec. 1165. Drunkenness in connection with the nature of the act.

In determining whether or not the testator was competent to make a will, the dispositions of his property are always a subject of examination and consideration; not merely to see whether they are extravagant or unreasonable (for perfectly competent people make such dispositions of their property), but whether they depart so widely from what is usually considered natural as to be fairly referable to no other cause than a disordered intellect.⁴² Thus where a testator was suffering from the effects of a debauch when he executed his will, and a physician gave his opinion that he was incapable of understanding what he was doing, yet it was shown that the will was reasonable and the testimony was consistent with his ability to execute it, as well as of his understanding of the condition of his property, the will was upheld.⁴³ Where

⁴¹ *Pancoast v. Graham*, 2 Mc-Cart. Eq. (N. J.) 294. In a very similar case, where no inquisition of lunacy had been held, and no insanity was shown, a will was upheld, though at the time of its execution the testator was somewhat under the influence of liquor. *Bannister v. Jackson*, 45 N. J. Eq. 702; 17 Atl. 692. See also *In re*

Hatten's Will, 3 N. Y. St. Rep. 213.

For two instances where wills were set aside, see *In re Underhill's Will*, Prob. Rep. (N. Y.) 196; and *McSorley v. McSorley*, 2 Bradf. Sur. 188.

⁴² *Peck v. Cary*, 27 N. Y. 9; 84 Am. Dec. 220.

⁴³ *In re Peck*, 42 N. Y. St. Rep. 898.

the disposition of property was in accord with intentions expressed at previous times when the testator was perfectly at himself, and it was shown he was sober when the will was executed, or not so intoxicated that he did not know what he was doing, a will was upheld, though it was shown he had greatly injured himself by excessive drinking.⁴⁴ In determining the physical condition of the testator his signature may be considered; and if it shows no evidence of unsteadiness it will be quite a factor in determining the extent of his intoxication.⁴⁵ Where a testator, seventy-six years of age, just before his second marriage, had been addicted to the excessive use of liquors throughout his life, and his memory had begun to fail, though he still possessed some practical judgment on business matters, a deed in the nature of a testamentary disposition of his property was upheld, it having been executed in fulfillment of a purpose formed a long time before, and the division of the property was not so unequal as to shock one's sense of justice.⁴⁶ So a voluntary deed giving to one son more than to another will not be set aside, on the claim that at the time of its execution the grantor was somewhat intoxicated, especially if at the time he was sensible to what he was doing, and no undue or improper means were used to influence him to perform the act he did.⁴⁷ So where a woman's will totally excluded some of her next of kin with whom she had quarreled, and was in the handwriting of her attorney who was one of the executors and a residuary legatee to a large amount, he and his family both having large legacies, was upheld, having been executed eight years before her death, although she was guilty of excessive drinking and excessive extravagance, yet managed her own property, received her dividends, did various acts of business, corresponded with her friends rationally, and was not shown to be under any delusions, although the attesting witnesses spoke only to the bare execution, there being documents in her own hand-

⁴⁴ Hubbard's Will, 6 J. J. Marsh.

⁴⁶ Wiley v. Ewalt, 66 Ill. 26.

58.

⁴⁷ Belcher v. Belcher, 10 Yerg.

⁴⁵ *In re Schreiber*, 22 N. Y. St. 121.
Rep. 892.

writing showing both capacity and knowledge of the contents of the will, though not mentioning the residue.⁴⁸ So where a confirmed drunkard, perfectly aware of his tendencies to squander his estate, when he was perfectly sober executed a deed making provision for his family, his deed was upheld.⁴⁹ But where a testatrix at the time of executing her will entertained delusions likely to effect her testamentary provisions, and some time before that date she had suffered from attacks of *delirium tremens*, her will was refused probate, it being unequal in its provisions.⁵⁰ So where it was shown that a grantor of eighty-three was weak and infirm and addicted to intoxication, and the deed was drawn up by the agents of the grantees, a daughter and her husband, and no agent was employed on his part, a deed relinquishing to them, who were the reversioners, all the grantor's interest in a fund of six thousand pounds, in consideration of an annuity of forty pounds a year during his life, was set aside.⁵¹ So where a testator in a fit of *delirium tremens* fell out of the window of the second story of a house and badly injured himself, and he mistakenly insisted that his wife's grandson had pushed him out, and was under the delusion that his wife wanted to poison him and persons in the house were trying to rob him; and after making a will giving to one of his sons a considerable gift, and laboring under the mistaken belief that such son had broken open the envelope in which it was enclosed and read it, he made a second one which gave him nothing, and otherwise radically changed bequests formerly made to others, the will was set aside.⁵² So where a testator had several times been committed to an asylum for alcoholic insanity, and the physician who attended him and one of the attesting witnesses testified that he was of unsound mind, a will giving one of his two sons more than the other, devising to his wife property a part of which he had previously sold, and giving

⁴⁸ *Wheeler v. Alderson*, Hogg Eccl. Rep. 574.

⁴⁹ *Ritter's Appeal*, 59 Pa. 9.

⁵⁰ *Waters v. Cullen*, 2 Bradf.

⁵¹ *McDiarmid v. McDiarmid*, 3 Bligh N. R. 374.

⁵² *Edge v. Edge*, 38 N. J. Eq.

her only about one-half the amount devised to her sister and her children, though the wife had cared for and watched over him faithfully, probate of his will was refused.⁵³

Sec. 1166. Drunkenness in connection with undue influence.

If undue influence is relied upon, then a less degree of intoxication will be sufficient to overturn a will executed by a person at the time he is intoxicated, or who has been greatly reduced mentally and physically by excessive drinking, than would be necessary if only intoxication was the sole factor in the contest. When the charge is undue influence, evidence of intoxication is always admissible, though standing alone it would by no means overturn the will.⁵⁴ Thus where a testator, seventy years of age and who had been an habitual drunkard for fifty years, yet having an uncontrollable appetite, went to live with his brother who was a saloon keeper, and who offered him a home with full and free opportunity to drink when and what he pleased, and who even resisted the efforts of his guardian to take him away, and on the day when he made his will had been drinking some, it was held that his will making his brother his sole legatee should be set aside, as having been procured by undue influence.⁵⁵ So where an aged person, with his faculties greatly impaired by drinking, made a will giving to his wife, who had for some time directed his intentions and controlled his acts, two-thirds of his property instead of one-half provided for in a prior will, saying that he desired to satisfy her and that it must be drawn as she desired it, she at the time of its execution giving directions as to particular dispositions, it was held that its probate must be refused on the ground that it had been executed under undue influence.⁵⁶ So where the

⁵³ *In re Ely*, 16 N. Y. Misc. Rep. 228.

The cases of *In re Halbert*, 15 N. Y. Misc. Rep. 308; 37 N. Y. Supp. 757; and *In re Johnson*, 7 N. Y. Misc. Rep. 220; 27 N. Y. Supp. 649, were distinguished in this case, on the ground that the only contention in them was that the

testator was intoxicated at the time he executed his will, and no question of insanity was raised.

⁵⁴ *Miller Estate*, 179 Pa. 645; 36 Atl. 139; 39 L. R. A. 220; *Smith v. Smith*, 67 Vt. 443.

⁵⁵ *Slinger's Will*, 72 Wis. 22.

⁵⁶ *Julke v. Adam*, 1 Redf. 454.

attorney preparing a will was a legatee under it to the extent of one-fourth of testator's estate, and the remaining legatees took the remainder of the estate to the exclusion of his own family, and it was shown that the testator was a person of slender capacity, addicted to drink, singular in appearance, indulging in childish and frivolous amusements and occupations, it was held that the court must view the operation of the will itself with care, diligence and suspicion.⁵⁷ And where a will was drawn for a foreigner who had little familiarity with the English language and who was habitually intoxicated, by his own partner who supervised its execution and took substantial benefits under it, it was held to raise a strong suspicion of fraud and undue influence.⁵⁸ So where some women kept a testator in a state of intoxication and had represented to him by others they were persons of virtue and good character, and urged him to make a will in their favor to the exclusion of his own blood, it was held that evidence to show they were persons of bad character was admissible.⁵⁹ But where a will was prepared for a person of slender capacity under which the attorney preparing it received at least one-fourth of the estate and the remaining legatees took the rest of the estate to the exclusion of his only son and heir, it was admitted to probate, though he was addicted to drink, it being shown that there had been a complete alienation between him and his son, they having ceased to speak to each other, and that the attorney meant that it should be fairly and openly executed.⁶⁰ And where a legatee had treated the testator kindly, furnished him a home, cared for him, advanced him means, which the testator several times declared conformed with his wishes, it was held his will was entitled to probate, and such probate should not be denied on the ground of mental incapacity and undue influence merely upon a showing that he was addicted to drink, was an habitual drunkard and had been for two

⁵⁷ *Barry v. Bretlin*, 2 Moore, P. C. 482.

⁵⁸ *Koegel v. Egner*, 54 N. J. Eq. 623; 35 Atl. 394.

⁵⁹ *Nussear v. Arnold*, 13 S. &

R. 323. See also *McDiarmid v. McDiarmid*, 3 Bligh N. R. 374.

⁶⁰ *Barry v. Butin*, 2 Moore, P. C. 482.

years, and had been admitted to an insane asylum several times and twice to the penitentiary for drunkenness, when a similar will had been previously made and the persons who would otherwise have been entitled to his bounty had attempted to restrain his appetite, but had refused him admission into their homes.⁶¹ If there be no evidence showing fraud, compulsion or improper practices, a will executed by a person weak in will and impaired in memory, and because of that an easy prey to fraud, compulsion and improper conduct, will be upheld, although at the time he executed such will he was in a somewhat elated state of mind caused by drinking liquor near at hand.⁶² But where the charge is that the will was procured by undue influence, and that the mind of the testator was unsound, it cannot be shown that he had declared he had never executed the will in question, and that if he had signed it the legatees got him drunk and made him do it. Such evidence is not admissible, it not being evidence of the charge of undue influence and unsoundness of mind.⁶³

Sec. 1167. Point of time under investigation.

The point of time for the investigation whether the testator had the capacity to execute the will in question is the moment of its execution.⁶⁴ The evidence must show, to overturn a will, that at the moment of its execution he was legally disqualified from giving effect to it; ⁶⁵ and if that be shown, evidence of his capacity at other times is imma-

⁶¹ *In re* Reed, 2 Connoly, 403.

⁶² *In re* Storey, 20 Ill. App. 183.

⁶³ *Gibson v. Gibson*, 24 Mo. 227. Consult *Wheeler v. Alderson*, Hagg. Eccl. Rep. 574.

⁶⁴ *In re* Hatten's Will, 3 N. Y. St. Rep. 213; *Ball v. Kane*, 1 Pennewill (Del.) 12; 39 Atl. 778; *Hennessey v. Woulfe*, 49 La. Ann. 1376; 22 So. 394; *In re* Tasker's Estate, 205 Pa. 455; 55 Atl. 24; *Dimond's Estate*, 3 Pa. Dist. Rep.

554; *Pierce v. Pierce*, 38 Mich. 412; *In re* Schulser's Estate, 198 Pa. 81; 47 Atl. 966; *In re* Tasker's Estate, 205 Pa. 455; 55 Atl. 24; *Gable v. Grant*, 3 N. J. Eq. 629.

⁶⁵ *Peck v. Cary*, 27 N. Y. 9; 84 Am. Dec. 220; *Wheeler v. Alderson*, 3 Hagg. Eccl. Rep. 574; *Andress v. Weller*, 3 N. J. Eq. 604; *In re* Hubbar's Will, 6 J. J. Marsh. 58.

terial and irrelevant.⁶⁷ Merely proving that the testator was a drunkard, not accompanied by proof that he was intoxicated when he executed the will, is not sufficient to carry the case to the jury upon the charge of incapacity to execute it,⁶⁸ and proof of habits of excessive periodical drinking that are not continuous, not accompanied by proof of intoxication when the will is executed, especially when it is shown he dictated the will and understood the provisions perfectly, both then and afterwards, is not sufficient to require the case to be submitted to the jury.⁶⁹ Proof that the testator had had attacks of *mania a potu* frequently during a period of ten years before the date of the will is not sufficient to set it aside, in absence of evidence of drunkenness and unsound mind on the day he executed it.⁷⁰ Vague statements that the testator was more or less under the influence of liquor on the morning of the day he executed his will are not sufficient to justify a refusal to admit it to probate.⁷¹ Proof of continued debauches or continued prior drunkenness will not be sufficient, at least if it be shown that at the time he executed the will he was not under the excitement of liquor,⁷² or where he appeared then to have been sober,⁷³ and rational.⁷⁴

⁶⁶ *Pierce v. Pierce*, 38 Mich. 412.

⁶⁷ *Dimond's Estate*, 3 Pa. Dist. Rep. 554.

⁶⁸ *Levis' Estate*, 140 Pa. 179; 21 Atl. 242; *In re Tasker's Estate*, 205 Pa. 455; 55 Atl. 24; *In re Schulser's Estate*, 198 Pa. 81; 47 Atl. 966.

⁶⁹ *Harmony Lodge I. O. O. F.'s Appeal*, 127 Pa. 269; 18 Atl. 10; *In re Tasker's Estate*, 205 Pa. 455; 55 Atl. 24.

⁷⁰ *Herbert v. Winn*, 24 La. Ann. 385; *In re Tracey*, 11 N. Y. St. Rep. 103.

⁷¹ *Dimond's Estate*, 3 Pa. Dist. Rep. 554.

⁷² *Ayrey v. Hill*, 2 Add. Eccl. Rep. 206.

⁷³ *Hubbard's Will*, 6 J. J. Marsh. 59; *In re Tracey's Will*, 11 N. Y. St. Rep. 103; *Gable v. Grant*, 3 N. J. Eq. 629; *In re Watson*, 34 N. Y. St. Rep. 906.

⁷⁴ *Hart v. Thompson*, 15 La. 88; *Fluck v. Rea*, 51 N. J. Eq. 233; affirming 51 N. J. Eq. 539. In this case the testator had been drunk practically for six months, but four men who saw him at the time he executed his will testified he was not then intoxicated and was in full possession of his faculties; and his signature to the will was not that of a trembling inebriate, but the bold, rapid writing of a sober man.

Sec. 1168. Presumptions—Burden of proof.

Mere proof that the testator had been intoxicated on previous times and was then incapacitated to execute a will, does not raise the presumption that he was not capable of executing it at the date of its execution.⁷⁵ Nor is there raised a presumption of incapacity by proof that the testator was an habitual drunkard.⁷⁶ The burden in a contest of a will, to show incapacity in the testator arising from his alleged drunken condition, or because of a long-continued course of drunkenness, rests upon the contestor or person averring the incapacity.⁷⁷ In a contest of the will of an habitual drunkard, to uphold a will it need not be shown it had been executed in lucid interval.⁷⁸ Even on proof of insanity occasioned by drunkenness, those claiming the will to be valid need not show it was executed during a lucid interval; for such insanity being of a temporary character, there is no presumption it continued up to the time the will was executed, especially where the proof introduced only shows its existence on a prior date.⁷⁹ The burden is upon the contestant to show that at the very time the testator signed his will that he was incompetent to execute one.⁸⁰ But there are a few cases which to a certain extent reverse this rule. Thus it has been held that to establish a will attacked on the grounds of intoxica-

⁷⁵ *Black v. Ellis*, 3 Hill L. (S. C.) 68; *In re Schulser's Estate*, 198 Pa. 81; 47 Atl. 966; *Elkinton v. Brick*, 44 N. J. Eq. 154; 15 Atl. 391; 1 L. R. A. 161; *In re Lee's Will*, 46 N. J. Eq. 193; 18 Atl. 525.

⁷⁶ *Koegel v. Egner*, 54 N. J. Eq. 623; 35 Atl. 394; *In re Lee's Will*, 46 N. J. Eq. 193; 18 Atl. 525; *In re Schusler's Estate*, 198 Pa. 81; 47 Atl. 966.

⁷⁷ *Harper's Will*, 4 Bibb, 244; *Starrett v. Douglass*, 2 Yeates, 48; *Black v. Ellis*, 3 Hill, 68; *Riley*, 73.

⁷⁸ *Gardner v. Gardner*, 22 Wend.

526; 34 Am. Dec. 340; *Koegel v. Egner*, 54 N. J. Eq. 623; 35 Atl. 394; *In re Lee*, 46 N. J. Eq. 193; 18 Atl. 525.

⁷⁹ *Duffield v. Roberson*, 2 Harr. (Del.) 375; *Elkinton v. Brick*, 44 N. J. Eq. 154; 15 Atl. 391; 1 L. R. A. 161.

⁸⁰ *Andress v. Weller*, 3 N. J. Eq. 604; *Fluck v. Rea*, 51 N. J. Eq. 233; 27 Atl. 636; *Sanderson v. Sanderson*, 52 N. J. Eq. 243; 30 Atl. 326; *Herbert v. Winn*, 24 La. Ann. 385; *In re Halbert*, 15 N. Y. Misc. Rep. 308; 37 N. Y. Supp. 757; *Rutland v. Gleaves*, 1 Swan 198.

tion all that is required to be shown is the absence of the excitement of liquor at the time of its execution, or at least the absence of excitement in any such degree as would vitiate it,⁸¹ and that where an aged person of low intellect had become addicted to the excessive use of intoxicating liquors, and who was perfectly mild while under their influence, the bare proof of its execution, it was held was not sufficient to authorize its probate, but there must be proof of instructions or knowledge of its contents on the part of the testator.⁸² So where a will was offered for probate and it appeared that the testator for some time prior to its execution and until his death had been generally in a state of derangement produced by the habitual and intemperate use of intoxicating liquors, although he enjoyed some intervals in which his mind might have been lucid, it was held that before it was admitted to probate it must be clearly shown that he executed the will during one of his lucid intervals.⁸³ So where the testatrix was shown to have been seriously impaired by the use of liquors and opiates, and she had nothing to do with the preparation of her will, and had not read it or heard it read or its contents stated, it was held that the proponent must show that she knew what was in it when she signed it.⁸⁴ And where the testatrix was of great age and addicted to the use of opiates and intoxicating liquors to such an extent as to enfeeble her faculties, it was held that the legal presumption she understood the contents of her will, which had been read to her, was only a *prima facie* presumption.⁸⁵

Sec. 1169. Inquisition of drunkenness.

The usual statute rendering the contracts of an habitual drunkard void, entered into after he has been adjudged such, does not necessarily render him incompetent to execute a will nor afford sufficient evidence that he did not have the capac-

⁸¹ Ayrey v. Hill, 2 Add. Eccl. Rep. 206.

⁸² Durling v. Loveland, 2 Curt. Eccl. Rep. 225.

⁸³ Cochran's Will, 1 T. B. Mon. 264; 15 Am. Dec. 116.

⁸⁴ Burritt v. Silliman, 16 Barb. 198.

⁸⁵ Rutland v. Gleaves, 1 Swan 198.

ity to execute it.⁸⁶ But such an adjudication covering the period when the will was executed raises a *prima facie* presumption that he was incompetent, and casts upon those upholding the will the burden of sustaining it by proof of his capacity to execute it.⁸⁷ It is not necessary to show, in order to uphold the will, that the testator had been judicially declared restored.⁸⁸ Perhaps an occasional case holds that it is not *prima facie* evidence, and other affirmative evidence of incapacity is necessary to overturn the will.⁸⁹ Failure of the person appointed to give bond and take charge of his ward's property until his death, leaving him to manage his own affairs, after a long lapse of years, will raise a presumption of reformation on the ward's part and a consequent capacity to execute a will.⁹⁰

Sec. 1170. Ratification of a previously executed will.

Suppose a testator is so intoxicated when he executed his will as to be unable to do so, but on being restored to his reason, and fully informed of what he has done and with a full and ample knowledge of its contents and provisions, he expresses satisfaction with its terms and his intention of retaining it as his will without further execution. Is the will

⁸⁶ Lackey v. Cunningham, 56 Pa. 370; Miller Estate, 179 Pa. 645; 36 Atl. 139; 39 L. R. A. 220; *In re Slinger's Will*, 72 Wis. 22; 37 N. W. 236.

⁸⁷ Hannum v. Worrall, 2 Del. Co. Rep. 49; Dugan's Estate, 6 Pa. Dist. Rep. 222; Lackey v. Cunningham, 56 Pa. 370; Lewis v. Jones, 50 Barb. 645; *In re Johnson*, 57 Cal. 529.

⁸⁸ *In re Johnson*, 57 Cal. 529; Lewis v. Jones, 50 Cal. 645 (explaining *In re Patterson*. 4 How. Pr. 34).

⁸⁹ See Dugan's Estate, 6 Pa. Dist. Rep. 222.

⁹⁰ Lackey v. Cunningham, 56 Pa. 370.

A hospital record for the in-

sane, containing an entry that the testator's father was admitted to the hospital because of intemperance, continued six months, and that he was affected with melancholia, resulting from intemperance, was held irrelevant in the absence of evidence showing the particular disease to be hereditary. *Rerchenbach v. Ruddach*, 127 Pa. 564; 16 Atl. 432; 24 Wkly. N. C. 476.

It has been held that a retrospective finding of the court on a commission of habitual drunkenness overreaching the date of a will was presumptive, but not conclusive, evidence of the testator's incapacity. *In re Patterson*, 4 How. Pr. 34.

valid? A contract made under such circumstances can unquestionably be ratified. In discussing one phase of this question Justice Campbell, of Michigan, said: "If a person is capable of knowing what he is about, has a will in his possession that he is satisfied with and does not choose to cancel or destroy it, the inference that it was not procured to be executed against his will or without his intelligent consent seems to arise as naturally in cases of asserted intoxication as in those of fraud or undue influence, and it would be equally unreasonable in either case to refuse to give such weight as it naturally calls for."⁹¹ But the quotation, however, only goes to the point that retention of the will in his possession was evidence that he himself did not consider he was so intoxicated at the time of its execution as not to know what he was doing. The question asked may be as readily asked in an instance where a will has been procured by undue influence. In such instances the mere retention of the will by the testator without objection cannot render it valid.⁹²

Sec. 1171. Gift.

If a drunken man knows the effect of his act, a gift by him is valid, especially if it be one proper for him to make;⁹³ but it is otherwise if he do not comprehend the consequences of his act.⁹⁴ So, if it is shown that the donor had periods of sobriety in which he was able to attend to business, and it is not shown he was intoxicated at the time he made the gift, it is not sufficient to avoid the transaction to show that he was a hard drinker, and that his habits of intoxication had affected his health and frequently rendered him unfit for business.⁹⁵ Where an habitual drunkard, with a very weak mind, sold his whole property to his brother, in whom he put great confidence, apparently without any consideration, his conveyance was set aside.⁹⁶

⁹¹ *Pierce v. Pierce*, 38 Mich. 412.

⁹² *Chaddick v. Haley*, 81 Tex. 617; 17 S. W. 233.

⁹³ *Carrigan v. Carrigan*, 15 Gr. Eq. (N. J.) 341.

⁹⁴ *Mishey's Appeal*, 107 Pa. St.

611; *Chapleau v. Chapleau*, 1 Leg. News 473.

⁹⁵ *Ralston v. Turpin*, 25 Fed. 7.

⁹⁶ *McCraw v. Davis*, 2 Ind. Eq. (N. C.) 618; see *Dunage v. White*, 1 Swan St. 137; *Cooke v. Clayworth*, 18 Ves. Jr. 17.

CHAPTER XXXVIII.

DIVORCE.

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SECTION.

- 1179. Drunkenness as cruelty.
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Sec. 1172. Drunkenness as a ground for a divorce.

In all States of the Union, except ten, drunkenness in one form or another is a cause for a divorce. Independent of other causes, drunkenness in England has not been a cause of divorce.¹ The right to a divorce because of drunkenness is given by a statute, and as these statutes greatly vary in the terms it is difficult to state in concise and intelligible form the exact result of the decisions.² But whatever the language

¹ See *Shutt v. Shutt*, 71 Md. 193; 17 Atl. 1024. This was at one time true in Maryland, and perhaps now, and so in Pennsylvania. *Mason v. Mason*, 131 Pa. 161; 18 Atl. 1021; *Bean v. Bean*, 11 Lanc. Bar 138, though this seems doubtful; *Johnson v. Johnson*, 35 Phila. Leg. Int. 70; *Foote v. Foote*, 71 N. J. Eq. 273; 61 Atl. 90 (not an absolute divorce).

² The following cases are instances of proceedings for divorces

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because of some form of drunkenness. *Stevens v. Stevens*, 8 R. I. 557; *Batchelder v. Batchelder*, 14 N. H. 380; *Golding v. Golding*, 6 Mo. App. 602; *Crowley v. Crowley* (Ky.), 40 S. W. 380; *Ryan v. Ryan*, 9 Mo. 539; *Porritt v. Porritt*, 16 Mich. 140; *McGraw v. McGraw*, 171 Mass. 146; 50 N. E. 526; *Magahay v. Magahay*, 35 Mich. 210; *Blaney v. Blaney*, 126 Mass. 205; *Werner v. Kelley*, 9 La. Ann. 60; *Lake v. Linton*, 6

of the statute may be, they will not be extended so far as to include the right to a divorce because of excessive use of a drug, as morphine or cocaine or chloroform.³ Nor is drunkenness insanity under a statute giving a divorce where either of the parties becomes insane.⁴ Drunkenness existing at the time of the marriage, although habitual, is no grounds for a divorce, unless possibly it was concealed. It must arise after the marriage.⁵ In some States habitual drunkenness to be a cause of divorce must have extended over a definite period immediately preceding the application for divorce; thus, in California, one year;⁶ and the same was true in Arkansas at one time,⁷ and so in Minnesota.⁸ Under such statutes if the defendant had ceased his intoxication for a definite period of several months—as for six months—immediately prior to the application for it, a divorce will not be granted.⁹ Where the drunken habit must have been for one year, proof of the habit for any less period will not warrant the granting of the divorce.¹⁰ Habitual drunkenness, however, does not constitute extreme cruelty;¹¹ but a statute allowing a divorce for any misconduct that permanently destroys the happiness

La. Ann. 262; *McKay v. McKay*, 18 B. Mon. 8; *Harman v. Harman*, 16 Ill. 85; *Burns v. Burns*, 13 Fla. 369; *Malone v. Malone*, 19 Cal. 627; 81 Am. Dec. 91; *Brown v. Brown*, 38 Ark. 324; *Rose v. Rose*, 9 Ark. 507.

³ *Youngs v. Youngs*, 130 Ill. 230; 22 N. E. 806; 6 L. R. A. 548, affirming 33 Ill. App. 223; *Commonwealth v. Whitney*, 11 Cush. 477; *Barber v. Barber* (Conn.) 14 Law Rep. 375; 1 Bishop, Mar. and Div. 627; *Dawson v. Dawson*, 23 Mo. App. 169; *Holland v. Holland*, 4 Leg. Gaz. 372; *Ring v. Ring*, 112 Ga. 854; 38 S. E. 330.

⁴ *Elzey v. Elzey*, 1 Houst. (Del.) 308.

⁵ *Porritt v. Porritt*, 16 Mich. 140; *Blaney v. Blaney*, 126 Mass.

205; *Lyster v. Lyster*, 111 Mass. 327; *Tilton v. Tilton*, 29 S. W. 290.

⁶ *Dunn v. Dunn*, 62 Cal. 176.

⁷ *Rose v. Rose*, 9 Ark. 507.

At one time in New Hampshire the plaintiff must have held a legal domicile in the State for three years during which the drunkenness existed. *Batchelder v. Batchelder*, 14 N. H. 380.

⁸ *Reynolds v. Reynolds*, 44 Minn. 132; 46 N. W. 236.

⁹ *Reynolds v. Reynolds*, 44 Minn. 132; 46 N. W. 236; *Burt v. Burt*, 168 Mass. 204; 46 N. E. 622.

¹⁰ *McCarthy v. McCarthy*, 117 Mo. App. 115; 93 S. W. 317.

¹¹ *Haskell v. Haskell*, 54 Cal. 262; anonymous, 17 Abb. N. C. 231.

of the plaintiff and defeats the purpose of the marriage relation, embraces instances of the habitual and immediate use of either intoxicating liquors or narcotics.¹²

Sec. 1173. Degree of drunkenness necessary to authorize the granting of a divorce.

What is sufficient drunkenness to authorize the granting of a divorce must turn upon the words used in the statute, but the most common cause assigned for a divorce is habitual drunkenness, or where one of the parties is an habitual drunkard. What constitutes habitual drunkenness, or when a man is an habitual drunkard, has been elsewhere discussed in this work and need not be here repeated;¹³ it is sufficient here to say that the habit must be actual and confirmed, though it need not be continual or even of daily occurrence;¹⁴ it must be a fixed habit or practice.¹⁵ One who has lost the control of his will-power so that he cannot resist the temptation to drink whenever the opportunity is offered is an habitual drunkard.¹⁶ But it is not essential to constitute a man an habitual drunkard that he be drunk all the time. He may be an habitual drunkard though there be intervals when he entirely refrains from the use of liquors,¹⁷ and a

¹² Barber v. Barber, 14 Law Rep. 375 (Conn.).

¹³ See Sections 51, 52, 53, 54.

¹⁴ Mack v. Handy, 39 La. Ann. 491; Williams v. Goss, 43 La. Ann. 868; 9 So. 750.

¹⁵ Walton v. Walton, 34 Kan. 195; 18 Pac. 110; Burns v. Burns, 13 Fla. 369; Golding v. Golding, 6 Mo. App. 602; McGill v. McGill, 19 Fla. 341; Magahay v. Magahay, 35 Mich. 210; Richards v. Richards, 19 Ill. App. 465; Myrich v. Myrich, 67 Ga. 771; Gourlay v. Gourlay, 16 R. I. 705; McKay v. McKay, 18 B. Mon. 8; Shuck v. Shuck, 7 Bush. 306; Craven v. Craven, 1 Rev. Leg. 508; Mack v. Handy, 39 La. Ann. 491;

2 So. 181; Williams v. Goss, 43 La. Ann. 868; 9 So. 750.

¹⁶ Walton v. Walton, 34 Kan. 195; 8 Pac. 110; Magahay v. Magahay, 35 Mich. 210; Richards v. Richards, 19 Ill. App. 465; De Lesdernier v. De Lesdernier, 45 La. Ann. 1364; 14 So. 191; Williams v. Goss, 43 La. Ann. 868; 9 So. 750; Blaney v. Blaney, 126 Mass. 205; McBee v. McBee, 22 Or. 329; 29 Pac. 887.

¹⁷ Walton v. Walton, 34 Kan. 195; 8 Pac. 110; Richards v. Richards, 19 Ill. App. 465; McGill v. McGill, 19 Fla. 341; Berryman v. Berryman, 59 Mich. 605; 26 N. W. 789.

man may be addicted to habitual drunkenness if he has the fixed habit of frequently getting drunk, though sober for weeks at a time, and although he may not be more often drunk than sober.¹⁸ The reasons for allowing a divorce for habitual drunkenness are because of the fact that the drunkard's habits are such as to render the marital relation disgusting and unendurable,¹⁹ and not alone because it disqualifies for business,²⁰ and partly because it renders him unfit for properly rearing and caring for children born of his marriage.²¹ If the indulgence in intoxicating liquors be excessive, frequent and regular, then it constitutes habitual drunkenness, such as the divorce laws contemplate.²² Thus, where a person for two years immediately prior to the time of the filing of the petition for a divorce had been frequently and customarily or habitually given to the excessive use of liquors, during which time he had thereby lost his power to control his appetite for drink, he was held to be an habitual drunkard.²³ And where a divorce could be granted for "continued drunkenness," it was held that the proof must be sufficiently clear to show that the defendant's habits of drunkenness were confirmed and that he was an habitual drunkard.²⁴ A fixed habit of drinking to such an excess as to disqualify a person from attending to his business during the greater part of the time usually devoted to business is habitual drunkenness, though there be intervals when he may be able to attend to his business.²⁵ Where the evidence

¹⁸ Brown v. Brown, 38 Ark. 324; Malone v. Malone, 19 Cal. 627; 81 Am. Dec. 91; Page v. Page (Wash.), 96 Pac. 82.

¹⁹ Burns v. Burns, 13 Fla. 369; Richards v. Richards, 19 Ill. App. 465; Shuck v. Shuck, 7 Bush, 306; Halls v. Cartwright, 18 La. Ann. 414; De Lerdernier v. De Lerdernier, 45 La. Ann. 1364; 14 So. 191.

²⁰ Richards v. Richards, 19 Ill. App. 465.

²¹ Richards v. Richards, 19 Ill.

App. 465; Barber v. Barber (Conn.), 14 Law Rep. 375.

²² Golding v. Golding, 6 Mo. App. 602; McGill v. McGill, 19 Fla. 341; Magahay v. Magahay, 35 Mich. 210.

²³ Richards v. Richards, 19 Ill. App. 465.

²⁴ Gourlay v. Gourlay, 16 R. I. 705; 19 Atl. 142.

²⁵ Malone v. Malone, 19 Cal. 627; 81 Am. Dec. 91; De Lerdernier v. De Lerdernier, 45 La. Ann. 1364; 14 So. 191; Williams

showed that the husband often came home drunk, frequently staying away to midnight and sometimes all night, and on some occasions his wife had to undress him and put him to bed, that nearly every morning he got his whisky bottle filled, but on several occasions persons refused to sell to him liquor because he was drunk, and at one time he was in such a condition as to closely approximate *delirium tremens*, it was held that the wife was entitled to a divorce, although no witness stated he was wholly incapacitated for business.²⁶ If one be habitually drunk at home, though when abroad attending to business he is sober, yet he is, nevertheless, an habitual drunkard.²⁷ Where the evidence showed that the defendant for a period of twelve or fifteen years three or four times a year became grossly intoxicated, usually remaining in that condition for ten days or a week, that he had been several times in an inebriate asylum, that he could not resist the desire to drink when such desire came upon him, that a single glass of liquor would bring on his ill habit, and any excitement had the same effect upon him, it was held that he was an habitual drunkard.²⁸ So where a husband got drunk once or twice a week, on going to town, for six or seven years, so much so he would sleep in the barn or in a strawstack on coming home, during which times he was morose and ugly and occasionally brutal, profane and violent, both to his family and dumb beasts on his premises, that once he broke dishes and furniture in his house, and another time used violence towards his wife, threatening to drive her away with a horse whip, it was held that the evidence showed he was an habitual drunkard, notwithstanding it appeared that he was one of the best and most prosperous farmers in his community, that when sober he was a good husband and father, and that there was no evidence that he could not drive his team home and take care of it.²⁹ And where it

v. Goss, 43 La. Ann. 868; 9 So. 750; Richards v. Richards, 19 Ill. App. 465; Berryman v. Berryman, 59 Mich. 605; 26 N. W. 789.

²⁶ Williams v. Goss, 43 La. Ann. 868; 9 So. 750.

²⁷ McGill v. McGill, 19 Fla. 341; see McBee v. McBee, 22 Or. 329; 29 Pac. 887; 29 Am. St. 613.

²⁸ Blaney v. Blaney, 126 Mass. 205.

²⁹ Berryman v. Berryman, 59 Mich. 605; 26 N. W. 789.

appeared that the husband had been for a large part of the time in a state of intoxication, ranging from partial to stupor, a divorce was decreed, it being shown he had inflicted personal violence on his wife.³⁰ And where the testimony showed that the husband generally drank on an average three to five glasses of whisky a day, becoming intoxicated from one to three times a week, for a period of four or five years immediately preceding the application for a divorce, it was held that the charge of habitual drunkenness had been sustained.³¹ So it has been held that the fact that the husband was always in liquor and refused to do anything for the support of his family, while able to do so, was a sufficient cause for divorce, though he never became intoxicated.³² Occasional excessive drinking does not make a man an habitual drunkard,³³ even though the offending party be the wife.³⁴ It is not sufficient to sustain the charge of habitual drunkenness to prove that on several occasions, years before the action was brought, the defendant drank to excess.³⁵ It is not ground for a divorce that a person indulges in the habitual though moderate use of liquors.³⁶ Thus, the fact that a husband became drunk once in three weeks during the evening, to such an extent that the next morning he did not go to his work as usual, was held not to entitle the wife to a divorce, it not appearing his habit had produced want or

³⁰ *Kissam v. Kissam*, 21 N. Y. App. Div. 142; 47 N. Y. Supp. 270; *Doan v. Doan*, 3 Clark 7; 4 Pa. Law J. 332; see *Burt v. Burt*, 168 Mass. 204; 46 N. E. 622.

³¹ *Marous v. Marous*, 86 Ill. App. 597.

³² *Ziegler v. Ziegler*, 1 Wkly. L. Bull. 163. This case can not, however, be accepted as entitled to much consideration.

³³ *Walton v. Walton*, 34 Kan. 195; 8 Pac. 110; *McBee v. McBee*, 22 Or. 329; 29 Pac. 887; 29 Am. St. Rep. 613; *Kempf v. Kempf*, 34 Mo. 211; *Gourlay v. Gourlay*, 16 R. I. 705; 19 Atl. 142; *Williams v. Goss*, 43

La. Ann. 868; 9 So. 750; *Mack v. Handy*, 39 La. Ann. 491; 2 So. 181; *Myrich v. Myrich*, 67 Ga. 771; *Acker v. Acker*, 22 App. D. C. 353; *Rapp v. Rapp*, 149 Mich. 218; 112 N. W. 709; 14 Det. L. N. 415.

³⁴ *Meathe v. Meathe*, 83 Mich. 150; 47 N. W. 109; *Bean v. Bean*, 11 Lane. Bar 138; *Kempf v. Kempf*, 34 Mo. 211.

³⁵ *Gourlay v. Gourlay*, 16 R. I. 705; 19 Atl. 142.

³⁶ *Bain v. Bain*, 79 Neb. 711; 113 N. W. 141; *Schaub v. Schaub*, 117 La. 727; 42 So. 249.

suffering in his family or occasioned him loss of his position.³⁷ So where a husband only became drunk when he came to town, which was generally on business, and then not always, he seldom carrying liquor home, becoming grossly drunk on only a few occasions in years, but being sober at home except on the occasions mentioned, it was held that he was not an habitual drunkard.³⁸ One act of drunkenness of a wife, though accompanied by acts of indecency probably resulting from her drunken condition, is not sufficient to justify the granting of a divorce.³⁹

Sec. 1174. Pleadings.

The charge that the defendant is an habitual drunkard is a sufficient allegation under a statute allowing a divorce where either party is an habitual drunkard;⁴⁰ but a charge that the defendant had for one year last been under the influence of intoxicating liquors does not show that he had been an habitual drunkard for one year, and is insufficient.⁴¹ Yet under the California statute a failure to allege that the defendant was unable because of the use of intoxicating liquors during the greater portion of the time from properly attending to his business, or that his conduct inflicted mental anguish upon the plaintiff, was held not fatal.⁴² In this same State if the petition charge habitual intemperance to the degree which causes great mental anguish upon the part of the plaintiff, it is not defective because it does not state the extent of such intoxication, nor the acts done by the defendant while incapacitated which tended to cause such mental anguish, nor that they were reasonably sufficient to

³⁷ Dennis v. Dennis, 68 Conn. 186; 36 Atl. 34; 34 L. R. A. 449.

³⁸ McBee v. McBee, 22 Or. 329; 29 Pac. 887; 29 Am. St. 613.

³⁹ Kempf v. Kempf, 34 Mo. 211; see also Meathe v. Meathe, 83 Mich. 150; 83 N. W. 150.

⁴⁰ Horne v. Horne, 1 Tenn. Ch. 259; Burns v. Burns, 13 Fla. 369;

Brown v. Brown, 39 Ark. 324; Myrich v. Myrich, 67 Ga. 771; Forney v. Forney, 80 Cal. 528; 22 Pac. 294.

⁴¹ Glenn v. Glenn, 87 Mo. App. 377; McCarthy v. McCarthy, 117 Mo. App. 115; 93 S. W. 317.

⁴² Reading v. Reading, 96 Cal. 4; 30 Pac. 803.

bring about such a result.⁴³ Where the allegation was that the defendant, disregarding his duties as a husband, had been guilty of habitual drunkenness, this was held sufficient, the petition not having been tested by a demurrer.⁴⁴

Sec. 1175. Wasting his estate.

At one time—if not now—a statute of Kentucky provided that a wife was entitled to a divorce for confirmed habits of drunkenness on the part of the husband of not less than one year's duration, when accompanied with a "wasting of his estate" without any suitable provision for her maintenance and the maintenance of his children. The words "wasting his estate" were held to embrace and apply to the husband's health, time and labor, all of which, for the purpose of supporting himself and family, were essential to his estate, although he had no property.⁴⁵

Sec. 1176. Proof.

As a rule, in most jurisdictions testimony that the defendant is an habitual drunkard are mere conclusions of the witness, and are not accepted as proof of the fact. It is necessary, therefore, to prove specific acts of drunkenness, extending over a considerable period of time, his conduct and actions, so that the court may judge whether or not he is an habitual drunkard.⁴⁶ Even the testimony of experts and the family acquaintances that the defendant is an habitual drunkard is not admissible to prove that fact.⁴⁷ Drunkenness subsequent to the bringing of the suit for a divorce may be proven for the purpose of showing a continuing habit and not as a cause of action.⁴⁸ Proof of gambling by the husband

⁴³ Forney v. Forney, 80 Cal. 528; 22 Pac. 294.

⁴⁴ Reading v. Reading, 96 Cal. 4; 30 Pac. 803.

⁴⁵ McKay v. McKay, 18 B. Mon. 8; Shuck v. Shuck, 7 Bush. 306; Azbill v. Azbill, 14 Ky. I. Rep. 105.

⁴⁶ Batchelder v. Batchelder, 14 N. H. 380; Horne v. Horne, 1 Tenn. Ch. 259.

⁴⁷ Golding v. Golding, 6 Mo. App. 602, appx.

⁴⁸ Mack v. Handy, 39 La. Ann. 491; 2 So. 181.

may be shown on a charge of drunkenness in support of charges of squandering money and debauchery.⁴⁹ Where a statute provided that a divorce should not be granted on the testimony of the plaintiff alone, proof by the plaintiff that the defendant's drinking habit was acquired after marriage need not be corroborated where the testimony of other witnesses tends to show that his habit did not become habitual until some years after the marriage.⁵⁰ Negative testimony of witnesses that they had never seen the defendant drunk will not outweigh affirmative statements of other witnesses showing he is an habitual drunkard,⁵¹ and the value of a witness' testimony that he had never seen the defendant intoxicated depends upon his intimacy with him and his opportunity to observe.⁵²

Sec. 1177. Defense.

It is a complete defense if the plaintiff married the defendant, knowing at the time he was a slave to the inordinate use of intoxicating liquor, or was an habitual drunkard.⁵³ Where the charge is habitual drunkenness, the defendant may show that the plaintiff has committed adultery, and the showing will be a complete defense,⁵⁴ but not, however, if the defendant consented to the employment of a person to allure the plaintiff into the offense.⁵⁵ Of course, in considering the question whether the plaintiff is entitled to a divorce his or her refinement or coarseness must be taken into consideration; for what would be unbearable or intolerable for one person might not be for another, and the parties' ways of life and habits

⁴⁹ Mack v. Handy, *supra*.

⁵⁰ Lewis v. Lewis, 75 Iowa, 200; 39 N. W. 271.

⁵¹ Smith v. Smith, 11 Ky. L. Rep. 859; Richards v. Richards, 19 Ill. App. 465.

⁵² Walton v. Walton, 34 Kan. 195; 8 Pac. 110. Of course, the intelligence of the witness must be considered.

Where a decree denying a di-

vorice was upheld, see McGonegal v. McGonegal, 46 Mich. 66; 8 N. W. 724, and where refusing a divorce was reversed, see Crichton v. Crichton, 73 Wis. 59; 40 N. W. 638.

⁵³ Tilton v. Tilton, 16 Ky. L. Rep. 538.

⁵⁴ Ryan v. Ryan, 9 Mo. 539.

⁵⁵ Dennis v. Dennis, 68 Conn. 186; 36 Atl. 34; 34 L. R. A. 449.

of speech should be judged, not by the standard of very cultivated people, but by that which respectable persons of the same class would spontaneously acknowledge.⁵⁶ But the fact that the wife was not of the most refined character, was at times in her anger profane, not always ladylike in her behavior, somewhat acquiescing in her husband's drinking habits, and neither rebuking nor remonstrating with him as she should, is no excuse for his abusing her in his drunken moods, and does not deprive her of her right to a divorce because of his habitual drunkenness.⁵⁷ Yet a wife may condone the drunkenness of her husband. Thus where he remains an habitual drunkard during the statutory period and then ceases, and she then voluntarily continues the marital relation after he so ceases, she thereby condones the offense; yet, if there be no cessation of drunkenness, the fact that she continues to live with him will not be a condonation of his offense, and she may at any time break away from and successfully maintain her action for divorce; for she has a right to remain with him in the hope that she may reclaim him, and it would be wholly unjust to use her actions and endeavors, prompted by her love and affection for him, to reform him, as a bar to her right of action. Expressions of love and affection for him, both orally and in letters, and disclosing that she looked upon their interests as joint and identical, and containing no intimation that she expected their marriage to be dissolved, are not sufficient to show such a condonation of his offense as will be a bar to her application for a decree of final separation. And where a separation had taken place, but the parties met, and the husband agreed to furnish his wife with a specific monthly sum of money, convey to her some property and stop drinking, followed by kind and affectionate letters written by her to him in pursuance of the agreement, it was held not to amount to a condonation, where he failed to carry out the agreement and continued his habits of drinking.⁵⁸ So where a wife had been forced to leave her husband

⁵⁶ *Kline v. Kline*, 50 Mich. 438;
15 N. W. 581.

⁵⁸ *Moore v. Moore*, 41 Mo. App.
176.

⁵⁷ *Berryman v. Berryman*, 59
Mich. 605; 26 N. W. 789.

because of his drunkenness and gross treatment of her, but returned to him upon his promising to refrain from drinking, and to treat her with kindness, upon his again getting drunk and threatening her, it was held that she was justified in leaving him, although he had not actually abused her, and that she was entitled to a decree of separation, notwithstanding his promise to reform.⁵⁹ Where a husband agreed to abstain from drinking and to convey certain property to his wife, which he did, on his returning to drink she was held not required to reconvey the property to him in order to successfully maintain her action for a divorce. If the agreement has been reduced to writing, but that part of it concerning his abstaining from drinking has been omitted, yet such fact may be shown by parol upon a second application for a divorce, where the agreement was executed upon condition that her first application for a divorce be dismissed.⁶⁰

Sec. 1178. Custody of children.

It is seldom that the court will award the custody of children, most especially so if young, to the custody of the guilty party. The welfare of the child is of the first consideration, and it is difficult to see how its welfare would be better if in a drunken parent's rather than in the sober one's custody. Of course, the court has full power at any time to change the decree and award the custody of the child to the other parent, or if neither be a fit person to have its custody, then to some third person who will accept and care for it.⁶¹

⁵⁹ *Threemits v. Threemits*, 4 Desaus. 560.

⁶⁰ *Lewis v. Lewis*, 75 Iowa, 200; 39 N. W. 271.

⁶¹ *McGill v. McGill*, 19 Fla. 341; *Brandon v. Brandon*, 14 Kan. 342. In this Kansas case the custody of her two children was awarded to the drunken mother.

A promise by an intemperate father to quit drinking is not sufficient to cause the withdrawal of the children from the custody of a competent guardian, and their restoration to him. *In re Lally*, 85 Iowa, 49; 51 N. W. 1155; 16 L. R. A. 681.

Sec. 1179. Drunkenness as cruelty.

Drunkenness alone cannot be construed as cruelty to or inhuman treatment of the other party.⁶² Nor is mere unhappiness occasioned by the vice of drunkenness, or by an ill-sorted marriage, resulting in the destruction of domestic comfort, sufficient to even warrant judicial separation on that ground.⁶³ Excessive drinking, falling short of habitual intemperance, though accompanied by adulterous conduct not amounting to actual adultery, is not extreme cruelty within the meaning of a statute providing that extreme cruelty shall be a good cause for a divorce. The cruelty designated by the statute must be some other cause than these.⁶⁴ Even though the drunkenness be accompanied by acts of considerable violence, a divorce will not be decreed, especially where the real cause for the application is the husband's desire to get rid of a drunken wife.⁶⁵ Drunkenness is not sufficient to warrant a divorce, though frequently repeated, on the ground of indignities rendering the condition of the injured party intolerable, under a statute providing for a divorce because of habitual drunkenness.⁶⁶ Where a statute provides for a divorce on the ground of habitual drunkenness for two years, a wife is not obliged to suffer two years of extreme and repeated cruelty for that length of time before she obtains a divorce, simply because the cruelty is caused by habitual intemperance.⁶⁷ Proof that the wife had become addicted to the habit of occasional drunkenness, and also occasional family broils and

⁶² Anonymous 17 Abb. N. C. 231; *Mason v. Mason*, 1 Edw. 278; *Haskell v. Haskell*, 54 Cal. 262; *Bowie v. Bowie*, 3 Md. Ch. 51.

⁶³ *Hudson v. Hudson*, 3 Swab. & T. 314; 33 L. J. Mat. (N. S.). 5; 9 Jur. (N. S.) 1302; 9 L. T. (N. S.) 579; 12 W. R. 216.

⁶⁴ *Haskell v. Haskell*, 54 Cal. 262.

⁶⁵ *Scott v. Scott*, 29 L. J. Mat. (N. S.) 64.

⁶⁶ *Kempf v. Kempf*, 34 Mo. 211.

But a divorce on the ground of indignities, such as to render the

husband's condition intolerable, may be founded on the excessive use of opium. *Dawson v. Dawson*, 23 Mo. App. 169.

Continued lewd and indecent conduct of the husband towards a young daughter of the wife by a former husband is not a cause for a divorce under a statute awarding one for "personal indignities rendering life burdensome." *Cline v. Cline*, 10 Ore. 474.

⁶⁷ *Harman v. Harman*, 16 Ill. 85.

coarse, revolting language on her part during such occasions, accompanied by offers of personal violence to her husband while intoxicated when he interfered between her and his mother, and of disgraceful methods resorted to by her to procure intoxicating liquors to drink, will not warrant a divorce on a charge of excessively vicious conduct on her part.⁶⁸

Sec. 1180. Drunkenness connected with cruelty.

If a wife would be entitled to a divorce on the ground of cruel treatment inflicted upon her by her husband, then the fact that such treatment was the result of his intemperance will not deprive her of her right to it, for an habitual drunkard may be as guilty of cruel treatment as one not addicted to drunkenness.⁶⁹ And this is true even though the acts of cruelty were committed in a frenzy of intoxication, that fact not even being a mitigation of the offense;⁷⁰ for such acts under such circumstances rather aggravate than excuse the offense.⁷¹ Although a husband may be amiable and good-natured towards his wife when sober, yet that fact will not palliate his conduct when drunken.⁷² One single act of cruelty might not entitle a wife to a divorce, but a series of them would.⁷³ In England, in the case of a wife, it was held, where her intemperance deprived her of her power to control her passion and put her into such a state of mind that she was in the habit of assaulting her husband, that a decree of separation would be awarded in his favor, it being shown that their difficulties were the consequence

⁶⁸ *Shutt v. Shutt*, 71 Md. 193; 17 Atl. 1024.

⁶⁹ *Bowie v. Bowie*, 3 Md. Ch. 51; *McVickar v. McVickar*, 46 N. J. Eq. 490; 19 Atl. 249. (Unless it is said she consented to the habitual drunkenness.) *Doan v. Doan*, 3 Clark, 7; 4 Pa. L. J. 332.

⁷⁰ *Lee v. Lee*, 3 Wash. 236; *Lanning v. Laning*, 21 N. J. Eq. 248; *Marsh v. Marsh*, 28 L. J. Mat.

(N. S.) 13; 1 Swab. & T. 312; 5 Jur. (N. S.) 46; *Mason v. Mason*, 1 Edw. Ch. 278.

⁷¹ *Camp v. Camp*, 18 Tex. 528.

⁷² *Lockridge v. Lockridge*, 3 Dana, 28; 28 Am. Dec. 52.

⁷³ *Power v. Power*, 11 Jur. (N. S.) 800; 4 Swab. & T. 173; 34 L. J. Mat. (N. S.) 137; 13 W. R. 1113.

and not the cause of her intemperance.⁷⁴ But the use of abusive language to a wife, and habits of constant intoxication do not amount to cruelty;⁷⁵ but they may be considered as giving color to his conduct.⁷⁶ Nor can vulgarity and profanity of a husband, occasioned by intemperance, be regarded as cruelty.⁷⁷ Ill treatment during spells of intoxication and proceeding from ill will, if there be no evidence of a fixed purpose to treat her amiss or that he no longer entertained affection for her, will not entitle her to a divorce.⁷⁸ And it has been held that a single blow inflicted by him upon her in a frenzy of intoxication would not be cruel treatment, nor would it even if repeated, such conduct not being extreme cruelty.⁷⁹ In the case of a drunken wife it was held that cruelty of treatment by her in the sense of bodily harm or serious danger to his health was not shown by proof that she had habits of intoxication, with occasional outbursts of passion and violence, they, however, never occurring except when she was under the influence of drink and without self-control, and the only personal violence she ever offered him was on two or three occasions, when he interfered between her and his mother residing with them.⁸⁰ Neglect by the husband for several months to provide for her because of his drunkenness is not cruelty.⁸¹ Where a husband's violence towards his wife was caused by her drunken habits, that was held not to prevent his obtaining a divorce from her because of her adultery.⁸² Harshness and indecency of conduct, occasioned by intemperance, cannot alone be classed as cruelty under a statute allowing a divorce for cruelty, for cruelty

⁷⁴ *White v. White*, 1 Swab. & T. 592; 6 Jur. (N. S.) 28; 1 L. T. (N. S.) 197. See also *Williams v. Goss*, 43 La. Ann. 868; 9 So. 750; *Mack v. Handy*, 39 La. Ann. 491; 2 So. 181; *Leake v. Linton*, 6 La. Ann. 262.

⁷⁵ *C — v. C —*, 28 Eng. L. & Eq. 603.

⁷⁶ *Powers v. Powers*, 20 Neb. 529; *Morrison v. Morrison*, 14 Mont. 8; 35 Pac. 1.

⁷⁷ *Bogges v. Bogges*, 4 Dana 308; *Brown v. Brown*, L. R. 1 Prob. & Div. 46.

⁷⁸ *Brown v. Brown*, 38 Ark. 324.

⁷⁹ *Laning v. Laning*, 21 N. J. Eq. 248. The soundness of this case may be well doubted.

⁸⁰ *Shutt v. Shutt*, 71 Md. 193.

⁸¹ *Camp v. Camp*, 18 Tex. 528.

⁸² *Pearman v. Pearman*, 1 Swab. & T. 601; 29 L. J. Mat. (N. S.) 54; 8 W. R. 274.

must be something more than the mere injury to a person's sensibilities or sense of delicacy.⁸³ But where the intoxication leads to violence on the part of the husband towards his wife, such as blows and kicks, driving her from the home even temporarily, and his habits of intoxication are such as to likely produce a recurrence of his acts of violence, a decree of divorce will be awarded her.⁸⁴

Sec. 1181. Drunkenness as evidence of cruelty.

Upon a charge of cruel and inhuman treatment the drunkenness of the defendant is always admissible and should be considered as giving color to his conduct.⁸⁵ It is to be considered in connection with other objectionable acts of which he is shown to have been guilty, as tending to show a greater liability of or recurrence of the ill treatment than if he were sober,⁸⁶ or as tending to explain the nature and character of his violence and threats.⁸⁷

Sec. 1182. Drunkenness as affecting desertion.

Drunkenness may give a wife the right to a divorce on the grounds of desertion. Such is the case where he continues his habits of intoxication to such an extent that it is unsafe for her to live with him, for the statutory period authorizing a divorce for desertion after the separation from him on that account. Such conduct on his part is a desertion of his wife.⁸⁸

⁸³ *Workam v. Workam*, 31 Miss. 154; *Mason v. Mason*, 1 Edw. Ch. 278; *Holland v. Holland*, 4 Leg. Gaz. 472.

⁸⁴ *Rodman v. Rodman*, 20 Grant Ch. (U. C.) 428; *Marsh v. Marsh*, 28 L. J. Mat. (N. S.) 13; 1 Swab. & T. 312; 5 Jur. (N. S.) 46; *Allen v. Allen*, 31 Mo. 479; *Lee v. Lee*, 3 Wash. 236; *Hughes v. Hughes*, 19 Ala. 307; *Powers v. Powers*, 20 Neb. 529; *Mason v. Mason*, 131 Pa. 161; 18 Atl. 1021; *Wheeler v. Wheeler*, 53 Iowa, 511; 36 Am. Rep. 240; *Crichton v.*

Crichton, 73 Wis. 59; 40 N. W. 638; *Waddell v. Waddell*, 2 Swab. & T. 584; *Wachholz v. Wachholz*, 75 Wis. 377; 44 N. W. 506; *Clutch v. Clutch*, 1 N. J. Eq. 474.

⁸⁵ *Powers v. Powers*, 20 Neb. 529; 31 N. W. 1.

⁸⁶ *Rodman v. Rodman*, 20 Grant Ch. (U. C.) 428.

⁸⁷ *Coursey v. Coursey*, 60 Ill. 186; *Harman v. Harman*, 16 Ill. 85.

⁸⁸ *McVickar v. McVickar*, 46 N. J. Eq. 490; 19 Atl. 249; 19 Am. St. Rep. 422.

This is even true where his drunkenness is so great that he cannot discharge his marital duties or obligations, thus compelling her to leave him.⁸⁹ In such instances she may leave him and seek a home elsewhere without incurring the charge that she had deserted him.⁹⁰ If he reforms his habits it is his duty to seek her out and inform her of that fact and manifest his reformation, and if he fails to do so and voluntarily prolongs the separation for the statutory period, she being ignorant of his reformation, he cannot urge his reformation as a bar to her application for a divorce.⁹¹ But mere improvidence and intemperance on his part, whereby she refuses to live with him does not constitute a desertion on his part.⁹²

Sec. 1183. Judicial separation—English statute.

An English statute provides that where the husband is an habitual drunkard, as defined by statute,⁹³ his wife shall be entitled to an order of separation from him. So if the wife be an habitual drunkard her husband may apply for an order that he be no longer bound to cohabit with her and for the custody of their children, but he is required to pay her personally, or for her use, to any officer of the court or other person on her behalf, such a weekly sum, not exceeding two pounds as the court, having regard both to the husband's and her means, may consider reasonable.⁹⁴ This statute applies to those acts committed before its enactment, which goes to show that the person is an habitual drunkard.⁹⁵ In proving the marriage, evidence of reputation that the par-

⁸⁹ *Camp v. Camp*, 18 Tex. 528;
James v. James, 58 N. H. 266;
Lyster v. Lyster, 111 Mass. 327.

⁹⁰ *James v. James*, 58 N. H. 266.

⁹¹ *McVickar v. McVickar*, 46 N. J. Eq. 490; 19 Atl. 249; 19 Am. St. 422.

⁹² *Plinsley v. Plinsley*, 35 N. J. Eq. 18; *Laning v. Laning*, 21 N. J. Eq. 248.

⁹³ Act 1879, 42 & 43 Vict. c. 19, § 3.

⁹⁴ Act 1902, 2 Edw. VII c. 28, § 5; *Patterson's Licensing Acts*, p. 583.

⁹⁵ *Vine v. Leeds*, JJ., L. R. 10 Q. B. 195; 39 J. P. 213; 44 L. J. M. O. 60; 31 L. T. 842; 23 W. R. 849; *Lane v. Lane* [1890], P. 133; 60 J. P. 345; 65 L. J. P. 63; 74 L. T. 557.

ties were married is received.⁹⁶ The separation may be decreed even though the parties be not living together at the time it is ordered, but the rule is that an order of separation on the petition of the wife will not be granted her where her safety does not require it, and where a maintenance order is sufficient relief for her.⁹⁷ Before the making the order for maintenance it is said that the court must be satisfied that the husband has means or is able to work to earn more than sufficient money for his own maintenance. But if he has an income, and there be no children of the marriage, or where, if there are children, the wife has not enough to support them, she, if she have no means of her own, may be allotted one-third of the husband's net income; or, if she has means apart from her husband, then her income is made up to one-third of their joint incomes, not to exceed, however, two pounds a week.⁹⁸ If the wife resume cohabitation or if she commit adultery, a statute provides for the husband's discharge from the order; and the same is true if the husband resume cohabitation or commits adultery.⁹⁹ Obedience to the order to pay the allowance may be enforced by imprisonment or by an indictment at common law.¹

⁹⁶ Howard v. Smith, 26 Sol. J. 533; Deakin v. Deakin, 33 J. P. 805; Elliot v. Totnes Union, 57 J. P. 151; Regina v. Yeomans, 24 J. P. 149.

⁹⁷ Dodd v. Dodd [1906], P. 189; 70 J. P. 163; 75 L. J. P. 49; 94 L. T. 709; 54 W. R. 541; 22 T. L. R. 484.

⁹⁸ Cobb v. Cobb [1900], P. 294; 64 L. J. P. 125; 83 L. T. 716.

⁹⁹ Williams v. Williams [1904], P. 31; 73 L. J. P. 31; 68 J. P. 188; 90 L. T. 174; 20 T. L. R. 213; Weightman v. Weightman Thornton's Intoxicants WEK 462 [1906], 70 J. P. 120; 94 L. T. 621; 22 T. L. R. 362; Johnson v. Johnson [1900], P. 19.

¹ Rex v. Robinson, 2 Burr. 799; Rex v. Davis, Sayer 163; Rex v. Balme, 2 Cowp. 650.

CHAPTER XXXIX.

NEGLIGENCE.

SECTION.

- 1184. Intoxicated person may recover when negligently injured.
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- 1195. Drunken man liable for injuries he inflicts.
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- 1197. Intoxication only evidence of contributory negligence—Question for jury.

SECTION.

- 1198. Weight of evidence and its sufficiency.
- 1199. Question for jury.
- 1200. Master's liability to his servant for drunken servant's negligence.
- 1201. Proof of notice of servant's drunken habits.
- 1202. Drunken passengers.
- 1203. Expelling drunken passengers.
- 1204. Passenger forfeiting right to carriage by boisterous conduct.
- 1205. Carrier leaving drunken passenger in dangerous place.
- 1206. Greater care due to a drunken man in a dangerous place.
- 1207. Assaults by drunken passengers upon other passengers.
- 1208. Notice of intoxication of passenger.

Sec. 1184. Intoxicated person may recover when negligently injured.

The mere fact that an injured person was negligently injured when he was drunk will not bar his right to a recovery. Drunken men, though becoming so voluntarily, are

not beyond the pale of the law. Evidence of drunkenness will not, therefore, itself be a bar to a right of recovery.¹ Thus, in a Massachusetts case it was said: "Intoxicated persons are not removed from all protection of law. The plaintiff was bound to show that he was in the exercise of due care, and the jury were so instructed. If he used such care by himself or others, his intoxication had nothing to do with the accident. The city may be liable under some circumstances for an injury sustained * * * by an intoxicated person if the condition of the injured person does not contribute in any degree to the occasion."² "When contributory negligence is the issue," says Beach,³ "it must appear that the plaintiff did not exercise ordinary care, and that, too, without reference to his inebriety, or he may have his action. The question is whether or not the plaintiff's conduct came up to the standard of ordinary care, not whether or not the plaintiff was drunk. As sober men are frequently careless and guilty of negligence, so it very occasionally happens that drunken men are careful and prudent, or if negligent, that their intoxication cut no figure in the matter. From which the law infers that there is no proper and necessary connection between sobriety and carefulness, nor between inebriety and negligence. This is a view, however, to be taken with the qualification that while intoxication is not, as a matter of law, to be regarded contributory negligence,

¹ *Stuart v. Machias Port*, 48 Me. 477; *Robinson v. Pioche*, 5 Cal. 460; *Cramer v. Burlington*, 42 Iowa, 315; *O'Hagan v. Dillon*, 10 Jones & S. 456; *Weymire v. Wolfe*, 52 Iowa, 533; *Dichett v. Spuyten Duyvil, etc.*, R. Co., 5 Hun, 165; *Loewer v. Sedalia*, 77 Mo. 431; *Healy v. New York*, 3 Hun, 708; *Salina v. Trosper*, 27 Kan. 545; *Thorp v. Brookfield*, 30 Conn. 321; *Alger v. Lowell*, 3 Allen 406; *Baltimore, etc.*, R. Co. v. *Boteler*, 38 Md. 568; *Baker v.*

Portland, 58 Me. 199; 4 Am. Rep. 274.

² *Alger v. Lowell*, 3 Allen 406.

"A drunken man is as much entitled to a safe street as a sober one, and much more in need of it." *Robinson v. Pioche*, 5 Cal. 460.

"Intoxication is competent, but not conclusive evidence of negligence." *Aurora v. Hillman*, 90 Ill. 61; *Rock Island v. Vanland-schoot*, 78 Ill. 485; *Illinois, etc.*, R. Co. v. *Cragin*, 71 Ill. 177.

³ Beach on Contributory Negligence (1st ed.) § 146.

it is held that it tends to show negligence on the part of the plaintiff. * * * The plaintiff is, therefore, on the one hand entitled to an instruction to the effect that his intoxication is not, as matter of law, contributory negligence or conclusive evidence of such negligence as will prevent a recovery; and the defendant on his part is entitled to an instruction to the effect that the intoxication of the plaintiff is evidence of negligence, from which the jury are at liberty to infer such negligence as will bar the action.”⁴ But an intoxicated person, under the law, is entitled to as much care and caution on the part of others as if he were sober; and if he be injured when, by the exercise of ordinary care upon the part of the person causing the injury, he might have escaped, he is entitled to recover from such persons such damages as has been occasioned him by the negligence.⁵

Sec. 1185. Contributory negligence of a drunken man.

If a person *voluntarily* becomes drunk, and by reason of his intoxicated condition he contributes to his injury or to bringing it about, he can no more recover than he could if he had been sober. But “drunkenness alone, though voluntary, is not negligence. A drunken man may be careful. The true rule is that voluntary drunkenness does not relieve the drunken man from the degree of care required of a sober man in the same circumstances, and if his drunkenness renders him incapable of exercising such care, then it contributes to any injury thereby sustained, and bars a recovery for

⁴ Citing *Wynn v. Allard*, 5 Watts. & S. 524; *Illinois, etc., R. Co. v. Cragin*, 71 Ill. 177; *Cleghorn v. New York, etc., Co.*, 56 N. Y. 44; *People v. Eastwood*, 14 N. Y. 562; *Wood v. Andes*, 11 Hun, 543; *Cassedy v. Stockridge*, 21 Vt. 391; *Chicago, etc., R. Co. v. Bell*, 70 Ill. 102; *Fitzgerald v. Weston*, 52 Wis. 354; *Salina v. Trosper*, 27 Kan. 545.

⁵ *Robinson v. Pioche*, 5 Cal. 460; *O’Keefe v. Chicago, etc., R. Co.*, 32

Iowa, 467; *Whalen v. St. Louis, etc., R. Co.*, 60 Mo. 323; *Kean v. Baltimore, etc., R. Co.*, 61 Md. 154; *Houston, etc., R. Co. v. Reason*, 61 Tex. 613.

The fact that the injury was aggravated by the drunken condition of the injured person will not lessen the amount of damages he is entitled to recover. *Maguire v. Sheehan*, 117 Fed. 819; 59 L. R. A. 496.

another's negligence." ⁶ The rule has been thus stated by Judge McBride, of the Supreme Court of Indiana: ⁷ "When one, by reason of his own voluntary intoxication, exposes himself to danger, and receives injuries which he could, and by the exercise of ordinary prudence would, have avoided if sober, he is guilty of contributory negligence, and cannot recover for such injuries." ⁸ And in an Illinois case it was said: "A person who voluntarily uses intoxicating drinks until he has become physically helpless, or his powers so far impaired that he is unable to exert the necessary effort to avoid danger, is guilty of negligence when he places himself in a position of danger, and so when he stupefies his intellectual powers so that he is unable to foresee and guard against danger." ⁹ "The principle deducible from these authorities is," said the Supreme Court of Indiana, "that voluntary drunkenness is not available to avert the usual and natural consequence flowing from a man's act, and from this deduction flows the ultimate conclusion that a drunken man will be held to the same measure of responsibility as a sober one, and his actions judged by the same standard, except in cases of contract. As this is the rule, the act of King in riding the appellant's mare upon the railroad track must be treated as if it had been done by a sober man, and, thus treated, it is evident that there can be no recovery by the appellant. This result is just in itself and required by the highest consideration of public policy. If it were otherwise, then a drunken man might purposely ride his horse upon a railroad track in front of a locomotive and secure a recovery by pleading his own wrong in voluntarily making himself drunk. Such a result no principle of right or justice would tolerate. If King had been sober, there could be

⁶ *Bageard v. Consolidated Traction Co.*, 64 N. J. L. 316; 45 Atl. 620; 49 L. R. A. 424.

⁷ In the case just cited it is said this is "the best statement of the doctrine I have found."

⁸ *Woods v. Board*, 128 Ind. 289; 27 N. E. 611.

⁹ *Illinois Central R. R. Co. v. Cragin*, 71 Ill. 177; *Smith v. Norfolk, etc., R. Co.*, 114 N. C. 728; 19 S. E. 863; 25 L. R. A. 287; *Welty v. Indianapolis, etc., R. Co.*, 105 Ind. 55; 4 N. E. 410.

no doubt that the appellant could not recover, and as King's drunkenness cannot be permitted to change the nature of his act, it conclusively follows that his drunkenness will not avail to change the results that flow from that act. The same rule applies to him drunk as to him sober. If it were otherwise, a premium would be put on drunkenness, and that the law has never yet done, and, it is not hazardous to affirm, never will do."¹⁰ "Intoxication," said the Supreme Court of Rhode Island, "does not relieve a man from the degree of care required of a sober man in the same circumstances:"¹¹ But if the intoxicated person did not contribute to his injury, then drunkenness on his part will not relieve the person carelessly inflicting upon him such injury from liability—the question whether he was drunk or sober not affecting the question of liability.¹² Yet where a street railway company's servants carelessly drove its car over a drunken man, and he was negligent because of his intoxication, it was held he could not recover.¹³ So if a drunken man be upon a railroad track, even lawfully, though his getting on it was due to the negligence of the railroad company in the first instance, yet his intoxication will not relieve him from his duty to use care and caution commensurate with his danger.¹⁴

¹⁰ *Welty v. Indianapolis, etc., R. Co.*, 105 Ind. 55; 4 N. E. 410.

¹¹ *Vizacchero v. Rhode Island Co.*, 26 R. I. 392; 59 Atl. 105; 69 L. R. A. 188; *Chicago City R. Co. v. Lewis*, 5 Ill. App. 242; *Louisville, etc., R. Co. v. Johnson*, 108 Ala. 62; 19 So. 51; 31 L. R. A. 372; *Johnson v. Louisville, etc., R. Co.*, 104 Ala. 241; 16 So. 75; *Louisville, etc., R. Co. v. Johnson*, 92 Ala. 204; 9 So. 269; *Fisher v. West Virginia, etc., R. Co.*, 42 W. Va. 183; 24 S. E. 570; *Missouri Pacific R. Co. v. Evans*, 71 Tex. 361; 9 S. W. 325; 1 L. R. A. 476; *Price v. Philadelphia, etc., R. Co.*, 84 Md. 506; 36 Atl. 263; 36 L. R. A. 213; *Smith v. Norfolk, etc., R. Co.*, 114 N. C.

728; 19 S. E. 863, 923; 25 L. R. A. 287; *Keesohn v. Elgin, etc., Co.*, 229 Ill. 533; 82 N. E. 360, affirming 132 Ill. App. 416; *Strand v. Chicago, etc., R. Co.*, 67 Mich. 380; 34 N. W. 712; *Bageard v. Consolidated T. Co. (N. J. L.)*, 45 Atl. 620; *Vizacchero v. Rhode Island Co.*, 26 R. I. 392; 59 Atl. 105; *Burke v. Chicago, etc., R. Co.*, 108 Ill. App. 565.

¹² *Denver Tramway Co. v. Reid*, 4 Colo. App. 53; 36 Pac. 500; *Sylvester v. Casey (Iowa)*, 81 N. W. 455; *Rhyner v. Menasche*, 107 Wis. 201; 83 N. W. 303.

¹³ *Weeks v. New Orleans, etc., R. Co.*, 32 La. Ann. 615.

¹⁴ *St. Louis, etc., R. Co. v. Wilkerson*, 46 Ark. 513; *McDonald v.*

Sec. 1186. Contributory negligence of a drunkard—When rule does not apply.

If the injured person was so drunk at the time of his injury as to be totally incapable of his danger or unable to control his acts, to the defendant's knowledge, then the rule of contributory negligence on his part does not apply if the defendant by due care, taking into view his knowledge of the drunken man's condition, could have avoided the danger. Such was held to be the case where a drunken passenger while singing and dancing in a baggage car, with both side doors wide open, fell out of the car through the door and was injured, the trainmen well knowing of his condition in ample time to have stopped him. In this case the trial court instructed the jury as follows, which instruction was approved on appeal: "In this case the plaintiff must show you that he was so much under the influence of liquor or so drunk at the time the accident happened that he was irresponsible, or incapable of taking care of himself under the circumstances in which he was placed; that the defendants knew of his condition at the time the accident happened; and that, after they knew of the plaintiff's condition and his danger, they could have prevented the accident by the exercise of due care. If the plaintiff fails to satisfy you of any of these facts his case fails. When a man in his senses exposes himself voluntarily to apparent danger, he is not in the exercise of that care which the law makes it the duty of every man to make to prevent injury to himself; and drunkenness will not relieve the plaintiff from the exercise of the care required of people in general. But, while drunkenness will not excuse the exercise of due care on the plaintiff's part, still, if the plaintiff was so completely under the influence of liquor or so drunk at the very time of the accident that he was irresponsible or incapable of taking care of himself, and the defendants knew of his condition in time to prevent the accident, and did not use due care to prevent it, they were in

Chicago, etc., R. Co., 75 Wis. 121; So. 618; Alger v. Lowell, 3 Allen
43 N. W. 744; Memphis, etc., R. 402; Meyer v. King, 72 Miss. 1;
Co. v. Womack, 84 Ala. 149; 4 16 So. 245; 35 L. R. A. 474.

fault. * * * In this case, while the defendants were not under obligation to accept the plaintiff as a passenger in the condition he tells you he was, still, if they did accept him when they knew he was so much under the influence of liquor that he was irresponsible, or incapable of taking care of himself, under the circumstances in which he was placed, or if they permitted him to remain on their train after they became aware of his condition, it was their duty to use due care to prevent injury to him; and due care would be the exercise of such care as a reasonably prudent man would exercise, situated in precisely similar circumstances as the facts shown you existed at the time of this accident. In this case, if the defendants knew the plaintiff's condition, and could have prevented the accident by the exercise of due care, they are in fault; but if the defendants, after they knew of the plaintiff's condition, could not have prevented the accident by due care, they are not in fault. This is predicated on the fact that you find that the plaintiff was so much under the influence of liquor that he was irresponsible, or incapable of taking care of himself."¹⁵

Sec. 1187. What is contributory negligence in a drunken man.

The law does not require of a drunken man any greater degree of diligence than of a sober one; and if he conducts himself with due care, the fact of his intoxication will not bar his recovering damages for an injury carelessly or negligently inflicted upon him by another,¹⁶ and the mere fact of his intoxication is not evidence *per se* of negligence sufficient to bar a recovery.¹⁷ In fact, his intoxication is of no

¹⁵ *V. neeler v. Grand Trunk, etc.*, R. Co., 70 N. H. 607; 50 Atl. 103; 54 L. R. A. 955; *Rollestone v. T. Cassireo & Co.*, 3 Ga. App. 161; 59 S. E. 442.

¹⁶ *Chicago, etc., R. Co. v. Drake*, 33 Ill. App. 114; *Ward v. Chicago, etc., R. Co.*, 85 Wis. 601; 55 N. W. 771; *Missouri Pacific*

R. Co. v. Evans, 71 Tex. 361; 9 S. W. 325; 1 L. R. A. 476.

¹⁷ *Newton v. Central Vt. R. Co.*, 80 Hun, 491; 30 N. Y. Supp. 488; *Northern P. R. Co. v. Craft*, 69 Fed. 124; 16 C. C. A. 175; 29 U. S. App. 687; *Tompkins v. Oswego*, 40 N. Y. St. Rep. 4; *Lynch v. New York, etc., R. Co.*, 47 Hun,

importance whatever if his own negligence did not contribute to the injury.¹⁸ Intoxication alone to be a bar to his recovery must have been the proximate cause or one of the proximate causes of the injury.¹⁹ Yet if one places himself in a place of danger at a time when he is so drunk that he cannot exert himself sufficiently to avoid it, he is guilty of contributory negligence;²⁰ and likewise is he guilty if he stupefies himself with liquor so that he cannot foresee or realize his danger.²¹ If there be evidence of the plaintiff's intoxication at the time of the injury, then it is error to refuse to instruct the jury that if they believe from such evidence he was guilty of negligence contributing to the injury he cannot recover.²² The drunkenness need not be so great as to produce imbecility in the intoxicated person to render his contributory negligence a bar to his action.²³ In order to defeat his cause of action, it is not necessary that the jury find he became careless or reckless after he became intoxicated; for his inability caused by his intoxication, to properly control his actions, will amount to negligence if such actions contributed to his injury.²⁴ And an instruction, where

524; *Holmes v. Oregon, etc., R. Co.*, 5 Sawy. 290; *Kingston v. Ft. Wayne, etc., R. Co.*, 112 Mich. 40; 70 N. W. 315; 40 L. R. A. 131; *Dichett v. Spuyten Duyvil, etc., R. Co.*, 5 Hun, 165; *Louisville, etc., R. Co. v. Cummins*, 111 Ky. 333; 63 S. W. 594; 23 Ky. L. Rep. 681; *Wabash R. Co. v. Monegan*, 94 Ill. App. 82.

¹⁸ *Houston, etc., R. Co. v. Reason*, 61 Tex. 613; *Meyer v. Pacific R. Co.*, 40 Mo. 151; *Alger v. Lowell*, 3 Allen 402; *Maguire v. Middlesex R. Co.*, 115 Mass. 239; *Central, etc., Co. v. Phinazee*, 93 Ga. 488; 21 S. E. 66.

¹⁹ *Meyer v. Pacific F. Co.*, 40 Mo. 151; *Davis v. Oregon, etc., R. Co.*, 8 Or. 172; *Lynch v. New York*, 47 Hun, 524; *Strand v. Chi-*

cago, etc., R. Co., 67 Mich. 380; 34 N. W. 712; *Fisher v. West Virginia, etc., R. Co.*, 39 W. Va. 266; 19 S. E. 578; 23 L. R. A. 758; *Bradley v. Second Ave. R. Co.*, 8 Daly, 289.

²⁰ *Chicago City R. Co. v. Lewis*, 5 Ill. App. 242; *Illinois Cent. R. Co. v. Cragin*, 71 Ill. 177.

²¹ *Illinois Central R. Co. v. Cragin*, 71 Ill. 177.

²² *Brand v. Schenectady, etc., R. Co.*, 8 Barb. 368.

²³ *Fitzgerald v. Weston*, 52 Wis. 354; 9 N. W. 13; *Davis v. Oregon, etc., R. Co.*, 8 Or. 172; *Seymer v. Lake*, 66 Wis. 651; 29 N. W. 554; *Ford v. Umatilla Co.*, 15 Or. 351; 16 Pac. 33.

²⁴ *Cramer v. Burlington*, 42 Iowa, 315.

the plaintiff was shown to have been drunk at the time of his injury, that ordinary care is that care which might be reasonably expected of one in the situation of the person injured is erroneous.²⁵

Sec. 1188. Concurring negligence of both parties.

The negligent running of a train, without headlights,²⁶ or the failure of the engineer to discover a trespasser on the track,²⁷ or his failure to blow a whistle at a crossing where a drunken man refuses to get off the track,²⁸ or his belief that a man whom he sees on the track will leave it before the train reaches him,²⁹ will not entitle the injured person to recover, for his own negligence concurred with the negligence of the person or company inflicting the injury, and it is a complete bar. But if one injuring him saw his danger within time that with reasonable care he could have avoided injuring him, then his concurring negligence will not bar a recovery.³⁰ And if his danger could have been seen by those injuring him, by the exercise of due diligence, in time to have enabled them to have prevented the injury, then they are liable, even though he was grossly negligent in assuming a place of danger.³¹ An engineer seeing a person

²⁵ Buesching v. St. Louis, etc., Co., 6 Mo. App. 85.

²⁶ Little Rock, etc., R. Co. v. Parkhurst, 36 Ark. 371; O'Keefe v. Chicago, etc., R. Co., 32 Iowa, 467.

²⁷ Smith v. Norfolk, etc., R. Co., 114 N. C. 728; 19 S. E. 863, 923; 25 L. R. A. 287; Little Rock, etc., R. Co. v. Haynes, 47 Ark. 297; Keen v. Baltimore, etc., R. Co., 61 Md. 154.

²⁸ Norwood v. Raleigh, etc., R. Co., 111 N. C. 236; 16 S. E. 4; Price v. Philadelphia, etc., R. Co., 84 Md. 506; 36 Atl. 263; 38 L. R. A. 213.

²⁹ Herring v. Wilmington, etc., R. Co., 10 Ired. L. 402; 51 Am. Dec. 395; St. Louis, etc., R. Co.

v. Wilkerson, 46 Ark. 513; McDonald v. Chicago, etc., R. Co., 75 Wis. 121; 43 N. W. 744.

³⁰ Norwood v. Raleigh, etc., R. Co., 111 N. C. 236; 16 S. E. 4; Werner v. Citizens' St. Ry. Co., 81 Mo. 368; Kean v. Baltimore, etc., R. Co., 61 Md. 154.

³¹ Pickett v. Wilmington, etc., R. Co., 117 N. C. 616; 23 S. E. 264; 30 L. R. A. 257; Lloyd v. Albemarle, etc., R. Co., 118 N. C. 1010; 24 S. E. 805; Yarnall v. St. Louis, etc., R. Co., 75 Mo. 575; Falp v. Roanoke, etc., R. Co., 120 N. C. 525; 27 S. E. 74; Dean v. Wilmington, etc., R. Co., 107 N. C. 686; 12 S. E. 77; Werner v. Citizens' St. Ry. Co., 81 Mo. 368.

lying upon a railroad track has no right to assume he will leave in time to avoid the injury.³² So if an engineer by his actions perceives that a person walking upon the track in front of a moving train is apparently so drunk as to render it doubtful if he knows his danger or is unable to get out of the way, he will be guilty of negligence if he run his locomotive against him to his injury, if he could have stopped it in time by the use of at least ordinary care and have thus averted the injury.³³ The running of a train without a headlight with which a man on the track could have been seen in time to have stopped the train, by the use of due care, will render the company liable.³⁴ So if a drunken person be riding on the platform of a car, and the trainmen have notice of his condition, and that he is riding there, it does not necessarily follow that he cannot recover for injuries he sustains by falling off the platform, if his drunkenness was such that he could not and did not realize his dangerous position; for the carrier owes to him something more than passive care and attention. It is its duty to bring him into the car, or at least call his attention to his danger and its rules forbidding passengers to ride on the car platform.³⁵ So if a guest at a hotel becomes drunk and unconscious, and its keeper expel him at night, by reason of which he dies because of exposure to the cold, the keeper is liable; and he cannot urge the negligence of the guest in becoming drunk.³⁶ So if a person induces another to drink to such excess that he dies from his drinking, he is liable for having occasioned his death under a statute providing

³² *Dean v. Wilmington, etc., R. Co.*, 107 N. C. 686; 12 S. E. 77; *Lake Shore, etc., R. Co. v. Miller*, 25 Mich. 274.

³³ *Lake Shore, etc., R. Co. v. Miller*, 25 Mich. 279; *Dean v. Wilmington, etc., R. Co.*, 107 N. C. 686; 12 S. E. 77; *Indianapolis, etc., R. Co. v. Galbreath*, 63 Ill. 436.

³⁴ *Lloyd v. Albemarle, etc., R. Co.*, 118 N. C. 1010; 24 S. E. 805.

³⁵ *Fisher v. West Virginia, etc., R. Co.*, 39 W. Va. 366; 19 S. E. 578; 23 L. R. A. 758; *Holmes v. Oregon, etc., R. Co.*, 5 Fed. 528 (failure of a boat to close up gap between it and the wharf, through which a passenger fell).

³⁶ *Weymire v. Wolfe*, 52 Iowa, 533; *McHugh v. Schlosser*, 159 Pa. 480; 28 Atl. 291; 23 L. R. A. 574.

that any one causing the death of another shall be liable therefor, and he cannot urge that the drinking was the voluntary act of the deceased.³⁷

Sec. 1189. Trespassing drunken man.

Drunken trespassers who are injured while trespassing are not regarded with that leniency held with reference to blind or other disabled persons. "Men must be content, especially when they are trespassers, to enjoy the pleasures of intoxication *cum periculis*. When they make themselves drunk, and in that helpless condition wander upon the premises of sober men and sustain an injury, they will not be heard to plead their intoxication as an answer to the charge of negligence; and the courts consistently hold that such intoxicated trespassers have no standing in any forum where justice is impartially administered."³⁸ Instances of injuries to drunken trespassers upon railroad tracks by moving trains illustrate the principle above stated. An engineer seeing a person upon a railroad track ahead of the train he is controlling has the right to think that such person will act with

³⁷ McCue v. Klein, 60 Tex. 168; 48 Am. Rep. 260.

³⁸ Beach, Contributory Negligence (1st ed.), § 146; Mulherrin v. Delaware, etc., R. Co., 81 Pa. St. 366; Chicago, etc., R. Co. v. Bell, 70 Ill. 102; Toledo, etc., R. Co. v. Riley, 47 Ill. 514; Herring v. Wilmington, etc., R. Co., 10 Ired. 402; 51 Am. Dec. 395; Bugbee v. Union R. Co. (R. I.), 59 Atl. 165; Denman v. St. Paul, etc., R. Co., 26 Minn. 357; Lake Shore, etc., R. Co. v. Miller, 25 Mich. 279; McClelland v. Louisville, etc., R. Co., 94 Ind. 276; Weymire v. Wolfe, 52 Iowa, 543; Wilds v. Brunswick R. Co., 82 Ga. 667; 9 S. E. 595; Yarnall v. St. Louis, etc., R. Co., 75 Mo. 575; Southwestern R. Co. v. Hanker-

son, 61 Ga. 114; Little Rock, etc., R. Co. v. Parkhurst, 36 Ark. 371; Houston, etc., R. Co. v. Smith, 52 Tex. 178; Richardson v. Wilmington, etc., R. Co., 8 Rich. L. 120; Houston, etc., R. Co. v. Sympkins, 54 Tex. 615; 38 Am. Rep. 632; Manly v. Wilmington, etc., R. Co., 74 N. C. 655; Illinois, etc., R. Co. v. Hutchinson, 47 Ill. 408; Price v. Philadelphia, etc., R. Co., 84 Md. 506; 36 Atl. 263; 36 L. R. A. 213; Kean v. Baltimore, etc., R. Co., 61 Md. 168; Anderson v. Chicago, etc., R. Co., 87 Wis. 195; 58 N. W. 79; 23 L. R. A. 203; Whalen v. St. Louis, etc., R. Co., 60 Mo. 323; Virginia Midland R. Co. v. Boswell, 82 Va. 932; 4 S. E. 689.

ordinary care and prudence, and leave the track before the train reaches him, unless there is something in his manner that reasonably shows he will not or does not apprehend his danger. This question has been ably discussed in a Michigan case from which we make the following quotation, as we could make like quotations from an hundred other cases: "If an engineer sees a team and carriage, or a man, in the act of crossing the track far enough ahead of him to have ample time, in the ordinary course of such movements, to get entirely out of the way before the approach of the engine; or if he sees a man walking along upon the track at a considerable distance ahead, and is not aware that he is deaf or insane, or from some other cause insensible of the danger; or if he sees a man or a team approaching a crossing, too near the train to get over in time, he has a right to rely upon the laws of nature and the ordinary course of things, and to presume that the man driving the team, or walking upon the track, has the use of his senses, and will act upon the principles of common sense and the motive of self-preservation, common to mankind in general, and that they will, therefore get out of the way; that those on the track will get off and those approaching it will stop in time to avoid the danger; and he, therefore, has the right to go on without checking his speed until he sees that the team or man is not likely to get out of the way, when it would become his duty to give extra alarm by bell or whistle, and if that is not heeded, then, as a last resort, to check his speed or stop his train, if possible, in time to avoid disaster. If, however, he sees a child of tender years upon the track, or any person known to him to be, or from his appearance giving him good reason to believe that he is insane, or badly intoxicated, or otherwise insensible of danger, or unable to avoid it, he has no right to presume that he will get out of the way, but should act upon the belief that he might not or would not, and he should, therefore, take means to stop his train in time. A more stringent rule than this—a rule that would require the engineer to check his speed or stop his train whenever he sees a team crossing the track, or a man walking it,

far enough ahead to get out of the way in time, until he can send ahead to inquire why they do not; or which would require the engineer to know the deafness, or blindness, or acuteness of hearing or sight, or habits of prudence or recklessness, or other personal peculiarities, of all those persons he may see approaching, or upon the track, and more especially of all those who may be approaching the crossing upon a highway—though not seen—any such rule, if enforced must effectually put an end to all railroads as a means of speedy travel or transportation, and reduce the speed of trains below that of canal boats forty years ago, and would effectually defeat the object of the Legislature in authorizing this mode of conveyance. But how are railroad companies or their engineers or employes to know the personal peculiarities, the infirmities, personal character or station in life of the hundreds of persons crossing or approaching their track? By inspiration or intuition? And if they do not know, then how and why shall the company be required to run their road or regulate their own conduct or that of their servants, by such personal peculiarities of strangers, of which they know nothing? These questions suggest their own answers.”³⁹ There are cases which hold that a railroad company is not required to keep an outlook for trespassers on its tracks;⁴⁰ but there are others that hold otherwise.⁴¹ But intoxication of the trespasser on its tracks imposes no greater diligence on the part of a railroad company than if he were sober, unless those in charge of the train know of his condition.⁴² If those in charge of the train could have

³⁹ Lake Shore, etc., R. Co. v. Miller, 25 Mich. 279.

⁴⁰ Memphis, etc., R. Co. v. Womack, 84 Ala. 149; Woodruff v. Northern Pac. R. Co., 47 Fed. 689; Mobile, etc., R. Co. v. Watly, 69 Miss. 145; 13 So. 825; Scheffler v. Minneapolis, etc., R. Co., 32 Minn. 518; 21 N. W. 711; Morrissey v. Eastern R. Co., 126 Mass. 377; 30 Am. Rep. 686.

⁴¹ Smith v. Norfolk, etc., R. Co.,

114 N. C. 728; 19 S. E. 863, 923; 25 L. R. A. 287; McDonald v. International, etc., R. Co., 86 Tex. 1; 22 S. W. 939, reversing 20 S. W. 847, and 21 S. W. 774; Gunn v. Ohio River R. Co., 42 W. Va. 676; 26 S. E. 546; 36 L. R. A. 575.

⁴² Columbus, etc., R. Co. v. Wood, 86 Ala. 164; Frazer v. South, etc., R. Co., 81 Ala. 185; 60 Am. Rep. 145.

avoided the danger by the use of due care after made aware of the trespasser's intoxicated condition, then the company will be liable if he be injured.⁴³ But where the employes of a railroad knew a drunken man had entered a deep cut through which a train was soon expected, and they also knew that if he was in the cut when the train passed his life would be in peril, and with this knowledge they permitted the train to run into the cut without informing those in charge of it of his perilous position, and he was killed, it was held that the company was liable.⁴⁴ So where a railroad company's servants found a drunken trespasser asleep in its switch yard, who, to their knowledge, recently, after being aroused from a drunken stupor, left the train of another company at its station, it was held that it had not performed its whole duty to him by merely arousing and starting him to wandering in the dark through such yard over its network of tracks and switches. In such an instance it was its duty to see him safely out of the yard, or at least to use ordinary care to avoid injuring him in moving its cars and switch engine about.⁴⁵ Where a trackwalker found a

⁴³ *Frazer v. South, etc., R. Co.*, 81 Ala. 185; 60 Am. Rep. 145; *Houston, etc., R. Co. v. Symkins*, 54 Tex. 615; 38 Am. Rep. 632; *Norwood v. Raleigh, etc., R. Co.*, 111 N. C. 236; 16 S. E. 4; *Clark v. Wilmington, etc., R. Co.*, 109 N. C. 430; 14 S. E. 43; 14 L. R. A. 749; *Dean v. Wilmington, etc., R. Co.*, 107 N. C. 686; 12 S. E. 77; *Troy v. Cape Fear, etc., R. Co.*, 99 N. C. 298; 6 S. E. 77.

⁴⁴ *Fagg v. Louisville, etc., R. Co.*, 111 Ky. 30; 63 S. W. 580; 54 L. R. A. 919.

⁴⁵ *Cincinnati, etc., Ry. Co. v. Marrs*, 119 Ky. 954; 85 S. W. 188; 70 L. R. A. 291.

"We fully concede," said the court in this case, "that Marrs' being drunk did not make him any

the less a trespasser, when he first went into the yard of the corporation, and his intoxication added no new duty from it to him then. But when its servants actually discovered him, trespasser though he was, they owed him the duty to refrain from injuring him, and this duty was as comprehensive as the helplessness of his condition demanded to insure his safety from injury by them. * * *

The servants of the corporation, after finding him in the yard, could not shut their eyes and close their faculties to what must have been apparent to the most casual observer, and say, that, under the circumstances surrounding Marrs, they owed him no duty, and could after that treat him as a tres-

trespasser lying on the track, and on accosting him the man aroused upon his elbow and apparently assented, when told to get off the track, as a train would presently be coming along; and the trackwalker did not know he was drunk, or in any other way physically incapacitated, the company was held not liable.⁴⁶ So where an intoxicated person walked out on a railroad trestle to a place of great peril and was there killed by a train, it was held that he was guilty of negligence contributing to his injury.⁴⁷ If a person becomes voluntarily drunk, and then, unconscious of what he is doing, lays down on a railroad track and is injured, he cannot recover damages for his injuries, unless the railroad company's employes, after being made aware of his condition, by the use of due care, could have avoided injuring him.⁴⁸ It has been held that a failure of the company to use a headlight on its locomotive would not enable a person in such a position to recover, although if they had its servants in charge of the locomotive would have been able to have seen him in time to have stopped it and prevented the injury.⁴⁹ If a drunken

passer. They knew he was intoxicated and in the yard, and, having seen him twice before within an hour in a drunken stupor, they had no right to assume that when left to himself he would not again sink into a torpor, as he had done twice before."

⁴⁶ *Virginia Midland R. Co. v. Boswell*, 82 Va. 932; 7 S. E. 383.

⁴⁷ *Anderson v. Chicago, etc., R. Co.*, 87 Wis. 195; 58 N. W. 79; 23 L. R. A. 203.

⁴⁸ *Southwestern R. Co. v. Hankerson*, 61 Ga. 114; *Louisiana, etc., Ry. Co. v. McDonald* (Tex. Civ. App.), 52 S. W. 649; *Denman v. St. Paul, etc., R. Co.*, 26 Central R. Co. v. *Hutchinson*, 47 Minn. 357; 4 N. W. 605; *Illinois Ill. 408*; *O'Keefe v. Chicago, etc., R. Co.*, 32 Iowa, 467; *Jones v.*

New Orleans, etc., R. Co., 122 La. 354; 47 So. 679; *Price v. Philadelphia, etc., R. Co.*, 84 Md. 506; 36 Atl. 263; 36 L. R. A. 213; *Houston, etc., R. Co. v. Sympkins*, 54 Tex. 615; 38 Am. Rep. 632; *Norfolk, etc., R. Co. v. Harman*, 83 Va. 553; 8 S. E. 251.

In some of the cases it is held that the company's servants must have been guilty of gross negligence; but the better rule is that the company is liable if they are guilty of ordinary negligence. *Price v. Philadelphia, etc., R. Co.*, 84 Md. 506; 36 Atl. 263; 36 L. R. A. 213; *Columbus, etc., R. Co. v. Wood*, 86 Ala. 164; 5 So. 463; *Fulp v. Roanoke, etc., R. Co.*, 120 N. C. 525; 27 S. E. 74.

⁴⁹ *O'Keefe v. Chicago, etc., R. Co.*, 32 Iowa, 467.

person trespass upon a train, and is put off in a place of safety, the company is not responsible for his injuries thereafter inflicted by his getting upon its track.⁵⁰ Walking upon a railroad track is always a source of danger; and if a drunken man do so when he cannot appreciate his danger and is injured by a passing train of cars, he may not recover for his injuries.⁵¹

Sec. 1190. Drunken person on railroad crossing.

Drunken persons have the right to cross a railroad at a public or even a private crossing the same as any other individual; and the same care is required of them as if they were sober. The railroad company owes toward him no greater duty than to a sober person.⁵² He is required to look and listen the same as if he were sober; and also to pay heed to an approaching train.⁵³ And the fact that he is so drunk as not to be able to appreciate his danger or the danger of attempting to cross in front of an approaching train will not excuse him.⁵⁴ The intoxication of the plaintiff, at the time he went upon the crossing is always a matter of consideration for the jury,⁵⁵ but slight intoxication raises no presumption of want of ordinary care on his part.⁵⁶

⁵⁰ *Missouri Pacific R. Co. v. Evans*, 71 Tex. 361; 9 S. W. 325; 1 L. R. A. 476.

⁵¹ *Houston, etc., R. Co. v. Smith*, 52 Tex. 178; *Norfolk, etc., R. Co. v. Harman*, 83 Va. 553; 8 S. E. 251; *Button v. Hudson River R. Co.*, 18 N. Y. 248; *Anderson v. Chicago, etc., R. Co.*, 87 Wis. 195; 58 N. W. 79; 23 L. R. A. 203; *Columbus, etc., R. Co. v. Wood*, 86 Ala. 164; 5 So. 463; *East Tennessee, etc., R. Co. v. Winters*, 85 Tenn. 240; 1 S. W. 790.

⁵² *Indianapolis, etc., R. Co. v. Galbreath*, 63 Ill. 436.

⁵³ *Toledo, etc., R. Co. v. Riley*,

47 Ill. 514; *Chicago, etc., R. Co. v. Bell*, 79 Ill. 102; *Marquett, etc., R. Co. v. Hanford*, 39 Mich. 537.

⁵⁴ *Brand v. Schenectady, etc., R. Co.*, 8 Barb. 368; *Weeks v. New Orleans, etc., R. Co.*, 32 La. Ann. 615; *Galveston, etc., R. Co. v. Harris*, 22 Tex. Civ. App. 16; 53 S. W. 599; *Atchison, etc., R. Co. v. Hardy*, 94 Fed. 294; 37 C. C. A. 359.

⁵⁵ *Hankinson v. Charlotte, etc., R. Co.*, 41 S. C. 1; 19 S. E. 206; *Baltimore, etc., R. Co. v. Chambers*, 81 Md. 371; 32 Atl. 201.

⁵⁶ *Baltimore, etc., R. Co. v. Chambers*, *supra*.

Sec. 1191. Defective highway.

If a drunken man, by reason of his intoxicated condition, is injured by a defect in a public highway, he cannot recover, for the public is not required to guard against his negligence when he is intoxicated;⁵⁷ but if he is not so intoxicated as to interfere with the exercise of ordinary care in walking on the sidewalk or roadway, he is not deprived of the right of protection from the negligence of another who fails to properly guard an opening into which he falls and is thereby injured.⁵⁸ He must exercise such care as ordinarily prudent and sober persons would have exercised under such conditions.⁵⁹ But to charge the jury that the plaintiff's intoxication was "of no consequence" unless he was in such a condition that he was incapable of exercising ordinary care is erroneous.⁶⁰ The intoxication is evidence from which the jury may infer negligence on the part of the plaintiff.⁶¹ Where a wagon was left in a street, it was held that the owner could not exempt himself from liability by showing that the person injured by it was drunk at the time of the accident.⁶² Intoxication that did not contribute to the injury will not defeat him in his action.⁶³ Mere indulgence in liquor does not necessarily bar a traveler's right of action where he is injured by a defective street.⁶⁴ The mere fact that a person driving across a bridge is drunk will not defeat his right of action; though evidence of his condition is admissible upon the question whether he was guilty of negligence.⁶⁵ A city is not

⁵⁷ *Alger v. Lowell*, 3 Allen 402; *Cassedy v. Stockbridge*, 21 Vt. 391; *Woods v. Board*, 128 Ind. 289; 27 N. E. 611; *Healy v. New York*, 3 Hun. 708.

⁵⁸ *Clarke v. Philadelphia, etc.*, Co., 92 Minn. 418; 100 N. W. 231.

⁵⁹ *Covington v. Lee* (Ky.), 89 S. W. 493; 28 Ky. L. Rep. 492.

⁶⁰ *Rhyner v. Menasha*, 107 Wis. 201; 73 N. W. 41.

⁶¹ *Rhyner v. Menasha*, *supra*; *Cramer v. Burlington*, 42 Iowa, 315. But it is of no consequence

unless it aided in causing his injury. *Sylvester v. Casey*, 110 Iowa, 256; 81 N. W. 455; *Alger v. Lowell*, 3 Allen 402; *Maw v. King Tp.*, 8 Ont. 248.

⁶² *Ridley v. Lamb*, 10 Up. Can. 354.

⁶³ *Sylvester v. Casey*, 110 Iowa, 256; 81 N. W. 455.

⁶⁴ *O'Hagan v. Dillon*, 10 J. & S. (N. Y.) 458; *Stuart v. Machias Port*, 48 Me. 477.

⁶⁵ *Thorp v. Brookfield*, 36 Conn. 320.

excused from keeping its highway in a safe condition for travel by reason of the fact that the injured person was intoxicated when receiving his injury.⁶⁶ The drunkenness of a driver of a private vehicle in which the injured person is riding, because of which he drives the vehicle down an unfenced bank is imputed to such injured person, and he cannot recover for his injuries.⁶⁷

Sec. 1192. Drunken physician or surgeon.

If a physician or surgeon is intoxicated when he performs a surgical operation, that fact may be shown as a part of the *res gestae* where he is sued for malpractice.⁶⁸

Sec. 1193. Miscellaneous instances.

Where a saloon keeper sold a drunken man beer until he was unfit to drive a horse, and in that condition put him in a sleigh to drive home, and the horse hitched to the sleigh ran away and was injured, it was held that the saloon keeper was liable for its injuries to its owner.⁶⁹ So a saloon keeper was held liable where he permitted a drunken man, in his saloon to attach a paper to a customer's clothes and set fire to it, thereby injuring such customer.⁷⁰ A guest at a hotel cannot recover for a theft of his baggage if his intoxicated condition contributed to the loss,⁷¹ unless the theft was by the landlord's own servants.⁷² If the guest gets drunk upon

⁶⁶ *Alger v. Lowell*, 3 Allen 402; *Robinson v. Pioche*, 5 Cal. 461.

⁶⁷ *Hershey v. Mill Creek Tp.* (Pa.), 8 Cent. Rep. 252; *Rock Island v. Vanlandschoot*, 78 Ill. 485. *Contra*, *Brannen v. Kokomo, etc., Co.*, 115 Ind. 115; 17 N. E. 202.

⁶⁸ *Merrill v. Pepperdine*, 9 Ind. App. 416; 36 N. E. 921.

⁶⁹ *Dunlap v. Wagner*, 85 Ind. 529; 44 Am. Rep. 42.

⁷⁰ *Rommel v. Schombacker*, 120 Pa. 579; 11 Atl. 779.

This was upon the theory that

the saloon keeper, having opened a place for the entertainment of the public, was bound to see that his customers were properly protected from the assaults of drunken and vicious men whom he may choose to harbor.

⁷¹ *Walsh v. Porterfield*, 87 Pa. 376; *Jolie v. Cardinal*, 35 Wis. 118; *Shultz v. Wall*, 134 Pa. 262; 19 Atl. 742; 8 L. R. A. 97.

⁷² *Cunningham v. Buckey*, 42 W. Va. 671; 26 S. E. 442; 35 L. R. A. 850.

liquor purchased at his landlord's bar, that fact increases rather than diminishes the latter's degree of care toward him and his baggage.⁷³ If the owner of a team permit another to drive his vehicle in so reckless a manner that he is thrown out by reason of a defect in the street, or because of the negligence of another combining with the negligence of the driver, he cannot recover, for the negligence of the driver was his negligence.⁷⁴ The owner of a wagon in charge of his servant is liable for the acts of such servant while drunk in driving the team upon his (the owner's) business; and his intoxication is always a subject of inquiry as a part of the *res gestae* of the case.⁷⁵ Where a mother sent her children to the station to meet their drunken father and bring him home, and the station agent drove them away so they could not meet him, and after the train arrived and departed the father lay down upon the track and was killed, it was held the railroad company was not liable, because driving the boys away was not the proximate cause of the injury, the proximate cause being the act of the father in lying down on the track.⁷⁶ Mere proof that a night operator having charge of a telegraph office in the warehouse of a railroad company was addicted to drinking at the time plaintiff's goods stored in such warehouse were destroyed by fire will not render the company liable.⁷⁷ Where a statute made it a crime for a drunken person to take charge of a locomotive as engineer, and a drunken engineer while attempting to get up and take charge of one was injured, it was held that the company owed him no duty as an employe, but only as an intruder, and that he could not recover.⁷⁸ If the servant of a consignee of goods become intoxicated when he is unloading his goods from the cars and he is injured by a defect in the cars, because of his

⁷³ Rubenstein v. Cruickshanks, al, etc., Co., 1 Tex. Civ. App. 487; 54 Mich. 199; 19 S. W. 954; 52 20 S. W. 872.
Am. Rep. 806.

⁷⁴ Smith v. New York, etc., R. Co., 116 N. C. 932; 21 S. E. 177.
Co., 38 Hun, 33.

⁷⁵ Williams v. Edmunds, 75 Chapman, 4 Ga. App. 706; 62 S. Mich. 92; 42 N. W. 534. E. 488.

⁷⁶ Rozwadosfskie v. International-

impaired condition to do the work he cannot recover.⁷⁹ If an hotel keeper turn his drunken guest out in the cold at night, when he is incapable of caring for himself and appreciating his danger, he will be liable for his death.⁸⁰ A defendant cannot avoid liability for full damages occasioned by an injury he has negligently inflicted, by showing that the damage was greatly increased because of the habitual drunkenness of the plaintiff, which brought on *delirium tremens*.^{80*} A clause in a policy that it does not "cover any accidental injury which may happen to the insured while under the influence of intoxicating liquors" does not relieve the insurance company from liability to the insured for an injury he has received when he had taken drinks just before he was injured.^{80†}

Sec. 1194. Sale of poison to drunken man.

A druggist selling a poison in properly labeled packages or bottles to a man drunk, even grossly drunk, is not liable if he take it and die from the effects; for the sale is not the proximate cause of his death. Thus where a druggist sold chloroform to a youth who had arrived at the age of discretion, when he was grossly intoxicated, and the youth drank it and died from the effect it had upon him, it was held that the druggist was not liable.

Sec. 1195. Drunken man liable for injuries he inflicts.

A man is as liable for injuries he inflicts when drunk as he would be if he had inflicted them when sober, and he can-

⁷⁹ *Cogdell v. Wilmington, etc.*, R. Co., 130 N. C. 313; 41 S. E. 541.

⁸⁰ *Weymire v. Wolfe*, 52 Iowa, 533; *McHugh v. Schlosser*, 159 Pa. 480; 28 Atl. 291; 23 L. R. A. 574.

^{80*} *Maguire v. Sheehan*, 117 Fed. 819; 59 L. R. A. 496.

^{80†} *Fidelity, etc., Ins. Co. v. Chambers*, 93 Va. 138; 24 S. E. 896; 40 L. R. A. 432; *Prader v. National, etc., Asso.*, 95 Iowa, 149; 63 N. W. 601; *Standard, etc., Ins. Co. v. Jones*, 94 Ala. 439; 10 S. E. 530; *Travellers, etc., Ins. Co. v. Harvey*, 82 Va. 949; 5 S. E. 553.

⁸¹ *Meyer v. King*, 72 Miss. 1; 16 So. 245; 35 L. R. A. 474.

not set up as a defense that the plaintiff sold him the liquor which intoxicated him and that it was by reason of his intoxication he occasioned the injury.⁸²

Sec. 1196. Burden of proof—Presumptions.

Where the injured person claims that the defendant had notice of his condition, and after such notice did not use such care as the law required of him under the circumstances, the burden is upon him to show that fact; and if his right of recovery depends upon the absence of the exercise of such care under the circumstances, he cannot recover if proof of that fact be not given.⁸³ But the person who depends upon the intoxication of the injured person as a contributory cause of his injuries has the fact of his intoxication to prove;⁸⁴ and where the burden of proving the negligence of the plaintiff as a defense, is upon him, mere proof of his drunkenness is insufficient, unless from it the jury may reasonably find the fact that he contributed to his injury by reason of his drunken condition.⁸⁵ But if evidence of the injured person's intoxication be given, and the burden, by the practice of the forum, requires him to show he was free from fault, then he must show that he exercised due care and prudence and that his intoxication did not cause him to contribute to his injuries.⁸⁶ If it be shown that the conductor running a train which caused the accident was a man of intemperate habits, the burden is upon the defendant company to show he was not drunk when the accident occurred,⁸⁷ and the habit of intoxication once proved to have existed is presumed to have existed when the accident occurred, and the

⁸² *Cassady v. Magher*, 85 Ind. 228.

⁸³ *Columbus, etc., R. Co. v. Woods*, 86 Ala. 164; 5 So. 463.

⁸⁴ *Cramer v. Burlington*, 42 Iowa, 315; *Loewer v. Sedalia*, 77 Mo. 431.

⁸⁵ *Seymer v. Lake*, 66 Wis. 651; 29 N. W. 554; see *Ford v. Uma-*

tilla County, 15 Or. 315; 16 Pac. 33.

⁸⁶ *Burns v. Elba*, 32 Wis. 605; *Cramer v. Burlington*, 42 Iowa, 315; *Hubbard v. Mason City*, 60 Iowa, 400; 14 N. W. 772; *Columbus, etc., R. Co. v. Wood*, 86 Ala. 164; 5 So. 463.

⁸⁷ *Pennsylvania R. Co. v. Books*, 57 Pa. 339; 98 Am. Dec. 229.

burden of showing that it did not rests with the person asserting that fact.⁸⁸

Sec. 1197. Intoxication only evidence of contributory negligence—Question for jury.

Where a person is injured when he is intoxicated, that of itself does not constitute negligence, in law, warranting the court to enter a non-suit or giving "peremptory instruction to find for the defendant. The fact of intoxication is only a circumstance to go to the jury on the question of his negligence contributing to the injury.⁸⁹ In a New Hampshire

⁸⁸ Lane v. Missouri Pac. R. Co., 132 Mo. 4; 33 S. W. 645, 1128; Crew v. St. Louis, etc., R. Co., 20 Fed. 87; Chapman v. Erie R. Co., 55 N. Y. 579.

⁸⁹ Fox v. Michigan Cent. R. Co., 138 Mich. 433; 101 N. W. 624; 68 L. R. A. 336; Stuart v. Machias Port, 44 Me. 447; Alger v. Lowell, 3 Allen 402; Kingston v. Ft. Wayne, etc., R. Co., 112 Mich. 40; 70 N. W. 315; 74 N. W. 230; 40 L. R. A. 131; Pittsburgh, etc., R. Co. v. Caldwell, 74 Pa. 421; Bremen v. Michigan, etc., R. Co., 93 Mich. 156; 53 N. W. 358; Louisville, etc., R. Co. v. Johnson, 108 Ala. 62; 19 So. 51; 31 L. R. A. 372; Illinois Cent. R. Co. v. Proctor, 122 Ky. 92; 89 S. W. 714; 28 Ky. L. Rep. 598; Midland Valley R. Co. v. Hamilton, 84 Ark. 81; 104 S. W. 540; Trumbull v. Erickson, 97 Fed. 891; 38 C. C. A. 536; Kansas City, etc., Ry. Co. v. Davis, 83 Ark. 217; 103 S. W. 603; Hankinson v. Charlotte, etc., R. Co., 41 S. C. 1; 19 S. E. 206; Houston, etc., R. Co. v. Waller, 56 Tex. 331; Northern Pac. R. Co. v. Craft, 29 U. S. App. 687; 69 Fed. 124; 16 C. C. A. 175;

Holmes v. Oregon, etc., R. Co., 6 Sawy. 290; 5 Fed. 523; Baltimore, etc., R. Co. v. Boteler, 38 Md. 568; Illinois Cent. R. Co. v. Cragin, 71 Ill. 177; Lynch v. New York, 47 Hun, 524; Alexander v. Hunber, 86 Ky. 565; 6 S. W. 453; Seymer v. Lake, 66 Wis. 651; 29 N. W. 554; Ford v. Umatilla Co., 15 Or. 313; 16 Pac. 33; Williams v. Edmunds, 75 Mich. 92; 42 N. W. 534; Cincinnati, etc., R. Co. v. Cooper, 120 Ind. 469; 22 N. E. 340; 6 L. R. A. 241; Alcock v. Royal, etc., Corp., 13 Q. B. 292; 18 L. J. Q. B. (N. S.) 121; 13 Jur. 445; Aurora v. Hillman, 90 Ill. 61; Thorp v. Brookfield, 36 Conn. 320; Enright v. Atlanta, 78 Ga. 288; Wynn v. Allard, 5 W. & S. 525; Merrill v. Pepperdine, 9 Ind. App. 416; 36 N. E. 921; Hampson v. Taylor, 15 R. I. 83; 8 Atl. 331; 23 Atl. 732; Hubbard v. Mason City, 60 Iowa, 400; 14 N. W. 772; Barber v. Savage, 1 Sweeney 288; Lane v. Missouri Pac. R. Co., 132 Mo. 4; 33 S. W. 645, 1128; Lake Erie, etc., R. Co. v. Zoffinger, 107 Ill. 199; McCracken v. Markeson, 76 Wis. 499; 45 N. W. 323; Denver Tramway,

case it was said: "It is conceded the plaintiff was drunk. Whether his drunkenness so affected him as to render him incapable of appreciating or understanding the dangerous position in which he was, or of protecting himself from its hazards, although he was able to talk, laugh, sing and dance about, is a question of fact and not of law. It cannot be said, as a matter of law, that a man may not be able to do all that the plaintiff did, and still be so affected by the intoxicants of which he had partaken as not to appreciate or understand the danger of riding in a car with open side doors, or of stepping near the doors. * * * Leaving out of sight the immaterial fact of the cause of the plaintiff's incapacity, the question is whether a jury may not find that in the exercise of the care in transportation required of them, a railroad corporation, knowing that a passenger is in a dangerous position—the danger of which he does not know, and which they know he is ignorant of and powerless to avoid—are under obligation to do something to prevent the injury. To this question there can be but one answer upon reason and the authorities."⁹⁰ While drunkenness is not negligence *per se*, yet it is evidence of negligence, more or less cogent, according to the circumstances of each particular instance of an injury.⁹¹ It is not proper to separate the fact of drunkenness from the other facts proven and make it a basis of an instruction; for such a course tends to mislead the jury;⁹² nor

Co. v. Reid, 4 Colo. App. 53; 35 Pac. 269; Pennsylvania R. Co. v. Newmeyer, 129 Ind. 401; 28 N. E. 860; Gilman v. Eastern R. Co., 13 Allen 433; 90 Am. Dec. 210; Baltimore, etc., R. Co. v. Henthorne, 73 Fed. 634; 43 U. S. App. 113; 19 C. C. A. 623; Chicago, etc., R. Co. v. Sullivan, 63 Ill. 293; Huntington, etc., R. Co. v. Decker, 82 Pa. 119; Cleghorn v. New York, etc., R. Co., 56 N. Y. 44; 15 Am. Rep. 375; Johnson v. Louisville, etc., R. Co., 104 Ala. 242; 16 So. 75.

⁹⁰ Wheeler v. Grand Trunk, etc., R. Co., 70 N. H. 607; 50 Atl. 103; 54 L. R. A. 955.

⁹¹ Holmes v. Oregon, etc., R. Co., 6 Sawy. 290; 5 Fed. 523; Baltimore, etc., R. Co. v. Boteler, 38 Md. 568; Lynch v. New York, 47 Hun, 524; Northern Pac. R. Co. v. Craft, 69 Fed. 124; 16 C. C. A. 175; 29 U. S. App. 687; Seymer v. Lake, 66 Wis. 651; 29 N. W. 554; Ford v. Umatilla Co., 15 Or. 313; 16 Pac. 33.

⁹² Baltimore, etc., R. Co. v. Boteler, 38 Md. 568.

should an instruction exclude the fact of his intoxication in ascertaining the fact of contributory negligence.⁹³ Mere proof of intoxication at the time the injury occurred is not a defense unless it shows that it caused the plaintiff to contribute to his own injuries.⁹⁴ It may be shown that the driver of the vehicle was drunk where the injury was to persons riding with him, it being claimed that a defective street occasioned the injury.⁹⁵ So also that the engineer driving the engine that run over deceased was drunk,⁹⁶ and that a person was drunk who was injured on a railroad track, as a reason for his recovering damages;⁹⁷ or a traveler upon a public street who is injured by a defect in it,⁹⁸ or is injured in crossing a bridge.⁹⁹ Evidence of repeated intoxication of the injured person, or person causing the injury, is admissible as throwing light on the issue whether or not he was drunk at the time of the accident.¹ It may be shown that a physician sued for malpractice was drunk when he performed the operation or rendered the services.² It is, however, held that intoxication at the time of the accident cannot be inferred from mere proof of intemperate habits.³ Evidence of the general character of the driver of a wagon is not admissible.⁴

⁹³ Illinois Cent. R. Co. v. Cragin, 71 Ill. 177.

⁹⁴ Seymer v. Lake, 66 Wis. 651; 29 N. W. 554; Ford v. Umatilla Co., 15 Or. 313; 16 Pac. 33; Illinois Cent. R. Co. v. Cragin, 71 Ill. 177.

⁹⁵ Williams v. Edmunds, 75 Mich. 92; 42 N. W. 534; Alexander v. Hunber, 86 Ky. 565; 6 S. W. 453.

⁹⁶ Northern Pac. R. Co. v. Craft, 69 Fed. 124; 16 C. C. A. 175; 29 U. S. App. 687; Wynn v. Allrod, 5 W. & S. 525

⁹⁷ Cincinnati, etc., R. Co. v. Cooper, 120 Ind. 469; 22 N. E. 340; 6 L. R. A. 241.

⁹⁸ Aurora v. Hillman, 90 Ill. 61.

⁹⁹ Thorp v. Brookfield, 36 Conn. 320.

¹ Enright v. Atlanta, 78 Ga. 288. *Contra*, Hubbard v. Mason City, 60 Iowa, 400; 14 N. W. 772; Barber v. Savage, 1 Sweeney, 288; Lane v. Missouri Pac. Ry. Co., 132 Mo. 4; 33 S. W. 645, 1128.

² Merrill v. Pepperdine, 9 Ind. App. 416; 36 N. E. 921.

³ Hampson v. Taylor, 15 R. I. 83; 8 Atl. 331; 23 Atl. 732; Hubbard v. Mason City, 60 Iowa, 400; 14 N. W. 772; Kingston v. Ft. Wayne, etc., R. Co., 112 Mich. 40; 70 N. W. 315; 40 L. R. A. 131; Barber v. Savage, 1 Sweeney, 288; Lane v. Missouri Pac. Ry. Co., 132 Mo. 4; 33 S. W. 645, 1128.

⁴ Williams v. Edmunds, 75 Mich. 92; 42 N. W. 534; Hampson v. Taylor, 15 R. I. 83; 8 Atl. 331; 23 Atl. 732.

If a plaintiff testifies he was not drunk at the time of his injury and had not been drinking to the best of his recollection, he may be asked on cross-examination if he was not in the habit of getting drunk.⁵ If the defendant has introduced evidence tending to show the plaintiff was drunk when injured, the latter may prove not only that he was not then drunk, but also his general character for sobriety.⁶ The habit of an engineer to drink may be shown as well as his visits to a particular saloon,⁷ and so the general reputation of a flagman for drunkenness who is stationed at a crossing may be shown, in order only, however, to show that if the railroad company had used due care it must have known of his habits and unsuitableness for such a position;⁸ and so may the general reputation of an engineer.⁹ Evidence of so remote character as to throw little or no light upon the condition of the person injured at the time of the injury may be excluded without error being committed, as where he was charged at the time with the crime of drunkenness and was endeavoring to secure bondsmen to keep out of jail;¹⁰ nor can a witness give his opinion that the injured person was drunk where he had not been in sufficiently close contact with him to draw anything like a reliable conclusion.¹¹ Nor may a physician testify as to the effect of alcohol upon a person who has died, at least if he did not testify from personal knowledge and it had been merely shown he was drunk.¹²

⁵ McCracken v. Markeson, 76 Wis. 499; 45 N. W. 323; see Lake Erie, etc., R. Co. v. Zoffinger, 107 Ill. 199.

⁶ Denver Tramway Co. v. Reid, 4 Colo. App. 53; 35 Pac. 269.

⁷ Pennsylvania R. Co. v. Newmeyer, 129 Ind. 401; 28 N. E. 860.

⁸ Gilman v. Eastern R. Co., 13 Allen, 433; 90 Am. Dec. 910.

⁹ Baltimore, etc., R. Co. v. Henthorne, 73 Fed. 634; 43 U. S. App. 113; 19 C. C. A. 623. See Chicago, etc., R. Co. v. Sullivan, 63 Ill.

293; Huntington, etc., R. Co. v. Decker, 82 Pa. 119; Cleghorn v. New York, etc., R. Co., 56 N. Y. 44; 15 Am. Rep. 375; Northern Pac. R. Co. v. Craft, 69 Fed. 124; 16 C. C. A. 175; 29 U. S. App. 687.

¹⁰ Hubbard v. Mason City, 60 Iowa, 400; 14 N. W. 772.

¹¹ Johnson v. Louisville, etc., R. Co., 104 Ala. 242; 16 So. 75.

¹² Johnson v. Louisville, etc., R. Co., 104 Ala. 242; 16 So. 75.

Sec. 1198. Weight of evidence and its sufficiency.

The weight of the evidence is for the jury, and their decision upon it will not be disturbed.¹³ If the evidence be nearly balanced, the fact that one of the parties concerned was intoxicated may turn the scale, for a person partially bereft of his faculties is less observant than if he were sober.¹⁴ If intoxication of the plaintiff be shown, that will entitle the defendant to an instruction, that if they believe from the evidence the plaintiff was guilty of negligence and imprudence at the time of his injuries, because of his intoxication, which contributed to his injuries, then he cannot recover.¹⁵ Where a man lying drunk on a railroad track was run over and killed, and there was some evidence he could have been seen in time to stop the train before reaching him, it was held that the court was not authorized to take the case from the jury.¹⁶ And the same was held of a man walking upon a track, although the whistle was blown to alarm him, the evidence varying as to the distance the train was from him when it was blown from two hundred yards to twenty feet.¹⁷ So evidence that an employe was killed in switch yards, though drunk, may authorize a verdict against the railroad company.¹⁸ Proof that the plaintiff's breath showed that he was drinking when he fell into an excavation does not show he was guilty of contributory negligence;¹⁹ nor does mere proof that he had drunk one glass of beer.²⁰ Evidence that a railroad engineer was an habitual drunkard, frequently drunk when off, and sometimes when on, duty, being seldom free from

¹³ Williams v. Missouri Pac. R. Co., 109 Mo. 485; 18 S. W. 1098; Daly v. Hinz, 113 Cal. 366; 45 Pac. 693.

¹⁴ Wynn v. Allrod, 5 W. & S. 525.

¹⁵ Brand v. Schenectady, etc., R. Co., 8 Barb. 368; Bradley v. Second Ave. R. Co., 8 Daly 289; Fulp v. Roanoke, etc., R. Co., 120 N. C. 525; 27 S. E. 74.

¹⁶ Fulp v. Roanoke, etc., R. Co., 120 N. C. 525; 27 S. E. 74; North-

ern Pac. R. Co. v. Craft, 69 Fed. 124; 16 C. C. A. 175; 29 U. S. App. 687.

¹⁷ Houston, etc., R. Co. v. Smith, 52 Tex. 178.

¹⁸ Northern Pac. R. Co. v. Craft, 67 Fed. 124; 16 C. C. A. 175; 29 U. S. App. 687.

¹⁹ O'Hagan v. Dillon, 10 J. & S. (N. Y.) 458; The Anna, 47 Fed. 525.

²⁰ Aurora v. Hillman, 90 Ill. 61.

drink, is sufficient to sustain a verdict giving damages for an injury to a brakeman occasioned by the engineer failing to note signals which it was his duty to obey, and thus colliding with a car on the track, where the charge is that he was incompetent by reason of his drinking habits.²¹ Where a deceased when drunk, at night got off on the wrong side of a car where there was no platform, and fell off the bridge on which the car was stopped, the other passengers getting off on the other side, it was held proper to direct a nonsuit.²² So where a street car passenger, thrown from the car and injured, had no recollection of taking the car or of any of the facts connected with the accident, he at the time standing on the front platform swaying to and fro because of his drunken condition, the car being driven at the time at a moderate rate of speed, and there was no evidence of any defect in the road nor any of any extraordinary motion of the car, a verdict was directed for the defendant.²³ So where it was shown that a minor of years of discretion was intoxicated from excessive use of liquor to such an extent as to be incapable of exercising a reasonable degree of prudence and caution; and while in that state he drank chloroform sold him by the defendant, from the effects of which he died, it was held that these facts showed he was guilty of such contributory negligence that no action could be maintained to recover damages because of his death.²⁴ Where a much-intoxicated pedestrian attempted to cross a bridge after he was warned it was not safe, and within a few feet was another bridge, it was held he could not recover damages for his injuries,²⁵ and the same was held of an intoxicated person who drove off the unprotected bank of a highway after having been notified of his danger.²⁶ If a sidewalk is defective, but a person not intoxicated using due care could pass over it, a drunken man going over it who is injured cannot re-

²¹ *Williams v. Missouri Pac. R. Co.*, 109 Mo. 485; 18 S. W. 1098.

²² *Deselms v. Baltimore, etc., R. Co.*, 149 Pa. 432; 24 Atl. 283.

²³ *Holland v. West End St. R. Co.*, 155 Mass. 387; 29 N. E. 622.

²⁴ *Meyer v. King*, 72 Miss. 1; 16 So. 245; 35 L. R. A. 474.

²⁵ *Wood v. Andes*, 11 Hun, 543.

²⁶ *Monk v. New Utrecht*, 104 N. Y. 552; 11 N. E. 268.

cover damages.²⁷ Mere proof that a person injured on the track at night was drunk, and was run over by cars and an engine, will not justify a verdict against the railroad company.²⁸

Sec. 1199. Question for jury.

It is always a question for the jury to solve whether the intoxication of the injured person contributed to his injuries,²⁹ especially if there be a conflict of evidence on the question of his drunkenness.³⁰ As a rule the verdict of the jury upon that question is conclusive, whichever way the finding may be.³¹ And the court may not say to that jury that if the injured person was drunk when injured he cannot recover, even though the action be against a municipality to recover damages because of a defect in a street into which he fell.³² So whether or not the person injuring him had notice of his drunken condition is one for the jury;³³ and the question whether or not the acts of the person placing him in or permitting him to go into a dangerous place are the cause of his injury is also a question for the jury.³⁴ So is one whether the engineer could have discovered the deceased lying on the track if he had used due care in keeping an outlook for

²⁷ *McCracken v. Markesan*, 76 Wis. 499; 45 N. W. 323.

²⁸ *Church v. Northern Pac. R. Co.*, 31 Fed. 529.

²⁹ *Newton v. Central Vt. R. Co.*, 80 Hun, 491; 30 N. Y. Supp. 488; *Houston, etc., R. Co. v. Sympkins*, 54 Tex. 615; 38 Am. Rep. 632; *Stuart v. Machias Port*, 48 Me. 477; *Maw v. King Tp.*, 8 Ont. 248; *Williams v. Missouri Pac. R. Co.*, 109 Mo. 485; 18 S. W. 1098; *Laning v. New York C. R. Co.*, 49 N. Y. 521; 10 Am. Rep. 417; *Fisher v. West Virginia, etc., R. Co.*, 39 W. Va. 366; 19 S. E. 578; 23 L. R. A. 758.

³⁰ *Tompkins v. Oswego*, 40 N. Y. St. Rep. 4; *Salina v. Trosper*, 27 Kan. 545.

³¹ *Salina v. Trosper*, 27 Kan. 545; *Union Pacific R. Co. v. Diehl*, 33 Kan. 422; 6 Pac. 566.

³² *Stuart v. Machias Port*, 48 Me. 477; *Clark v. Wilmington, etc., R. Co.*, 109 N. C. 430; 14 S. E. 43; 14 L. R. A. 749; *Maw v. King Tp.*, 8 Ont. 248; *Williams v. Missouri Pac. Ry. Co.*, 109 Mo. 485; 18 S. W. 1098; *Laning v. New York C. R. Co.*, 49 N. Y. 521; 10 Am. Rep. 417.

³³ *Louisville, etc., R. Co. v. Johnson*, 108 Ala. 62; 19 So. 51; 31 L. R. A. 372; *Johnson v. Louisville, etc., R. Co.*, 104 Ala. 241; 16 So. 75.

³⁴ *Guy v. New York, etc., R. Co.*, 30 Hun, 399; *Southwestern R. Co. v. Hankerson*, 72 Ga. 182.

persons on the track.³⁵ So it is a question for the jury whether the agent of a carrier used due care in expelling the injured person from a street car when it was in motion.³⁶

Sec. 1200. Master's liability to his servant for his drunken servant's negligence.

If a master knowingly employ a servant having habits of intoxication or who frequently gets drunk when on duty; or if he retains him after notified of his drunken habits, he will become liable if because of his intoxication he carelessly and negligently injure another servant. "That drunkenness on the part of a railroad employe renders him an incompetent servant will scarcely be disputed; nor can it be questioned that a master who knowingly employs such a servant, or who, knowing his habits, retains him in his service, would be guilty of a reckless and wanton breach of duty, not only to the public, but to every employe in his service."³⁷

³⁵ Deans v. Wilmington, etc., R. Co., 107 N. C. 686; 12 S. E. 77; Schuenke v. Pine River, 84 Wis. 669; 54 N. W. 1007.

³⁶ Murphy v. Union R. Co., 118 Mass. 228; Healey v. New York, 3 Hun, 708.

³⁷ Norfolk & Western R. Co. v. Hoover, 79 Md. 253; 29 Atl. 994; 25 L. R. A. 710; Michigan Cent. R. Co. v. Gilbert, 46 Mich. 176; Galveston, etc., R. Co. v. Davis, 4 Tex. Civ. App. 468; 22 S. W. 659; Kean v. Detroit, etc., Mills, 66 Mich. 277; 33 N. W. 395; Neilon v. Kansas City, etc., R. Co., 85 Mo. 599; Maxwell v. Hannibal, etc., R. Co., 85 Mo. 95; Williams v. Missouri Pac. R. Co., 109 Mo. 475; 18 S. W. 1098; Laning v. New York Cent. R. Co., 49 N. Y. 521; 10 Am. Rep. 417; Baltimore, etc., R. Co. v. Henthorne, 73 Fed. 634; 19 C. C. A. 623; 43 U. S. App. 113; Huntington, etc., R. Co. v. Decker, 84 Pa. 419; 82 Pa.

119; Gilman v. Eastern R. Co., 13 Allen 433; 90 Am. Dec. 210; Craw v. St. Louis, etc., R. Co., 20 Fed. 87; Kean v. Detroit, etc., Mills, 66 Mich. 277; 33 N. W. 395; McPheet v. Scully, 163 Mass. 216; 39 N. E. 1007; Fink v. Coe, 4 G. Greene 555; 61 Am. Dec. 141; Hilts v. Chicago, etc., R. Co., 55 Mich. 437; 21 N. W. 878; Sawyer v. Sauer, 10 Kan. 466; Chicago, etc., R. Co. v. Sullivan, 63 Ill. 293; Chapman v. Erie R. Co., 55 N. Y. 579; Cleghorn v. New York, etc., R. Co., 56 N. Y. 44; 15 Am. Rep. 575; Lyons v. New York, etc., R. Co., 39 Hun, 386; Hanington v. New York, etc., R. Co., 19 N. Y. St. Rep. 20; Gahagan v. Boston, etc., R. Co., 1 Allen 189; 79 Am. Dec. 724; Craw v. St. Louis, etc., R. Co., 20 Fed. 87; Earnmoor S. S. Co. v. Union Ins. Co., 44 Fed. 374; Michigan Cent. R. Co. v. Gilbert, 46 Mich. 176.

Thus a brakeman injured by the negligence of a drunken conductor was allowed to recover damages against the railroad employing both of them;³⁸ an engineer by the negligence of a yardmaster;³⁹ a brakeman by a conductor;⁴⁰ a workman by the foreman of the mills;⁴¹ a laborer by the foreman of a quarry;⁴² a workman by the foreman of a building construction company;⁴³ an engineer by a conductor;⁴⁴ an engineer by his assistant.⁴⁵ So the master is liable for the act of a drunken servant he employs, if such drunken servant negligently injure a fellow-servant because of his drunken condition, where he fails to ascertain his habits of drinking, which he might have done by reasonable inquiry, Negligence in ascertaining the character of such an employe before he was employed or enters upon his employment is such as to render the master liable.⁴⁶ Of course, in order to hold the master on this ground it must be shown that the injury was caused by the servant's habits of intoxication;⁴⁷ and this is a question for the jury.⁴⁸

³⁸ Galveston, etc., R. Co. v. Davis, 4 Tex. Civ. App. 468; 22 S. W. 659; Williams v. Missouri Pac. R. Co., 109 Mo. 475; 18 S. W. 1098.

³⁹ Michigan Cent. R. Co. v. Gilbert, 46 Mich. 176.

⁴⁰ Galveston, etc., R. Co. v. Davis, 4 Tex. Civ. App. 468; 22 S. W. 659; Neilon v. Kansas City, etc., R. Co., 85 Mo. 599.

⁴¹ Kean v. Detroit, etc., R. Co., 66 Mich. 277; 33 N. W. 395.

⁴² Maxwell v. Hannibal, etc., R. Co., 85 Mo. 95.

⁴³ Laning v. New York Cent. R. Co., 49 N. Y. 521; 10 Am. Rep. 417.

⁴⁴ Huntington, etc., R. Co. v. Decker, 84 Pa. 419.

⁴⁵ Poirer v. Carroll, 35 La. Ann. 699.

⁴⁶ Zumwalt v. Chicago, etc., R. Co., 35 Mo. App. 661; Hiltz v.

Chicago, etc., R. Co., 55 Mich. 440; 21 N. W. 878; Gilman v. Eastern R. Co., 3 Allen 433; 90 Am. Dec. 210; Illinois Cent. R. Co. v. Jewell, 46 Ill. 99; 92 Am. Dec. 240; Chicago, etc., R. Co. v. Sullivan, 63 Ill. 293; Lyons v. New York, etc., R. Co., 39 Hun, 385; Pennsylvania R. Co. v. Books, 57 Pa. 343; 98 Am. Dec. 299; Stevens v. San Francisco, etc., R. Co., 100 Cal. 554; 35 Pac. 168; Sizer v. Syracuse, etc., R. Co., 7 Lans. 67.

⁴⁷ Englehardt v. Delaware, etc., R. Co., 78 Hun, 588; 29 N. Y. Supp. 425; Craw v. St. Louis, etc., R. Co., 20 Fed. 87; Campbell v. Wing, 5 Tex. Civ. App. 431; 24 S. W. 360; Hanington v. New York, etc., R. Co., 19 N. Y. St. Rep. 20.

⁴⁸ Brickner v. New York Cent. R., 2 Lans. 515.

Under a statute requiring the

Sec. 1201. Proof of notice of servant's drunken habits.

It is necessary to prove that the master had knowledge of his servant's drunken habits, or that he might have known them by reasonable inquiry. Of course, in the case of a corporation, then some officer of it must have notice; and whether notice to him is notice to his company, depends whether notice to him is notice to the corporation. Thus where the foreman of a railroad roundhouse had notice of the drunken habits of an engineer, this was held to be notice to his company;⁴⁹ so also notice of his habits to the general agent of a railroad company hiring a foreman, was held to be a sufficient notice to the railroad company;⁵⁰ so knowledge of a railroad superintendent is notice to his company of the habits of a conductor under him.⁵¹ And evidence that the master ought to have known of the habits of a drunken servant is admissible.⁵² Evidence of the general reputation of the servant for intemperance is admissible on the question of the negligence of the master in employing or retaining him. "If the servant's general reputation before employment is so notorious as to unfitness as that it must have been known to the master but for his (the master's) negligence in not informing himself—if he could have been ignorant of it only because he failed to make investigation—then it is obvious that he had not used the care and caution which the law demands of him in selecting his employes. Hence 'the servant's general reputation for unfitness may be sufficient to overcome the presumption that the master used due care in his selection, even though actual knowledge of such reputa-

engineer of a coal mine to be sober and competent, it is sufficient defense if the company believed he was sober and competent. *Mulhern v. Lehigh Valley Coal Co.*, 161 Pa. 270; 28 Atl. 1087.

⁴⁹ *Williams v. Missouri Pac. R. Co.*, 109 Mo. 475; 18 S. W. 1098.

⁵⁰ *Laning v. New York Cent. R. Co.*, 49 N. Y. 521; 10 Am. Rep. 417.

⁵¹ *Huntington, etc., R. Co. v.*

Decker, 84 Pa. 419; *Missouri Pac. R. Co. v. Patton* (Tex. Civ. App.), 25 S. W. 39; 26 S. W. 978; *Brickner v. New York, etc., R. Co.*, 2 Lans, 506; affirmed 49 N. Y. 672; *Laning v. New York, etc., R. Co.*, 49 N. Y. 521; 10 Am. Rep. 417; *Baltimore, etc., R. Co. v. Henthorne*, 73 Fed. 634; 19 C. C. A. 623; 43 U. S. App. 113.

⁵² *Chicago, etc., R. Co. v. Doyle*, 18 Kan. 58.

tion for unfitness on the master's part is not shown.' ''⁵³ So declarations of a railroad superintendent that he had several times hired and discharged a conductor for getting drunk and disobeying orders is admissible to show negligence on the part of the company in retaining him in its employ,⁵⁴ and so are his statements that he knew the servant under him had habits of intoxication.⁵⁵ So the drunken habits of the conductor known to his railroad superintendent may be shown.⁵⁶ Proof of the drunken habits of the servant extending over several months may be shown from which the jury may draw the conclusion that the master was negligent in not ascertaining his habit and retaining him in his employment, though no evidence be introduced showing that he had any actual knowledge of his intoxication.⁵⁷

Sec. 1202. Drunken passenger.

The fact that a man is intoxicated does not deprive him of the right to ride upon a railroad car or steamboat.⁵⁸ Carriers

⁵³ *Norfolk, etc., R. Co. v. Hoover*, 79 Md. 253; 29 Atl. 994; 25 L. R. A. 710, quoting *Wood on Master & Servant*, § 420; *Sawyer v. Sauer*, 10 Kan. 466; *Chicago, etc., R. Co. v. Sullivan*, 63 Ill. 293.

⁵⁴ *Huntington, etc., Co. v. Decker*, 82 Pa. 119.

⁵⁵ *Chapman v. Erie R. Co.*, 55 N. Y. 579; *Lanning v. New York, etc., R. Co.*, 49 N. Y. 521; 10 Am. Rep. 417.

⁵⁶ *Huntington, etc., R. Co. v. Decker*, 82 Pa. 119; *Lanning v. New York, etc., R. Co.*, 49 N. Y. 521; 10 Am. Rep. 417; *Cleghorn v. New York, etc., R. Co.*, 56 N. Y. 44; 15 Am. Rep. 375; *Gilman v. Eastern R. Co.*, 10 Allen, 233; 87 Am. Dec. 635; *McPhee v. Sully*, 163 Mass. 216; 39 N. E. 1007.

⁵⁷ *Hilts v. Chicago, etc., R. Co.*, 55 Mich. 437; 21 N. W. 878; *Sawyer v. Sauer*, 10 Kan. 466; *Chi-*

cago, etc., R. Co. v. Sullivan, 63 Ill. 293.

Where it was alleged that the servant was drunk at the time of the accident, evidence of his previous intoxication was held inadmissible. *Warner v. New York, etc., R. Co.*, 44 N. Y. 465.

⁵⁸ *Milliman v. New York, etc., R. Co.*, 66 N. Y. 643, affirming 4 Hun, 409; 6 T. & C. 585; *Fisher v. West Virginia, etc., R. Co.*, 39 W. Va. 366; 19 S. E. 578; 23 L. R. A. 758; *Central, etc., Co. v. Phinazee*, 93 Ga. 498; 21 S. E. 66; *Paris, etc., R. Co. v. Robinson* (Tex. Civ. App.), 114 S. W. 658; *Stevenson v. West Seattle, etc., Co.*, 22 Wash. 84; 60 Pac. 51; *Pittsburgh, etc., Ry. Co. v. Vandyne*, 57 Ind. 576; 26 Am. Rep. 68; *Putman v. Broadway, etc., R. Co.*, 55 N. H. 108; 14 Am. Rep. 190.

have a right to refuse a person as a passenger who is so intoxicated as to be offensive, disagreeable or annoying, although he may hold a ticket entitling him to a passage.⁵⁹ And if upon a previous trip he had been drunk and offensive, it may refuse him a second passage when he presents himself in an intoxicated condition to take the car.⁶⁰ So it may refuse to receive a passenger who is so drunk he cannot take care of himself; but the fact he is drunk and staggering, yet is capable of transacting with intelligence important business and has the foresight to provide for his own safety, will not justify it in its refusal to receive him because of his intoxicated condition.⁶¹ And as a drunken man has the right to ride upon a railroad car or steamboat, the fact of his drunkenness does not free the carrier from its duty to render him, as a passenger, due care. It is its duty to observe the same care to him as to a sober passenger.⁶² "A drunken man is not an outcast, and the railway carrier cannot negligently suffer harm to come to him while he is a passenger. It owes him some duty, which, at its peril, it must not omit. It is not to answer for his folly, but for its own breach of duty."⁶³ Nor is a carrier "bound to protect a drunken man from the consequences which result from his own folly and wrong."⁶⁴

⁵⁹ Pittsburgh, etc., R. Co. v. Vandyne, 57 Ind. 576; 26 Am. Rep. 68; Edgerly v. Union St. Ry. Co. (N. H.), 56 Atl. 558; Vinton v. Middlesex R. Co., 11 Allen 304; 87 Am. Dec. 714; Missouri Pacific R. Co. v. Evans, 71 Tex. 361; 9 S. W. 325; 1 L. R. A. 476; Stevenson v. West, etc., Co., 22 Wash. 84; 60 Pac. 51.

⁶⁰ Louisville, etc., R. Co. v. McNally (Ky.), 105 S. W. 124; 35 Ky. L. Rep. 1357.

⁶¹ Paris, etc., R. Co. v. Robinson (Tex. Civ. App.), 114 S. W. 658.

⁶² Milliman v. New York, etc., R. Co., 66 N. Y. 643; Fisher v. West Virginia, etc., R. Co., 39 W.

Va. 366; 19 S. E. 578; 23 L. R. A. 758; Central, etc., R. Co. v. Phinazee, 93 Ga. 488; 21 S. E. 66; Meyer v. Pacific R. Co., 40 Mo. 151; Holmes v. Oregon, etc., R. Co., 5 Fed. 523; Maguire v. Middlesex R. Co., 115 Mass. 239.

⁶³ Cincinnati, etc., R. Co. v. Cooper, 120 Ind. 469; 22 N. E. 940; 6 L. R. A. 241; Atchison, etc., R. Co. v. Webber, 33 Kan. 243; 6 N. W. 877; Railway Co. v. Valleley, 32 Ohio St. 345.

⁶⁴ Cincinnati, etc., R. Co. v. Cooper, 120 Ind. 466; 22 N. E. 940; 6 L. R. A. 241; Nash v. Southern Ry. Co., 136 Ala. 177; 33 So. 932.

The fact that a passenger was intoxicated does not necessarily show he was disqualified to avoid the consequences of the company's negligence; for if a sober and prudent passenger could not have avoided them, using due care to protect himself, the carrier will be liable.⁶⁵ Thus a drunken man has been allowed a recovery for injuries sustained in being put off a train while in motion;⁶⁶ but not where he voluntarily left it when in motion.⁶⁷ A recovery has been allowed where a drunken passenger at night fell through a hole in a pontoon bridge used for a wharf, no sufficient lights being on the bridge.⁶⁸ But if the passenger is not too drunk to take care of himself, then the company is not liable. Thus where a passenger was only partially intoxicated, and he was put off in a neighborhood near houses where he had passed his whole life, and the weather was not inclement, the company was held not liable; for by the use of ordinary care on his part he was in no danger.⁶⁹ If the carrier leave the ejected and drunken passenger in the custody of another, who takes charge of him, it will not be liable if he thereafter wanders on the track and is killed. Such was held to be the case where the carrier left a passenger in the custody of an overseer of the poor at a depot. In such an instance the duty of the carrier to the passenger has been fully performed.⁷⁰ Even though a drunken man refuse to pay his fare, that fact does not authorize or excuse the company from liability where its trainmen put him off at an improper place or where he, because of his condition, would be likely to suffer an injury. "Where the power expressly given by law is exercised in such a manner as to willfully and wantonly expose the ejected person to danger of life or limb, the company is still liable

⁶⁵ *Central, etc., Co. v. Phinazee*, 93 Ga. 488; 21 S. E. 66.

⁶⁶ *Meyer v. Pacific R. Co.*, 40 Mo. 151.

⁶⁷ *Strand v. Chicago, etc., R. Co.*, 67 Mich. 380; 34 N. W. 712.

⁶⁸ *Holmes v. Oregon, etc., R. Co.*, 5 Fed. 523.

⁶⁹ *Missouri Pacific R. Co. v.*

Evans, 71 Tex. 361; 9 S. W. 325; 1 L. R. A. 476; *Louisville, etc., R. Co. v. Johnson*, 92 Ala. 204; *Roseman v. Carolina Central R. Co.*, 112 N. C. 709; 16 S. E. 766; 19 L. R. A. 327.

⁷⁰ *Atchison, etc., R. Co. v. Weber*, 33 Kan. 543; 6 Pac. 877; 52 Am. Rep. 543.

for injury or death resulting from the expulsion." This rule applies to persons "manifestly too infirm to travel or too much intoxicated to be trusted to find the way to the nearest house or station."⁷¹ But where the servants of a street railway company supposed a passenger was drunk, but he testified he was sick, and on reaching the terminus of the route led him to the front of the station, at or near the public street, and left him at a place where the way was open in the direction he said he desired to go, and then returned to their car and left, and he turned and went to the back of the station, and about a quarter of an hour later slipped down between the front and rear wheels of a car moving on a track that was between where he was then standing and the place where he was left, and was injured, it was held that the company was not liable.⁷² Where a passenger was riding upon the platform of a car in such a state of intoxication as to be careless and heedless of his danger, in violation of the company's rules, it was held that it was the duty of those in charge of the train to call his attention to such rules forbidding such exposure and to his danger, and request him to go inside the car as soon as they had notice of what he was doing.⁷³ And where the servants of a railroad company, knowing a passenger was so drunk as to be unconscious of his condition, permitted him to remain upon the steps of a moving train in a place of danger, and he fell off and was injured, it was held that the company was liable, although he exercised no care for himself.⁷⁴ On his departure from a train the company's servants have the right to presume he will not return to the track and lie down upon it, and if he does do so without their knowledge and is injured by another train the company is not liable.⁷⁵

⁷¹ *Roseman v. Carolina Central R. Co.*, 112 N. C. 709; 16 S. E. 766; 19 L. R. A. 327.

⁷² *Bageard v. Consolidated Traction Co.*, 64 N. J. L. 316; 45 Atl. 620; 49 L. R. A. 424; 81 Am. St. 498.

⁷³ *Fisher v. West Virginia, etc.*,

R. Co., 39 W. Va. 366; 19 S. E. 578; 23 L. R. A. 758.

⁷⁴ *St. Louis, etc., R. Co. v. Carr*, 47 Ill. App. 353.

⁷⁵ *Brown v. Louisville, etc., R. Co.*, 103 Ky. 211; 44 S. W. 648; *Price v. Philadelphia, etc., R. Co.*, 84 Md. 506; 36 Atl. 263; 36 L. R.

Where the trainmen put a drunken passenger off the train in so careless a manner that he fell between the cars and was injured, the company was held liable.⁷⁶ So where trainmen put a drunken passenger off the train when he was incapable of taking care of himself, and there left him in the deep snow and when the weather was intensely cold, in consequence of which he was frozen, the company was held liable.⁷⁷ So where a street railway company left a sick passenger, who was thought to be drunk, on a sidewalk where he was exposed to bad weather and thereby injured, the company was held liable.⁷⁸ Where a passenger was so drunk as to be imbecile and helpless, to the knowledge of the trainmen, and he was carried by his station and then carried to another small station where he was put off over his protest, on a bitterly cold night, and there were no proper accommodations at the station for passengers except at the company's depot, and shortly after entering the depot to wait for a train to take him back to his destination, and while conducting himself properly, he was ejected from the depot and driven out into the night, as a consequence of which he died from exposure, it was held that the company was liable.⁷⁹

Sec. 1203. Expelling drunken passenger.

As has elsewhere been stated, a passenger who is so drunk that he cannot care for himself may be refused admittance to a train; and one who has been admitted to the train and who becomes by his conduct dangerous to either the life or safety of the other passengers, forfeits his right to carriage, and he may be expelled from the train. The right of expul-

A. 213; *Rozwadosfskie v. International, etc.*, R. Co., 1 Tex. Civ. App. 487; 20 S. W. 872; *McClelland v. Louisville, etc.*, R. Co., 94 Ind. 276; *Nash v. Southern Ry. Co.*, 136 Ala. 177; 33 So. 932.

⁷⁶ *Meyer v. Pacific Co.*, 40 Mo. 151.

⁷⁷ *Louisville, etc., R. Co. v. Sul-*

livan, 81 Ky. 624; 50 Am. Rep. 186.

⁷⁸ *Connolly v. Crescent City R. Co.*, 41 La. 57; 5 So. 259; 6 So. 526; 3 L. R. A. 133.

⁷⁹ *Haug v. Great Northern R. Co.*, 8 N. D. 23; 77 N. W. 97; 42 L. R. A. 664. The agent at the depot knew of his intoxicated condition.

sion extends further, and a passenger who becomes offensive or annoying to other passengers, by reason of his intoxicated condition, may be expelled.⁸⁰ This is especially true if he refuses to pay his fare, becomes boisterous and uses profane and obscene language.⁸¹ Permitting a passenger to enter a car when drunk is not a waiver of a right to expell him.⁸² Even though a boisterous passenger be sick and not intoxicated, the conductor may eject him if he honestly thinks he is drunk and the passenger offers no explanation of his condition.⁸³ A drunken passenger, offensive to the other passengers by reason of his boisterous conduct, may be removed to the baggage car and compelled to ride there.⁸⁴ If the drunken passenger assail the conductor putting him off by shooting at him, and the conductor in return shoot and wound him, believing in his excitement that it is necessary for his self-defense, the company will not be liable, though the conductor was not fully excusable for shooting.⁸⁵ In making the expulsion due care for his safety, having reference to the time, place and surroundings, must be used.⁸⁶ If he have not sufficient capacity to take care of himself, and by reason of his drunkenness he is put off in a place of danger and thereafter in such place is injured or killed, the expulsion will be regarded as the proximate cause of his injury.⁸⁷ But mere

⁸⁰ *Edgerly v. Union St. R. Co.* (N. H.), 36 Atl. 558; *Putnam v. Broadway, etc., R. Co.*, 55 N. Y. 108; 14 Am. Rep. 190; *Murphy v. Union R. Co.*, 118 Mass. 228; *Lemont v. Washington, etc., R. Co.*, 1 Mackey, 180; *Peavy v. Georgia, etc., Co.*, 81 Ga. 485; 8 S. E. 70; *Central Ry. Co. v. Mackey*, 103 Ill. App. 15; *Chesapeake, etc., R. Co. v. Robinette* (Ky.), 107 S. W. 763; 32 Ky. L. Rep. 1077; *Stringfield v. Louisville Ry. Co.* (Ky.), 105 S. W. 1190; 32 Ky. L. Rep. 578; *Hudson v. Lynn, etc., R. Co.*, 178 Mass. 64; 59 N. E. 647.

⁸¹ *Johnson v. Louisville, etc., R. Co.*, 104 Ala. 242; 16 So. 75.

⁸² *Louisville, etc., R. Co. v. Logan*, 88 Ky. 232; 10 S. W. 655; 10 Ky. L. Rep. 798; 3 L. R. A. 80.

⁸³ *Lemont v. Washington, etc., R. Co.*, 1 Mackey, 180.

⁸⁴ *Sullivan v. Old Colony R. Co.*, 148 Mass. 119; 18 N. E. 678; 1 L. R. A. 513.

⁸⁵ *Peavy v. Georgia, etc., Co.*, 81 Ga. 485; 8 S. E. 70.

⁸⁶ *Louisville, etc., R. Co. v. Johnson*, 108 Ala. 62; 19 So. 51; 31 L. R. A. 372; *Central Ry. Co. v. Mackey*, 103 Ill. App. 15.

⁸⁷ *Gill v. Rochester, etc., R. Co.*, 37 Hun, 109; *Louisville, etc., R. Co. v. Johnson*, 108 Ala. 62; 19 So. 51; 31 L. R. A. 372; *Johnson*

intoxication of the passenger is not enough to render the company liable, unless it was sufficient to take away consciousness or the power to consider and understand the danger to which he is exposed or deprive him of physical capacity to take care of himself and avoid danger; and he must use due care, if he can, to avoid being injured.⁸⁸ If the intoxicated condition came on after the passenger is ejected, by reason of his having previously drank liquor to excess, the company will not be liable for his injuries received by reason of the fact he was not able because of his drunken condition, to take care of himself when injured.⁸⁹ If put off at a place not dangerous, as by the side of the track, even in the country, and he goes upon the track and is injured, the company is not liable,⁹⁰ unless he was so incapacitated as not to be able to appreciate his danger, in which event he should be left at a station or in charge of some person.⁹¹ Where a passenger was drunk and persisted in swearing in the presence of lady passengers, and upon being requested by the conductor to quit, he denied that he had been swearing, and on being told he had been profane he called the conductor "a damned liar," and said he would swear as much as he "damned pleased," and that he "would be God damned if he would be put off the car," it was held that he was guilty of a breach of the peace and could be ejected.⁹² A passenger who falls into so deep a sleep that he cannot be aroused, having the appearance of being drunk, may be expelled, though

v. Louisville, etc., R. Co., 104 Ala. 242; 16 S. E. 75; Tuttle v. Cincinnati, etc., Ry. Co. (Ky.), 80 • S. W. 802; 26 Ky. L. Rep. 152.

⁸⁸ Johnson v. Louisville, etc., R. Co., 104 Ala. 242; 16 So. 75; Edgerly v. Union St. R. Co. (N. H.), 36 Atl. 558; Ham v. Delaware, etc., Co., 142 Pa. 617; 21 Atl. 1012; Conolly v. Crescent City R. Co., 41 La. 57; 5 So. 259; 6 So. 526; 3 L. R. A. 133.

⁸⁹ Johnson v. Louisville, etc., R. Co., 104 Ala. 242; 16 So. 75.

⁹⁰ McClelland v. Louisville, etc., R. Co., 94 Ind. 276; Louisville, etc., R. Co. v. Lewis, 14 Ky. L. Rep. 771; Ham v. Delaware, etc., Co., 142 Pa. 617; 21 Atl. 1012.

⁹¹ Gill v. Rochester, etc., R. Co., 37 Hun. 109. See Johnson v. Chicago, etc., R. Co., 58 Iowa, 348; 12 N. W. 339.

⁹² Robinson v. Rockland, etc., St. R. Co., 87 Me. 387; 32 Atl. 994; 29 L. R. A. 531.

he in fact is not drunk, his conduct justifying the inference that he is drunk.⁹³ Even though a passenger use no violence, yet if he is so drunk he vomits in the car, he may be expelled, for he is offensive to the other passengers.⁹⁴

Sec. 1204. Passenger forfeiting right to carriage by boisterous conduct.

A passenger may forfeit his right to carriage by his conduct which endangers the lives or safety of the trainmen or other passengers. Thus where a passenger was not so drunk as to be helpless, but was boisterous, and he followed the conductor from car to car with a knife threatening to kill him, thus causing great excitement among the passengers; and after being locked out of the car reserved for ladies he slyly pulled the bell cord, thus stopping the train, whereupon the trainmen ejected him, although it was night, yet not too dark to see the track distinctly, and the weather was not cold nor inclement, it was held that the company was not liable for his death caused by another train on the same track running over him.⁹⁵

Sec. 1205. Carriers leaving drunken passenger in a dangerous place.

If a carrier has notice of the drunken condition of a person it is carrying, then it is not due care on its part to leave him in a dangerous place. Thus if it leaves a passenger so far incapacitated, to its knowledge, by the voluntary use of intoxicating liquors as to produce mental incapacity in him to know or appreciate his danger or care for himself, upon the railway tracks or near them, and he is injured by a pass-

⁹³ *Hudson v. Lynn, etc., R. Co.*, 178 Mass. 64; 59 N. E. 647.

⁹⁴ *Converse v. Railway Co.*, 2 McArthur, 564; *Edgerly v. Union St. R. Co. (N. H.)*, 36 Atl. 558; *Chicago, etc., R. Co. v. Randolph*, 65 Ill. App. 208; *Chesapeake, etc., R. Co. v. Saulsberry*, 112 Ky. 915;

66 S. W. 1051; 23 Ky. L. Rep. 2341.

⁹⁵ *Louisville, etc., R. Co. v. Logan*, 88 Ky. 232; 3 L. R. A. 80; 10 S. W. 655; *Railroad Co. v. Valleley*, 32 Ohio, 345; 30 Am. Rep. 601.

ing train, it is liable; for its wrong in thus leaving him is the proximate cause of his injury.⁹⁶ Thus where an intoxicated person entered a train at C with a ticket for H, and when the train reached L, a station between C and H, the brakeman (whose duty it was to do so) failed to announce the name of the station, but someone in the car called out "H," as if naming the station, and the intoxicated person, believing it to be his station, endeavored to alight from the train in the usual manner, and the employes of the company, without giving any warning, carelessly started the train and thereby he, without his fault, was thrown violently from the car platform onto the track, rendering him unconscious, of which fact as well as his intoxicated condition the employes of the company had notice, and soon after, and while he was in a dazed and partially unconscious condition, at a point seventy rods distant from L, the employes of another train, having knowledge of the fact of his fall from the train and his condition in time to have avoided injuring him by the exercise of ordinary care, negligently and without giving any signal or warning of the approach of the train, or taking any precaution to avoid injuring him, caused its train to run upon him, thus causing his death, the company was held liable. "Here," said the court, "the carrier knowingly left its passenger upon the track, knowing, also, that injury from a fall had impaired his mental faculties, and it cannot be held blameless and its passenger declared a trespasser. The wrong of the carrier in leaving its injured passenger on the track, exposed to great and known peril, without mind enough to care for himself, was the proximate cause of his death. The case is stronger, not weaker, in the fact that those in charge of the train which ran upon him were informed as to his misfortune and his injury, and the two acts of negligence combined in one efficient cause, and the effect which might naturally have been expected did, in fact, result. The con-

⁹⁶ *Cincinnati, etc., R. Co. v. C.* 709; 16 S. E. 766; 19 L. R. A. Cooper, 120 Ind. 469; 22 N. E. 327; *Sullivan v. Seattle, etc., Co.*, 320; 6 L. R. A. 241; *Roseman v. 44 Wash.* 53; 85 Pac. 786. *Carolina Central R. Co.*, 112 N.

curing wrongs blended in one strong unity producing a legal tort for which the wrongdoer must make compensation.” But where a drunken man was put off at a flag station on a dark night, where were only three houses, and left alone, and six hours later he was killed by another train half a mile from the station, the company was held not liable, though he was in such a condition that he seemed to know nothing, it not appearing, from these facts that the expulsion was the proximate cause of his death.⁹⁷ Where a drunken passenger was properly expelled from the car, but at a place from which he could escape only by following the roughly ballasted railroad track and crossing cattle guards on one side and a bridge over a creek on the other, it was held that the company was liable for his death.⁹⁸ And where a trespasser got on a train standing in a cut when he was in a grossly drunken condition, and the trainmen at once put him off, leaving him in the cut, they knowing a passenger train would soon pass through the cut, but informed the company’s superintendent and nearest station agent of his peril, it was held that the company was liable. “If the decedent,” said the court, “had boarded the train several miles from the cut, and after reaching there had been removed, under the circumstances described, it seems to us that no one would have had any difficulty in reaching the conclusion that death or great bodily harm would have been the natural and probable result of the removal, and a liability would have been incurred by the appellee. In this case, according to the averments of the petition, he got on the train, and, after getting on, was a

⁹⁶* *Cincinnati, etc., R. Co. v. Cooper*, 120 Ind. 469; 22 N. E. 320; 6 L. R. A. 241.

In this case the court does not put the right of recovery upon the acts of those in charge of the train which ran over the deceased, but upon his condition caused by the negligence of the agents at L. in placing him or permitting him to take a position of danger, know-

ing at the time he was not in a condition to appreciate such danger.

⁹⁷ *Haley v. Chicago, etc., R. Co.*, 21 Iowa, 15.

⁹⁸ *Louisville, etc., R. Co. v. Johnson*, 108 Ala. 62; 19 So. 51; 31 L. R. A. 372; *Louisville, etc., R. Co. v. Johnson*, 92 Ala. 204; 16 So. 75.

trespasser, just the same as if he had boarded it at another station and been carried to that point. Getting on the train was an accomplished fact. The fact that he had just got on the train while it was standing in the cut did not give those in charge of it the right to seize and hurl him from it, without regard to consequences; neither did that fact give them the right to eject him, regardless of time, place and circumstances and his physical and mental condition. They had no more right to jeopardize his life in his removal because he had been on the train but a short time than they would have had if he had been carried to that point from elsewhere. The right to remove a trespasser does not depend upon the question as to the length of time he has been on the train; neither is the liability of the railroad company affected by the fact that the trespasser has been on the train a long or short time. That fact has nothing to do with the case. The same responsibility attaches for the removing of him in the one case as in the other.”⁹⁹ In another case a person who had failed to pay his fare on demand was put off when drunk, in a deep snow, and he fell and laid on it until he was badly frozen, entailing the loss of some toes, fingers and part of his heel. The company was held liable for his injuries.¹ In a case where a drunken trespasser was put off in a cut in the railroad, on either side of which was a wire fence, and the trial court in an instruction assumed that the agents of the company had the right to eject a trespasser, regardless of time, place and circumstances and his physical and mental condition, this was held error, and the court saying the facts showed the company was liable: “It seems to us that the ordinary principles which characterize humanity condemn such claim [that the company was not liable]. If the claim of appellee be true, that the decedent was ejected in a cut, away from any station, with banks and fences on either side

⁹⁹ *Waldron v. Louisville, etc., R. Co.*, 111 Ky. 30; 63 S. W. 580; 54 L. R. A. 919; *Louisville, etc., R. Co. v. Sullivan*, 81 Ky. 624; 50 Am. Rep. 186; *Louisville, etc.,*

R. Co. v. Ellis, 97 Ky. 330; 30 S. W. 979; 17 Ky. L. Rep. 259.

¹ *Louisville, etc., R. Co. v. Sullivan*, 81 Ky. 624; 50 Am. Rep. 186.

of the track, in such mental or physical condition as rendered him incapable of taking care of himself, the officer with a knowledge of his condition, then it was no less wrong to eject decedent under such circumstances than it would have been to have ejected from the train a toddling child who had not mental capacity to know the danger of walking upon a railroad track, or the physical ability to avoid such danger if he had the mental capacity to discern it. Would anyone contend, if appellant should kill a child under such circumstances, that it would not be liable to damages therefor?"² "When the carrier discovers that one helpless from intoxication is upon the train without right, it must, in selecting a safe place to put him off, have regard to his actual condition, physical and mental, without any reference to his responsibility for such condition. The law declares to the carrier that it shall not expose him to great peril, even in exercising its undoubted right to eject him; and, in declaring whether he will be subjected to peril, not only must climatic conditions, the propinquity of shelter, and other matters be taken into account, but also the actual state of his mind and bodily health and strength, if known to the agent of the carrier."³ Thus, for the trainmen to permit a thoroughly intoxicated passenger to sing and dance in a baggage car having both of its side doors wide open is an act of negligence on its part, and the rule of contributory negligence on his part does not apply to such an instance.⁴ But a railroad company rightfully putting a drunken passenger off at a station in a suitable

² Louisville, etc., R. Co. v. Ellis, 97 Ky. 330; 30 S. W. 979; 17 Ky. L. Rep. 259.

³ Hawk v. Great Northern R. Co., 8 N. D. 23; 77 N. W. 97; 42 L. R. A. 669; Railway Co. v. Valleley, 32 Ohio St. 349; 30 Am. Rep. 601; Atehison, etc., R. Co. v. Weber, 33 Kan. 554; 6 Pac. 877; 52 Am. Rep. 543; Connolly v. Crescent City R. Co., 41 La. 61; 5 So. 259; 6 So. 526; 3 L. R. A. 133; Indianapolis, etc., R.

Co. v. Pitzer, 109 Ind. 186; 63 N. E. 310; 10 N. E. 70; 58 Am. Rep. 387; Roseman v. Carolina Cent. R. Co., 112 N. C. 716; 16 S. E. 766; 19 L. R. A. 327; Brown v. Chicago, etc., R. Co., 51 Iowa, 238; 1 N. W. 487; Isbell v. New York, etc., R. Co., 27 Conn. 393; 71 Am. Dec. 78.

⁴ Wheeler v. Grand Trunk, etc., R. Co., 70 N. H. 607; 50 Atl. 103; 54 L. R. A. 955.

place is not liable if he pursues the train and in doing so is injured, and it is under no obligation to stop its train to ascertain the extent of his injuries.⁵ The leaving of a passenger in a public highway, near dwellings, is not the proximate cause of his death where he wanders on the track and is killed by another car.⁶

Sec. 1206. Greater care due to a drunken man in a dangerous place.

If a drunken man is in a place of danger and another knows that he is intoxicated and helpless, such other person may owe him a greater duty than if he were not intoxicated. Thus, where a railroad passenger, greatly intoxicated, on alighting from a train went into the switch yard of another company where were many tracks on which cars were being switched, and the servants of the latter company saw and well knew his physical condition, it was held that they owed him a greater duty than they would have owed to a sober man under the same circumstances, and that it was not enough to merely arouse him from his drunken stupor and tell him that he must leave, when they knew from his condition that he in all probability would again sink into another stupor.⁷ So where the servants of a railroad permitted a passenger, so drunk as to be unconscious of what he was doing, to ride upon the steps of a moving car, they well knowing his condition and what he was doing, it was held that the company was liable, although he took no care for himself.⁸ Thus, in an instance of putting off the train a drunken passenger, the Supreme Court of Alabama said: "If a passenger on a train is intoxicated to a degree to render him unconscious

⁵ *Chesapeake, etc., R. Co. v. Saulsberry*, 112 Ky. 915; 66 N. W. 1051; 23 Ky. L. Rep. 2341; 56 L. R. A. 580.

⁶ *Edgerly v. Union St. Ry. Co.* (N. H.), 36 Atl. 558.

⁷ *Cincinnati, etc., R. Co. v. Marrs*, 119 Ky. 954; 85 S. W. 188; 70 L. R. A. 291; *Fagg v. Louisville, etc., R. Co.*, 111 Ky. 30; 63 S. W. 580; 54 L. R. A. 919.

"This being true, they owed him one of two alternatives, either to see him safely out of the yard, which common humanity required, or, failing in this, to watch out for him as the engine was moved about in the corporation's business."

⁸ *St. Louis, etc., R. Co. v. Carr*, 47 Ill. App. 353.

of danger—unable to take in his position, surroundings and perils and his duty to avoid them—or he does not possess the power of locomotion, and is put off by a conductor on account of his misconduct, and the place where he is put off and left is dangerous to one in his condition, and these facts are known to the conductor, he would be guilty of reckless and wanton negligence, rendering the company in whose employment he is liable for damages resulting from his negligence, although the person ejected and injured might have been legally ejected in a proper manner at a proper place.”⁹ So it has been held that a railroad company cannot be held free from fault where its trainmen knowingly permit a passenger who is beastly drunk to go out alone upon the platform of a moving car.¹⁰ In an Ohio case it was said: “It might, perhaps, as far as this case is concerned, be conceded that if a man were so intoxicated as to be without reason, sense or intelligence, it would be unlawful, as it would be inhuman, to expel him from cars at night, where he would be just as likely as not to lie down upon the rails and go to sleep. We may concede, further, that to put off a drunken man, during a bitterly cold night, in the woods, far from any house, when the probabilities were that he would freeze to death before help could reach him, would be as indefensible

⁹ Louisville, etc., R. Co. v. Johnson, 108 Ala. 62; 19 So. 51; 31 L. R. A. 372; Louisville, etc., R. Co. v. Johnson, 92 Ala. 204; 16 So. 75; Tanner v. Louisville, etc., R. Co., 60 Ala. 621; Isbell v. New York, etc., R. Co., 27 Conn. 393; 71 Am. Dec. 78; Kerwhacker v. Cleveland, etc., R. Co., 3 Ohio St. 172; 62 Am. Dec. 246; Louisville, etc., R. Co. v. Sullivan, 81 Ky. 624; 50 Am. Rep. 186; Johnson v. Chicago, etc., R. Co., 58 Iowa, 348; Louisville, etc., R. Co. v. Ellis, 97 Ky. 330; 30 S. W. 979.

¹⁰ Fox v. Michigan Cent. R. Co., 138 Mich. 433; 101 N. W. 624; 68 L. R. A. 336.

A very drunken man has been compared to a toddling child; and if there was a liability for its injuries there would be for his. Louisville, etc., R. Co. v. Ellis, 97 Ky. 330; 30 N. W. 979; Waldron v. Louisville, etc., R. Co., 111 Ky. 30; 63 S. W. 580; 54 L. R. A. 919; Hawk v. Great Northern R. Co., 8 N. D. 23; 77 N. W. 97; 42 L. R. A. 669; Wheeler v. Grand Trunk, etc., R. Co., 70 N. H. 607; 52 Atl. 103; 54 L. R. A. 955; Chesapeake, etc., R. Co. v. Saulsberry, 112 Ky. 915; 66 S. W. 1051; 56 L. R. A. 580.

in law as it would be wicked and cruel in fact. And, further, to put a man off, in a dark night, upon a high railroad bridge, or upon the brink of a precipice, where the first step would be destruction—this could find no justification in law.”¹¹ “Through all the cases runs the principle that what humanity requires must be done by those who act with knowledge of another’s helplessness.”¹² But a railroad company is not liable for putting off a passenger, apparently drunk, within the limits of its yards, and near dwelling houses, who is able to walk and carry on an intelligent conversation, although the conductor putting him off had been informed at the station by its station agent that the man was not fit to travel, where such passenger, when asked for his fare refused to pay it or tell his destination. In such an instance it is not the station agent’s duty to pass upon the condition of the passenger for travel.¹³ If a conductor accepts an unattended passenger who is so drunk he cannot take care of himself, the carrier, although not an insurer of his safety, yet is bound to exercise reasonable care to protect him from danger.¹⁴ But where a conductor at the station took a drunken passenger to a place of safety, telling him to remain there with the other passengers until his train arrived, and when his train came in he was run over, it was held that the carrier was not liable.¹⁵

Sec. 1207. Assaults by drunken passenger upon other passengers.

A railway company is not liable for an assault by a drunken passenger upon another passenger, for the principle of

¹¹ *Railway Co. v. Valleley*, 32 Ohio St. 349; 30 Am. Rep. 601.

¹² *Indianapolis, etc., R. Co. v. Pitzer*, 109 Ind. 186; 6 N. E. 310; 10 N. E. 70; 58 Am. Rep. 387; *Connolly v. Crescent City R. Co.*, 41 La. 61; 5 So. 259; 6 So. 526; 3 L. R. A. 133; *Atchison, etc., R. Co. v. Weber*, 33 Kan. 554; 6 Pac. 877; 52 Am. Rep. 543; *Brown v. Chicago, etc., R. Co.*, 51 Iowa, 238; 1 N. W. 487; *Isbell v. New*

York, etc., R. Co., 27 Conn. 393; 71 Am. Dec. 78.

¹³ *Korn v. Chesapeake*, 125 Fed. 897; 63 L. R. A. 872.

¹⁴ *Price v. St. Louis, etc., R. Co.*, 75 Ark. 479; 88 S. W. 575; *Thixton v. Illinois Cent. R. Co. (Ky.)*, 96 S. W. 548; 29 Ky. L. Rep. 910; *Sullivan v. Seattle, etc., Co.*, 44 Wash. 53; 86 Pac. 786.

¹⁵ *Thixton v. Illinois Cent. R. Co. (Ky.)*, 96 S. W. 548; 29 Ky. L. Rep. 910.

respondeat superior does not apply to such an instance.¹⁶ And a railroad company is not bound to provide police force to control and prevent an angry and drunken mob from entering its cars at a station and assaulting its passengers.¹⁷ Nor is a street car company liable for the act of a drunken man, who quieted down on being told by the conductor he must keep quiet, when he apparently acquiesces and then suddenly makes an unprovoked attack upon a fellow passenger.¹⁸ But it is the duty of a conductor to use such means as he has at hand to quiet a drunken and riotous mob who have entered a car and are insulting and assaulting passengers, and to expel its members if he can, and he does not do his whole duty if he do not do so by reason of the fact that he is collecting fares in the other cars of the train.¹⁹ And where a drunken passenger had the *delirium tremens*, was laboring under the delusion that he had enemies on the train who were pursuing him, and because of his condition and delusion the conductor apprehended, or, as a man of understanding, knowledge and experience should have apprehended the danger he might mistake some passenger for his supposed enemy and shoot him, either in imaginary self-defense or otherwise, it was held that the company was liable for his act in killing a passenger whom he imagined was his enemy.²⁰ And where drunken passengers should not have been permitted aboard, and one of their number threw a bottle which broke and a piece of it put out a passenger's eye, the company was held liable.²¹ So where a guard on an elevated railroad car quarreled with a drunken passenger who was upon a crowded platform, whereby the crowd jostled another passenger on the platform, who, in order to protect himself,

¹⁶ Pittsburgh, etc., R. Co. v. Hinds, 53 Pa. 512; 91 Am. Dec. 224.

¹⁷ Pittsburgh, etc., R. Co. v. Hinds, *supra*.

¹⁸ Putman v. Broadway, etc., R. Co., 55 N. Y. 108.

¹⁹ Pittsburg, etc., R. Co. v. Hinds, *supra*.

²⁰ King v. Ohio, etc., R. Co., 22 Fed. 413; Spohn v. Missouri Pacific R. Co., 87 Mo. 74.

²¹ Pittsburgh, etc., R. Co. v. Pillow, 76 Pa. 510; Putnam v. Broadway, etc., R. Co., 55 N. Y. 108; 14 Am. Rep. 190.

seized the railing, and thereby his arm was caught between the railings of two cars and injured, it was held that the company was liable.²² It cannot be presumed that because a man is drunk when received as a passenger, though offensive to others as well by his demeanor as in his appearance, that he is a dangerous man, and that his presence on the car will imperil the safety of the other passengers, or that he will violently assault them without provocation.²³

Sec. 1208. Notice of intoxication of passenger.

Before a carrier can be held liable because of an injury it has occasioned a passenger which arises out of his drunken condition, its agents in charge of the train must have notice that he is so drunk as to be incapable of taking care of himself or appreciating his danger. The fact that he is boisterous and drunk does not necessarily show he is not capable, under the particular conditions surrounding him, to take care of himself. Nor is the conductor "bound, because of what he did see and hear, to institute inquiry among the other passengers before ejecting [the passenger], or to act upon their opinions given afterwards when he [has] no reason to believe that the intoxication had deprived the intestate of the mental capacity to find his way, or physical power to follow it to a neighboring house, or to the station." If, however, the passenger showed symptoms of infirmity or of stupor, in the presence of the conductor, then it is a question for the jury whether the conductor had knowledge of his drunken condition.²⁴ In the case of a railroad company,

²² *Graham v. Manhattan R. Co.*, 149 N. Y. 336; 43 N. E. 917.

²³ *Putman v. Broadway, etc., R. Co.*, 55 N. Y. 108; 14 Am. Rep. 190.

²⁴ *Roseman v. Carolina Central R. Co.*, 112 N. C. 709; 16 S. E. 766; 19 L. R. A. 327; *Cincinnati, etc., R. Co. v. Marrs*, 119 Ky. 954; 85 S. W. 188; 70 L. R. A. 291; *Louisville, etc., R. Co. v. Johnson*, 108 Ala. 62; 19 So. 51; 31 L. R. 372; *Rollestone v. T. Cassier &*

Co., 3 Ga. App. 161; 59 S. E. 442; *Parker v. Winona, etc., R. Co.*, 83 Minn. 212; 86 N. W. 2; *Tuttle v. Cincinnati, etc., Ry. Co. (Ky.)*, 80 S. W. 802; 26 Ky. L. Rep. 152; *Illinois Cent. R. Co. v. Proctor*, 122 Ky. 92; 89 S. W. 714; 28 Ky. L. Rep. 598; *Strand v. Chicago, etc., R. Co.*, 67 Mich. 380; 34 N. W. 712; *Fisher v. West Virginia, etc., R. Co.*, 39 W. Va. 366; 19 S. E. 578; 23 L. R. A. 758.

notice of the intoxicated condition of a drunken passenger must have been had by some of its servants operating the train, and notice to a newsboy on the train is not notice to it.²⁵ A mere surmise on the part of the conductor that a passenger sitting on the car steps is drunk is not notice to him of his condition.²⁶ The manner and conduct of a passenger in refusing to pay his fare in a non-sensical manner, the use of rude and obscene language to the conductor, such as no one except a drunken or crazy man would employ, and which evinces a want of rationality, tends to show the conductor had knowledge of his intoxicated condition.²⁷ For the purpose of bringing home to the trainmen a passenger's drunken condition, it is proper to show he was bloody about the face and his clothes had mud upon them.²⁸

²⁵ St. Louis, etc., R. Co. v. Carr, 47 Ill. App. 353.

²⁶ St. Louis, etc., R. Co. v. Carr, 47 Ill. App. 353.

²⁷ Louisville, etc., R. Co. v. Johnson, 108 Ala. 62; 19 So. 51; 31

L. R. A. 372; Wheeler v. Grand Trunk, etc., R. Co., 70 N. H. 607; 50 Atl. 103; 54 L. R. A. 955.

²⁸ Sullivan v. Seattle, etc., Co., 51 Wash. 71; 97 Pac. 1109.

CHAPTER XL.

LIFE INSURANCE.

SECTION.

- 1209. No representation made by insured concerning his use of intoxicating liquors.
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SECTION.

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Sec. 1209. No representation made by insured concerning his use of intoxicating liquors.

If an applicant for a policy of life insurance make no representation concerning his use of intoxicating liquors, and the policy issued thereon to him has no condition relating to their use, then it cannot be successfully urged by the insurer that the insured was addicted to the use of intoxicating liquors at the time of his application and when the policy was issued to him, which fact or habit he did not reveal to the

insurer or even concealed from it. By applying for a policy of insurance, and by accepting it, the insured neither warrants nor represents that he is not addicted, however great he may be so addicted, to the use of intoxicating liquors, nor does he thereby agree to refrain from their use. Even though the habit of their excessive use will shorten the insured's life, yet that fact and the failure to reveal his habit to the insurer before the policy is issued will not avail the latter as a defense.¹

Sec. 1210. Statements in application not made part of policy issued thereon.

Where false statements concerning the applicant's habits of intoxication or drinking are made in his application for insurance but no reference is made to them in the policy issued thereon, such false statements are held to be mere representations and do not avoid the policy.² So far has this rule been carried that where the application contained a statement that the representations in it were the basis of the contract, and the policy contained a clause to the effect that the policy was issued "in consideration of the representations made" in the application, it was held that false representations in such application concerning the applicant's habits of intoxication would not avoid the policy.³ And one court has even gone further than this and held that where the applicant "warranted" that his answers and representations were true, and the policy issued thereon contained a clause providing that if such answers and statements were untrue it should be void, yet the court refused to treat as warranties the answers

¹ Rawlins v. Desborough, 2 M. & Rob. 328; Rowls v. American, etc., L. Ins. Co., 27 N. Y. 282; 84 Am. Dec. 280.

An occasional case holds that the failure to reveal his habit will avoid the policy of insurance, on the ground of concealment. Mutual, etc., Ins. Co. v. Holterhoff, 2 Cin. Sup. Ct. Rep. 379; Forbes v.

Edinburgh, etc., Co., 10 Sc. Sess. Cas. (1st series) 451.

² MeVey v. Grand Lodge, 53 N. J. L. 17; 20 Atl. 873; see also Campbell v. New England Mut. L. Ins. Co., 98 Mass. 389; Higbee v. Guardian Mut. L. Ins. Co., 66 Barb. 462.

³ American, etc., Ins. Co., 39 N. J. L. 89.

relating to the insured's use of intoxicating liquors,⁴ saying: "Inasmuch as the policy itself does not distinctly identify and refer to the written application, and make it a part of the policy, I am inclined, in view of the established and reasonable rule, to think that the warranties are not to be created or extended by construction, and the doctrine of the later and best considered cases to hold that the statements in the application are representations and not warranties."

Sec. 1211. Statements amounting to warranties concerning drinking habits.

In whatever form a statement is made in the application concerning the habits of intoxication of the applicant, and the policy distinctly refers to them and provides that if it be false then such policy shall be void, then such statement is a warranty that the statement is true, and if false the policy will be void.⁵ Thus, where the application contained a clause that the applicant's habits were "correct and temperate," and the policy warranted that the statements made in such application were true, but the statement that he was "temperate" was false, it was held that the policy was void, because such a statement was material and made so by the agreement of the insured and insurer.⁶ And where a question in the application was, "Do you use spirituous, malt or vinous liquors? If so, what kind," and the answer was "No," and then the applicant was requested to "state the average quantity you use each day," and "have you at any time used them to excess, if so, give particulars," to which "no" was given for the answer. and the insured used intoxicating

⁴ Conover v. Massachusetts, etc., Co., 4 Bigelow L. & Acc. Ins. Rep. 187.

⁵ Miller v. Mutual, etc., Ins. Co., 31 Iowa, 216; Knudson v. Great Council (S. D.), 63 N. W. 611; Horton v. Equitable, etc., Soc., 2 Abb. L. Jr. 255; Thomson v. Weems, L. R. 9 App. Cas. 671; Scottish, etc., Soc. v. Buist, 4 Ct.

Sess. Cas. (4th Series) 1078; Life Association v. Foster, 11 Sc. Sess. Cas. (3d Series) 351.

Contra, Continental Life Ins. Co. v. Thoena, 26 Ill. App. 495.

⁶ Standard, etc., Ins. Co. v. Lauderdale, 94 Tenn. 635; 30 S. W. 732; Hartwell v. Alabama, etc., Ins. Co. 33 La. Ann. 1353; 39 Am. Rep. 294.

liquors occasionally and temperately, it was held that these questions and answers were equivalent to an agreement by the insured that the facts sought to be elicited by these questions were material, and whether they be regarded as warranties or representations, their untruthfulness, coupled with the effect they were calculated to have upon the insurer in accepting or rejecting the insured as a risk and in determining what premium to charge, avoided the contract.⁷ "The declarations," said the court, "show on their face that they were submitted to the insurance company as a presentation of the elements upon which it should be decided whether to accept or reject the application, and to estimate the risk proposed to be assumed. The facts, circumstances and conditions were to be the basis of the contract, its foundation or the faith of which it was to be entered into. If wrongly presented in any respect material to the risk, the policy that might be issued therefrom will not take effect. To enforce it would be to apply the insurance to a risk that was never presented. The test as to the effect of a misrepresentation is whether it may or may not have influenced the insurer in determining whether to accept the risk and what premium to charge. We think the application of this test to the case at bar must defeat recovery by the beneficiaries of the policy."

Sec. 1212. Statements that applicant is "temperate" or of "temperate habits."

If we look into the cases for a definition of "temperate" or of "temperate habits," we will find it difficult, if not impossible, to find one. Said a judge in an English case: "I believe it to be useless to attempt a precise definition of what constitutes 'temperate habits' or 'temperance' in the sense in which these expressions are ordinarily employed. Men differ so in their capacity for imbibing strong drinks

⁷ *Brignac v. Pacific, etc., Ins. Co.*, 112 La. 574; 36 So. 595; 66 L. R. A. 322. [Citing *Union Mutual Life Ins. Co. v. Reif*, 36 Ohio St. 596; 38 Am. Rep. 613, and

note, pp. 615, 616; 38 Am. Rep. —; *Chambers v. Northwestern, etc., Ins. Co.*, 64 Minn. 495; 67 N. W. 367; 58 Am. St. Rep. 549.]

that quantity affords no test.”⁸ So in another case it was said: “Men differ widely as to what constitutes intemperate habits. Some persons of extreme views may regard the slightest indulgence as intemperance; others, perhaps, would regard a man as sober as long as he can walk. The provision in the policy has no reference to extreme views on either side.”⁹ But it is well settled that the terms “temperate” or of “temperate habits” do not mean a total abstinence from the use of intoxicating liquors.¹⁰ So an isolated instance of the use of liquors does not render a man an “intemperate” person within the meaning of that word as used in a policy of insurance or in an application for one;¹¹ nor does an occasional use of them.¹² Thus, where an applicant answered in his application that he did not “use any intoxicating liquors or substances,” it was held that “this did not direct the mind to a single or incidental use, but to a customary or habitual use” of liquor.¹³ Even the occasional use of liquor to excess^{13*} will not be considered to render the applicant an intemperate person, and to be of “intemperate habits” the use must be “by frequent repetitions” until it becomes a “habit.”¹⁴ Thus, in a leading case it was said: “An attack

⁸ Thomson v. Weemes, L. R., 9 App. Cas. 671.

⁹ United Brethren, etc., Soc. v. O'Hara, 120 Pa. 256; 13 Atl. 932.

¹⁰ Brockway v. Mutual, etc., Ins. Co., 9 Fed. 249; McGinley v. United States Life Ins. Co., 8 Daly 390; 7 Ins. L. Jr. 791; Thomson v. Weemes, L. R., 9 App. Cas. 671; Meacham v. New York, etc., Asso., 120 N. Y. 237; 24 N. E. 283.

¹¹ Horton v. Equitable L. Ins. Soc., 2 Abb. L. Jr. 255; 2 Bigelow L. & Acc. Ins. Rep. 108.

¹² Meacham v. New York, etc., Assoc., 120 N. Y. 237; 24 N. E. 283; Swick v. Home L. Ins. Co., 2 Dill. 160; Grand Lodge, etc., of United Workmen, 145 Ill. 308; 33 N. E. 886; New York, etc., L. Ins.

Co. v. Simpson (Tex. Civ. App.), 28 S. W. 837; Union, etc., L. Ins. Co. v. Reif, 36 Ohio St. 596; 38 Am. Rep. 613.

¹³ Van Valkenburgh v. American, etc., L. Ins. Co., 70 N. Y. 605.

^{13*} Fludd v. Equitable, etc., of U. S., 75 S. C. 315; 55 S. E. 762.

¹⁴ Knickerbocker L. Ins. Co. v. Foley, 105 U. S. 350; DeCamp v. New Jersey, etc., Ins. Co., 3 Ins. L. Jr. 89; Northwestern L. Ins. Co. v. Muskegon Bank, 122 U. S. 501; 7 Sup. Ct. Rep. 1221; Van Valkenburgh v. American, etc., L. Ins. Co., 70 N. Y. 605; Mutual Life Ins. Co. v. Simpson (Tex. Civ. App.), 28 S. W. 837; Fludd v. Equitable, etc., of U. S., 75 S. C. 315; 55 S. E. 762.

of *delirium tremens* may sometimes follow a single excessive indulgence. Ray, in his Treatise on Medical Jurisprudence, says that though it most commonly occurs in habitual drinkers, after a few days of total abstinence from spirituous liquors, it may be the immediate effect of an excess, or series of excesses, in those who are habitually intemperate as well as those who are not. In the American Encyclopedia, under the head of 'Delirium Tremens,' it is stated that it 'sometimes makes its appearance in consequence of a single debauch,' though commonly it is the result of protracted or long-continued intemperance. When we speak of the habits of a person we refer to his customary conduct, to pursue which he has acquired a tendency from frequent repetition of the same acts. It would be incorrect to say that a man has a habit of anything from a single act. A habit of early rising, for example, could not be affirmed of one because he was once seen on the streets in the morning before the sun had risen, nor could intemperate habits be imputed to him because his appearance and actions on that occasion might indicate a night of excessive indulgence. The court did not, therefore, err in instructing the jury that if the habits of the insured 'in the usual, ordinary and every day routine of his life were temperate,' the representations made are not untrue, within the meaning of the policy, although he may have had an attack of *delirium tremens* from an exceptional over-indulgence."¹⁵

¹⁵ Knickerbocker Ins. Co. v. Foley, 105 U. S. 350. In this case to the question, "Is the party of temperate habits? Has he always been so?" the answers were "yes." The creditors of the insured took out the policy on the insured to secure the payment of their claims. In an action on the policy three witnesses testified to intemperance on the part of the insured. One of them, the insured's family physician, said he had been a hard drinker; and that he had attended him for *delirium tremens* and not

for indispositions produced, "as he thought," by the use of intoxicating liquors. The specific instances testified to were not controverted by the plaintiff's witnesses, but they said generally the deceased had been a man of temperate habits. There was a verdict for the plaintiff. See also Holtun v. Germania Life Ins. Co., 139 Cal. 645; 73 Pac. 591.

See also Bickford v. New York State Life Ins. Co., quoted in Bliss on Insurance (2d ed.), § 366, where it was held that a single

But this decision of the United States Supreme Court has been criticised by the highest judicial authority in England in a case where it is said: "As I read the rubric and report there was no law laid down in that case. An American jury had found that a man was of temperate habits, although it had been proved at the trial that he had an attack of *delirium tremens*, and the court refused to disturb the verdict, the main reason assigned for that decision being a statement occurring in some treatise on medical jurisprudence to the effect that in the case of an intemperate man *delirium tremens* is occasioned by abstinence from drink, and in the case of a temperate man by indulgence in liquor.¹⁶ Even if it had been laid down as matter of law,¹⁷ I should hesitate very much to adopt such a standard as that. A man suffering from *delirium tremens* occasioned by recent drinking may possibly be more temperate than another man who is similarly afflicted in consequence of his having abstained from his usual potations; but I should not like to affirm that either of them was, in the ordinary sense of the term, a man of temperate habits."¹⁸ And in another English case where the insured represented he was "temperate" when he had previously had *delirium tremens* the court gave judgment for the insurance company, although the jury specifically found he had made the statement *bona fide*.¹⁹ Care must be observed in consider-

instance of *delirium tremens* would not avoid a policy thereafter issued upon the statement that the insured was a temperate person, saying: "Intemperate habits in an individual are to be established by proving general and specific use of spirituous liquors. Proving *delirium tremens* is in effect like proving immoderate use of liquor prior to the fit of *delirium tremens* for a longer or shorter period. I cannot see that it proves more than that." Consult *De Camp v. New Jersey Mut. Ins. Co.*, 3 Ins. L. Jr. 89.

¹⁶ We submit that this deduction or conclusion of the English judge is incorrect and inaccurate.

¹⁷ And we think it was so laid down.

¹⁸ *Thomson v. Weems*, L. R., 9 App. Cas. 671.

¹⁹ *Hulton v. Waterloo, etc., Co.*, 1 F. & F. 735. See *New York Life Ins. Co. v. Parent*, 3 Quebec L. R. 163.

In a rather recent Texas case the questions and answers were as follows: "Do you ever drink wine, spirits or malt liquors? Ans. No. Q. To what extent? Ans. Not

ing the statements made concerning the drinking habits of the insured, for if the questions call for information respecting his habits as they then are, then it is immaterial what his habits had been in the past; and evidence of his past habits, in an action to recover the amount of the policy issued upon the application containing answers to such questions, is inadmissible.²⁰ Of course, if the insurance company be informed by the answers to the questions whether or not the applicant uses, or has used, intoxicating liquors, even though such answers do not fully disclose the use, and issues a policy thereon, it will be estopped to contest a right of action on such policy upon the ground that the insured was a person habitually addicted to the use of intoxicating liquors.²¹ Proof that the assured was an intemperate man after the policy was issued does not show he was one at the date of its issuance,²² but evidence of subsequent intemperate habits may be shown if accompanied by some evidence of previous intemperate habits.²³ Where to the question whether he used intoxicating liquors, and, if so, to

at all. Q. Former habits of drinking wine, spirits, or malt liquors? Ans. Not at all." A recovery was allowed upon the policy, although there was evidence the assured "drank freely and even excessively." "The evidence does not show," said the court, "that Simpson ever habitually drank liquors. Taking the testimony of appellant at its strongest, it would only show that at some time during his residence at Bryan, Simpson was considered a drinking man, and at that time that he drank freely and even excessively. But for how long a time this continued, and whether or not it had ever acquired the force of habit, is left uncertain by this testimony. The fact that after he moved to Eagle Pass he was not addicted to any such habit, though he occa-

sionally would take a drink, tends strongly to show that the use of the intoxicants had never become habitual." *New York Mut. Ins. Co. v. Simpson* (Tex. Civ. App.), 28 S. W. 837.

²⁰ *America, etc., Ins. Co. v. Day*, 39 N. J. L. 89; *Horton v. Equitable, etc., Soc.*, 2 Bigelow L. & Acc. Ins. Rep. 108; *Bacon v. New England Order of Protection*, 123 Fed. 152.

²¹ *John Hancock Mut. L. Ins. Co. v. Daly*, 65 Ind. 6.

²² *Gartside v. Connecticut Mut. L. Ins. Co.*, 8 Mo. App. 593.

²³ *United Brethren Mut. Aid Soc.*, 120 Pa. St. 256; 13 Atl. 932. "It was a link in the chain, which might, or might not, have been followed up by sufficient other evidence to establish a habit of intemperance."

what extent, accompanied by a request to give an average quantity for each day, the insured answered, "Only in sickness," but it was shown he did take an occasional drink, though not addicted to the habitual use of liquor, this was held not to be a material misrepresentation, such as would avoid the policy.²⁴ So where an applicant answered "No" to the question, "Were you ever intoxicated?" and many witnesses testified to having previously seen him in a hilarious and noisy mood, walking with difficulty from drinking, driving fast, being unable to sit up straight when driving, although they had never seen him when he could not drive, and some of them testified that he acted as if crazy with liquor at times, and one, a physician, said he had once found him in a state of acute alcoholism when examining him for commitment to a retreat, it was held that a finding there was no misrepresentation was justified by the evidence. So in the same case a like answer was given to the question, "Do you use alcoholic stimulants?" and evidence showed he had drunk liquors to excess at intervals from his youth, and once had been in a medical examiner's hospital for treatment for drunkenness, but the examiner testified the insured had promised to reform, and he thought he had done so, and he wrote the answers to the several questions for him; and a nurse in the hospital testified that he twice drank about that time, it was held that there was no misrepresentation, for the question and answer related to the time of the application and not to the past.²⁵ Where an applicant was asked what was his "practice" concerning the use of intoxicating liquors, and whether he had ever been "a free drinker," and if so, to what degree, and whether he had ever had *delirium tremens*, and the insurer's instructions to its medical examiner was that he should draw the line at a limit of a daily allowance equivalent to one and a half ounce of absolute alcohol, and the answers to these questions were made warranties, it was held that the form of the questions and the instructions to the medical examiner indicated that the information desired was the applicant's

²⁴ Mutual, etc., Ass'n v. Colter,
81 Ark. 205; 99 S. W. 67.

²⁵ Bacon v. New England Order
of Protection, 123 Fed. 152.

practice or habit in the respect inquired about, and the fact of his occasional excess did not show a breach of the warranty where the answer was he took a drink once a month.²⁶ But if the applicant falsely state that he is "sober and temperate" it will avoid the policy, although with no intent to deceive, it is made in good faith.²⁷

Sec. 1213. Death resulting from intemperate habits.

Intemperate habits, occasioning the insured's death, acquired after the issuance of the policy, will not avoid such policy. "The risk," said the Supreme Court of Missouri, "was taken upon the statement made at the time of issuing the policy, and had no reference to any future change in the habits of the insured. If Reichard became intemperate subsequent to the issuing and renewal of the policy, and this fact could be set up in a bar to [a] recovery, we see no reason why intemperance in eating, the undue exposure of the person to the inclemency of the weather, or any other act tending to shorten life, might not with equal propriety be pleaded in bar."²⁸ But if the statement concerning the intemperate

²⁶ Equitable Life Assurn. Soc. v. Liddell, 32 Tex. Civ. App. 252; 74 S. W. 87.

²⁷ Hartwell v. Alabama, etc., Ins. Co., 33 La. Ann. 1353; 39 Am. Rep. 294; 11 Ins. L. Jr. 897. In this case the court said: "Habits of intemperance generally grow upon the victim gradually, and to him insensibly, and he is aroused to an appreciation of his true condition, if at all, long after the habit has become fixed and has attracted, if not public attention, at least that of those who are thrown into daily or constant social or business intercourse with him; and with self-sufficiency and egotistical faith in himself he denies and resents as inapplicable to him what is apparent to others. But

this denial on his part, or disbelief as to his condition, does not affect his real existence, and while from misconception of the truth, growing out of a perverted or distorted view taken by himself, he may be acquitted of any dishonest attempt at deception or misrepresentation, his solemn declaration, although made without fraudulent or untruthful intent, which induces another to bind himself in a manner [in] which he would not have [done] in the absence of such declaration, cannot be invoked to the detriment of that other who binds himself on the faith of its correctness."

²⁸ Reichard v. Manhattan Life Ins. Co., 31 Mo. 518.

habits of the insured be untrue, and they are material, it is not necessary that his death should be caused by his intemperate habits to enable the insurer to avoid the policy. "The warranty set up in this case by the defendant, and the only fact to be ascertained is whether, at the time of making that warranty, the insured was then or had ever been addicted to the excessive or intemperate use of alcoholic stimulants, or did then use intoxicating drink habitually as a beverage." ²⁹ So where, in answer to the questions if the applicant had ever had the *delirium tremens*, he answered "No," and it was shown that a short time before the application had been made he had had them, though his death was not occasioned by the use of liquor, it was held that there could be no recovery on the policy, the court saying: "No one can doubt that if the truth had been told with respect to the particulars in question the medical examiner would not have accredited the application, and the society would have rejected so exceptionable a candidate." ³⁰

Sec. 1214. Promises concerning future habits.

In some policies are inserted a promissory clause that the insured will not "practice any pernicious habit that tends to shorten life," which is usually followed by a forfeiture clause if the promise be not kept. The word "habit" is construed to apply to "habits of intoxication," and the promise to be a warranty which will avoid the policy if not kept.³¹ "We concede," said one court, "that no particular form of words will make a statement or stipulation a warranty where it is

²⁹ Horton v. Equitable, etc., Soc., 2 Abb. L. Jr. 255; Swick v. Home Life Ins. Co., 2 Dill. 160; Southcombe v. Merrian, 1 C. & M. 286; 41 E. C. L. 159.

³⁰ McVey v. Grand Lodge, 53 N. J. L. 17; 20 Atl. 873.

³¹ Holteroff v. Mutual, etc., Ins. Co., 3 Am. L. Rec. 272; Knight v. Mutual Life Ins. Co., 14 Phila. 187; 9 W. N. C. 501 (the word

"guarantee" was used); Boyle v. Phoenix Mut. L. Ins. Co., Ramsey's App. Cas. (Low. Can.); 379 (promise not to acquire habits that would "increase the risk" on his life); Schultz v. Mut. L. Ins. Co., 6 Fed. 672; 14 Ins. L. Jr. 171; Meacham v. N. Y. St. Mut. Ben. Ass'n, 120 N. Y. 237; 21 N. E. 283 (statement expressly made a warranty).

apparent that it is not the intention of the parties to make the validity of the contract depend upon the literal truth or fulfillment of the statement or stipulation.³² The policy here, however, expressly stipulates that if his 'declaration shall be found in any respect untrue, it shall be void.' ''³³ So in another case it was said: "The language in regard to future pernicious habits is far more than a declaration of intention. It is a positive representation of a future fact, and is not to be regarded as an expression of an expectation or belief of the insured."³⁴ Nevertheless this rule has not always prevailed; and it has been held that expressions concerning the future conduct of the insured are nothing more than expression of an intent not to acquire pernicious or drinking habits, and consequently not warranties that will produce a forfeiture of the policy. "The assured declared as a matter of intention that he would not practice any pernicious habit," said the Supreme Court of Pennsylvania. "Was this declaration of future intention false? There is no allegation, much less proof that it was so. The assured might well have intended to adhere to his declaration in the most perfect good faith, yet in a moment of temptation have been overcome by his insidious enemy. In the absence of any clause in the policy avoiding it in case the assured should practice any such habit, and of any covenant or warranty on his part that he would not do so, we do not think his mere declaration to that effect in the declaration sufficient to avoid the policy."³⁵ There is no serious question that the term "pernicious habit" includes "alcoholism," as previously said. Thus the following instruction given to a jury was held to be correct: "The deceased had an appetite for intoxicating drinks to such an extent that a single indulgence necessarily instigated him to a reception of it, and led him into what have been called sprees, and these sprees were

³² Citing *Wheaton v. Hardisty*, 8 El. & Bl. 239; 92 E. C. L. 232, and *Kingsley v. N. E. Mut. F. Ins. Co.*, 8 Cush. 593.

³³ *Holterhoff v. Mutual Ben. L. Ins. Co.*, 3 Am. L. Rec. 272.

³⁴ *Schultz v. Mut. L. Ins. Co.*,

6 Fed. 672; 14 Ins. L. Jr. 171. See also *Standard L., etc., Ins. Co. v. Lauderdale*, 94 Tenn. 635; 30 S. W. 732.

³⁵ *Knecht v. Mut. L. Ins. Co.*, 90 Pa. St. 118; 35 Am. Rep. 641; 8 Ins. L. Jr. 639.

frequent and rendered him incapable of controlling his appetite while they continued, then, although there were intervals during which he remained entirely sober, there was such a repetition of acts of drinking as amounts to a habit.”³⁶ If the promise to totally abstain from the use of intoxicating liquor is on a penalty of a forfeiture of the policy if the promise be not kept, then a single act of indulgence will avoid the policy.³⁷

Sec. 1215. Statutes limiting legal effect of statements.

In a few States statutes have been enacted which limit the legal effect of statements inserted in the application; and of course, change what would otherwise be the rule with reference to their effect. Of course, to change the rules followed by the courts, a statement must clearly fall within the provision of the statute; for such a statute is rather strictly than liberally construed.³⁸ But where a statute provided that a “misrepresentation” inserted in an application should not avoid the policy issued thereon unless fraudulently made, or it increased the risk, it was held that the word “misrepresentation” was not used in a technical sense, but included warranties inserted in the policy by reference therein made to

³⁶ *Holterhoff v. Mut. Ben. L. Ins. Co.*, 3 Am. L. Rec. 272.

“Habit is defined to be ‘fixed or established custom, ordinary course of conduct.’ It need not be the uniform or unvarying rule, but to be a habit it must be the ordinary course of conduct, the general rule or custom. It may have exceptions. Exceptions do not destroy a rule. But unless, when occasion offers, there is a disposition or probable inclination to drink to excess, intemperate habits can not be predicated.” *Tatum v. State*, 63 Ala. 147.

Of course, such a clause in a policy authorizes the introduction

of evidence to show the assured’s habits of drinking. *Schultz v. Mut. L. Ins. Co.*, 6 Fed. 672; 14 Ins. L. Jr. 171.

³⁷ Such at least is the rule concerning such promises inserted in membership certificates in mutual insurance organizations. *Supreme Council v. Curd*, 111 Ill. 284; *Hogins v. Supreme Council*, 76 Cal. 109; 9 Am. St. 173; *Smith v. Father Mathew*, 36 Mo. App. 184; and there is no reason why it should not apply to ordinary policies of life insurance.

³⁸ *Conover v. Mass. Mut. L. Ins. Co.*, 1 Cent. L. Jr. 597; 4 *Bigelow*, etc., Ins. Rep. 189.

such application.³⁹ Yet where a statute provided that no false representation should avoid the policy unless "material," it was held that untrue representations made by the insured concerning his use of intoxicating liquors would not avoid his policy unless his habits in the use of intoxicating liquors were sufficient to impair his health.⁴⁰

Sec. 1216. Express clause concerning use of intoxicating liquors.

Notwithstanding what has been previously said, especially in the last section, courts have been rather inclined in recent times to enforce liberally clauses inserted in policies concerning both the past and future use of intoxicating liquors, upon the ground that such clauses tend to promote morality.⁴¹ Thus a clause in a policy withholding benefits if the insured died from the use of intoxicating liquors is valid, even in a mutual benefit association,⁴² and a provision in the by-laws of a beneficial association empowering its directors to expel a member for drunkenness is valid; and their action is conclusive, being a judicial act, "in the absence of fraud," and it "cannot be assailed collaterally."⁴³ In a benefit association an agreement as to total abstinence from the use of liquors is binding, and to defeat an action on the policy it is not necessary that the association shall have first expelled the member on whose certificate the action is brought.⁴⁴

Sec. 1217. Cancellation of policy.

Not infrequently the policy expressly reserves the right in the insurer to cancel the policy in case of intemperate habits

³⁹ *White v. Provident, etc., Soc.*, 163 Mass. 108; 39 N. E. 771.

⁴⁰ *Mutual Life Ins. Co. v. Thomson*, 94 Ky. 253; 22 S. W. 87; 14 Ky. L. Rep. 800.

⁴¹ Consult *St. Mary's Ben. Soc. v. Burford*, 70 Pa. St. 321; *Southcombe v. Merriam*, 41 E. C. L. 159; 1 C. & M. 286; *Standard L., etc., Ins. Co. v. Jones*, 94 Ala. 434; 10 So. 530; *Shader v. Railway Passenger Ass'n Co.*, 5 T. &

C. (N. Y.) 643, affirmed 66 N. Y. 441; 23 Am. Rep. 65.

⁴² *St. Mary's Ben. Soc. v. Burford*, 70 Pa. St. 321.

⁴³ *Jones v. National Mut. Ass'n (Ky.)*, 2 S. W. 447; 8 Ky. L. Rep. 599.

⁴⁴ *Hogins v. Supreme Council*, 76 Cal. 109; 9 Am. St. 173; *Smith v. Knights of Father Matthew*, 36 Mo. App. 184.

acquired by the insured after the issuance of his policy; and such an express agreement supersedes a general clause providing for an *ipso facto* forfeiture on the same ground.⁴⁵ Although there may be no express reservation in the policy giving a right in the insurer to cancel the policy because of misrepresentations as to past habits, or because of an agreement not to indulge in the use of intoxicating liquors, yet if there be false representations made with reference to such habits in the past, or if the agreement not to use intoxicating liquors be violated, the insurer may bring an action to have the policy cancelled, and is not bound to wait until an action is brought upon the policy to recover the amount otherwise due under it before insisting that it has been forfeited.⁴⁶ A delay of thirty-five days has been held not a waiver of the right to have the policy cancelled.⁴⁷ But where the insured's health had been impaired by intoxicating habits acquired after the policy had been issued, the court refused to cancel the policy in an action brought before his death for that purpose.⁴⁸

⁴⁵ *Northwestern Mut. L. Ins. Co. v. Hazelett*, 105 Ind. 212; 4 N. E. 582; 55 Am. Rep. 192. "The policy before us," said the court in this case, "having been presumably prepared by the company, and containing on its face inconsistent or ambiguous stipulations as to the consequences which should result from intemperance, the meaning most favorable to the assured must be attributed to it. This rule is particularly applicable in a case like this, where a forfeiture is insisted upon. To hold otherwise, would be to give a construction to the contract which would enable the insurance company to exercise its option, after having collected premiums, to insist upon a forfeiture or not, according to its pleasure. The consequence of intemperance was made the subject of a particular

specific and separate stipulation in which no other subject is mentioned; and, according to well established rules of construction, when such is the case the separate specific stipulation is to be preferred over a general stipulation inconsistent therewith."

Such a clause may be waived as to past habits, by issuing a policy with full knowledge of them. *Newman v. Covenant Mut. Ins. Ass'n*, 76 Iowa, 56; 40 N. W. 87; 14 Am. St. 196.

⁴⁶ *New York Life Ins. Co. v. Parent*, 3 Quebec L. R. 162; *New York Life Ins. Co. v. Talbot*, 3 Quebec L. R. 168; see *Andreveno v. Mut., etc., Ass'n*, 19 Ins. L. Jr. 668.

⁴⁷ *Andreveno v. Mut., etc., Ass'n*, 19 Ins. L. Jr. 668.

⁴⁸ *Connecticut Mut. L. Ins. Co. v. Bear*, 26 Fed. 582.

Sec. 1218. Various clauses concerning intoxicating liquors.

Various phrases have been used in policies of insurance, some of which have been judicially construed. One, perhaps the most common, is that there shall be no liability on the policy if "death be caused by intoxicants." To avoid the policy because of a violation of this condition in it, it must be shown by the insurer that death resulted from the use of intoxicants, and that their use was the direct and not merely a remote cause of it.⁴⁹ A clause avoiding a policy "if the insured shall die from the habitual use" of intoxicating liquors, proof that death was caused by the excessive use of liquor will not be sufficient to defeat an action thereon; but it must be shown that death was occasioned by the "habitual use" of such liquors; and it is a question for the jury to determine whether such use was an habitual one.⁵⁰ Of course, these phrases refer to the voluntary use of intoxicating liquors, and they do not cover an instance of their use under the direction of a physician, prescribed by him, in good faith as a medicine for the deceased.⁵¹ And a representation that the applicant had never used intoxicating liquors will not be considered a false one where he took them strictly as medicine under the direction of a physician treating him *bona fide* because

⁴⁹ Holterhoff v. Mut. Ben. L. Ins. Co., 3 Am. L. Rec. 272; Miller v. Mut. Ben. L. Ins. Co., 31 Iowa, 216; 7 Am. Rep. 122; 4 Am. L. T. Rep. 218; Mutual Ins. Co. v. Stibbe, 46 Md. 302; New York L. Ins. Co. v. La Boiteaux, 4 Am. L. Rec. 1.

⁵⁰ DeCamp v. N. J. L. Ins. Co., 4 Bigelow L. & Acc. Ins. Rep. 287.

⁵¹ Ranney v. Mutual Ben. L. Ins. Co. (U. S. D. C. Mass. 1873), May on Insurance (3d ed.), § 302. See also Aetna L. Ins. Co. v. Ward, 140 U. S. 76; 11 Sup. Ct. 720; Aetna L. Ins. Co. v. Davey, 123 U. S. 739; 8 Sup. Ct. 331; Higbee v. Guardian Mut. L. Ins. Co.,

66 Barb. 462; New York L. Ins. Co. v. La Boiteaux, 4 Am. L. Rec. 1.

In the first case cited the court told the jury: "If the death of the assured was caused by any drug administered to him in the course of medical practice for the purpose of cure, in sufficient quantity to produce death, and death was the effect of the drug, and not of the disease, then in such case the death could not properly be considered as resulting from intemperance in the use of intoxicating liquors, and the plaintiff, upon that branch of the case, would be entitled to recover."

of a disease.⁵² Yet where the policy was void if death of the insured was caused "by reason of intemperance from the use of intoxicating liquors," and the insured during a fit of *delirium tremens* escaped his guards, and running out was exposed to the cold which brought on congestion of his lungs causing his death, a recovery was denied, although, as can be seen, his death was only remotely caused by the liquor, the immediate cause being congestion of the lungs.⁵³ And where the policy is avoided by a clause providing that there shall be no recovery upon it if the insured is guilty of "intemperance impairing his health," the impairment need not have been caused by an indulgence "in strong drink for such a long period of time, or so frequently, as to become habitually intemperate."⁵⁴ Where it was provided that the insurer should not be liable in case the insured became "so far intemperate as to impair his health seriously and permanently, or to induce *delirium tremens*," the court said "it was not enough to work a forfeiture that the assured was a person who indulged in the use of intoxicating liquors, even to the extent of impairing his health seriously, unless the impairment was permanent. A person's health may be seriously impaired and yet only temporarily; but under the condition in this policy not only must there have been a serious impairment of health, but it must have been permanent. The condition is double in its character--that is to say one of two physical conditions brought about by intemperate habits would have worked a forfeiture under the policy--a serious and permanent impairment of health, or *delirium tremens*. In either case all rights under the policy would have been forfeited, but nothing short of the one or the other could have brought about that result."⁵⁵ Whether or not the insured's

⁵² Higbee v. Guardian Mut. L. Ins. Co., 66 Barb. 462.

⁵³ Miller v. Mut. Ben. Ins. Co., 34 Iowa, 222; Miller v. Mut. Ben. Ins. Co., 39 Iowa, 304.

⁵⁴ Aetna Life Ins. Co. v. Davey, 123 U. S. 739; 8 Sup. Ct. 331; Aetna Life Ins. Co. v. Davey, 38 Fed. 650.

⁵⁵ Aetna Life Ins. Co. v. Deming, 123 Ind. 384; 24 N. E. 86, 375. "The appellant requested the court to give an instruction to the effect that if the assured became so far intemperate from the excessive or protracted use of intoxicating liquors, drinks or beverages as to impair his health seri-

health was permanently impaired is a question for the jury,⁵⁶ and expert testimony that the quantity of liquor it is claimed the insured consumed is sufficient to permanently impair his health is not admissible.⁵⁷

Sec. 1219. *Delirium tremens.*

Where a provision in a policy provided that it should be void in case the assured became "so far intemperate as

ously and permanently, or to induce *delirium tremens*, the appellee could not recover, and this instruction the court gave.

The appellant also requested the court to give an instruction to the effect that if the assured used spirituous liquors to such extent as to produce frequent intoxication, he was intemperate within the meaning of the policy, and if such intemperance impaired his health seriously and permanently, or induced *delirium tremens*, this avoided the policy.

"We do not regard the refusal to give this instruction as error; if for no other reason, it does not materially differ from the instruction which the court gave. The only difference is in the words employed." See also *Odd Fellows' Mut. L. Ins. Co. v. Rohkopp*, 94 Pa. St. 59; 9 Ins. L. Jr. 787.

Where the affidavit of proof of death stated that the remote cause was alcoholism, yet also stated that the immediate cause was alcoholism and extreme prostration, the complaint was dismissed, on the ground that the policy had been avoided. *Hanna v. Connecticut L. Ins. Co.*, 8 N. Y. Mis. Rep. 431; 28 N. Y. Supp. 661.

⁵⁶ *Jarvis v. Connecticut Mutual Life Ins. Co.*, 5 Ins. L. Jr. 507.

⁵⁷ *Odd Fellows' Mutual Life Ins. Co. v. Rohkopp*, 94 Pa. St. 59; 9 Ins. L. Jr. 787. "The capacity of persons to drink liquors is unequal, and the effect is so different on different individuals, it by no means follows that a quantity sufficient to affect some other man's health, had the same affect on the health of Rohkopp. The question in issue was, did his intemperance so affect him? The court opened the door wide, and permitted the plaintiff in error to give all the evidence offered of Rohkopp's intemperate habits, and of the effect on him. That he was habitually intemperate, was not denied or controverted. It was clearly proved. The contention was, whether its effect was such as to bring him within the clause of the policy which would prevent a recovery. Possessing a constitution and health which habitual intemperance for so many years had been unable to seriously injure, showed a capacity to withstand its action that justly confined the evidence to the effect the liquor had on him, and not what effect it might have on some other person."

* * * to induce *delirium tremens*," the trial court instructed the jury that "the term '*delirium tremens*' in the policy read in evidence, is used in this policy in the ordinary acceptance of that term, and signifies that diseased condition of the brain said to be produced by the excessive and prolonged use of spirituous liquors." On appeal the court said that "we are unable to discover any infirmity in this instruction, at least of which the appellant [insurance company] can complain. The phrase '*delirium tremens*' has an ordinary and accepted meaning, as recognized by all lexicons of the English language, and is in common use by English speaking people. It is not confined and limited to the medical profession. There is nothing in the policy to indicate that the phrase was employed in a technical sense. We must, therefore, go to the dictionaries of the English language to find a definition." ⁵³

Sec. 1220. Death or injury while under the influence of intoxicating liquors.

Of recent years life policies frequently provide that the policy shall be void if the death of the insured took place while he was under the influence of intoxicating liquor; and

⁵³ The court then says: "The Century Dictionary gives the following definition: 'A disorder of the brain arising from inordinate and protracted use of ardent spirits, and therefore almost peculiar to drunkards. The delirium is a constant symptom, but the tremor is not always conspicuously present. It is, properly, a disease of the nervous system.'

"Starmouth's English Dictionary gives the following definition: 'A temporary insanity or madness, accompanied with a tremulous condition of the body or limbs, generally caused by habitual drunkenness.'

"Worcester's definition is as follows: 'A disease of the brain, characterized by frightful dreams and visions, and resulting from the excessive and protracted use of spirituous liquors.'

"Webster's definition is as follows: 'A violent delirium induced by the excessive and prolonged use of intoxicating liquors.'

"The definition as given in the instruction is more favorable to the appellant than that given in any of the lexicons named." *Aetna Life Ins. Co. v. Deming*, 123 Ind. 384; 24 N. E. 86, 375.

accident policies almost universally provide that there shall be no liability under it if the insured suffered an accident when he was likewise under the same influence. Under such a clause it is not material in order to avoid the policy to show the death or injury was occasioned by the intoxication of the insured; it is simply sufficient to show that when the death or accident occurred he was intoxicated.⁵⁹ In some instances courts have undertaken to define what is meant by the phrase "under the influence of intoxicating liquors."

"To be under the influence of intoxicating liquors," said the Supreme Court of New York, "within the meaning of this policy, the insured must have drunk enough to disturb the action of the physical or mental faculties, so that they are no longer in their natural or normal condition. When, therefore, the defendant imposed upon persons insured by it the condition that it would not be liable when death or injury should happen while the insured was under the influence of liquor, the intention manifestly was to require the insured to limit its use in such a degree as that he would retain the full control over his faculties of mind and body."⁶⁰ And in an English case it has been said that "the influence of intoxicating liquor" must be such as "disturbs the balance

⁵⁹ As the policy was rendered void if the assured was injured or killed while under the influence of intoxicating drinks, it was not essential, to work a forfeiture, that injury or death should occur in consequence of the use of the same." *Shader v. Railway Passenger's Assur. Co.*, 66 N. Y. 441; 23 Am. Rep. 65; 5 Ins. L. Jr. 749, affirming 3 Hun, 424; 5 T. & C. 543. See also *Standard Life, etc., Ins. Co. v. Jones*, 94 Ala. 434; 10 So. 530; *Macerobbie v. Accident Ins. Co.*, 13 Sc. L. Rep. 391; *Mair v. Railway Passenger Ass'n Co.*, 37 L. T. 356.

That an insured had taken drinks just before he received an

injury, will not, if he was not drunk, bring him within the clause of a policy to the effect that it shall not "cover any accident which may happen to the insured while under the influence of intoxicating drinks." *Fidelity, etc., Co. v. Chambers*, 97 Va. 138; 24 S. E. 896; 40 L. R. A. 432. See *Prader v. National, etc., Assn.*, 95 Iowa, 149; 63 N. W. 601; *Standard, etc., Ins. Co. v. Jones*, 94 Ala. 434; 10 So. 530; *Travelers, etc., Co. v. Harvey*, 82 Va. 949; 5 S. E. 553.

⁶⁰ *Shader v. Railway Passenger's Assur. Co.*, 3 Hun, 424; 5 T. & C. 543; affirmed, 66 N. Y. 441; 23 Am. Rep. 65; 5 Ins. L. Jr. 749.

of one's mind."⁶¹ In an Alabama case it was declared that the phrase "under the influence of intoxicating liquors" in its popular sense fell far short of meaning intoxication, but in its legal import it is equivalent to the latter term, which is also said to be "the synonym of 'inebriety,' 'drunkenness,' implying or evidenced by undue or abnormal excitation of the passions or feelings, or the impairment of the capacity to think and act correctly and efficiently."⁶² However, in a majority of the cases the question of intoxication is left to the jury, and the courts declining to define what constitutes intoxication.⁶³ If there be a conflict in the evidence on intoxication the court will not disturb the verdict or findings of the jury.⁶⁴ Where a statute rendered the insurance company liable if the insured came to his death "by suicide or drowning, or perishing from cold, or other accident caused by" his intoxication, and the deceased, falling off a bench, was placed in a small room without anything under his head, and while there he died from apoplexy or congestion of the brain brought on, as the plaintiff alleged, by placing him in an improper position, it was held not to be a case of "accident" within the statute, but death from natural causes induced by intoxication.⁶⁵

⁶¹ *Mair v. Railway Passenger's Assur. Co.*, 37 L. T. 356.

⁶² *Standard Life, etc., Ins. Co. v. Jones*, 94 Ala. 434; 10 So. 530.

In a Scottish case the court found that the insured was the worse for the liquor at the time of his injury, and it would seem that was sufficient to prevent a recovery under a clause in the policy providing that it did not "extend to any injury happening while the assured was under the influence of intoxicating liquor." *Maccrobbie v. Accident Ins. Co.*, 13 Sc. L. Rep. 391.

⁶³ *Newman v. Covenant Mut. Ins. Ass'n*, 76 Iowa, 56; 40 N. W.

87; 14 Am. St. 196; *Jones v. U. S. Mut. Acc. Ass'n*, 92 Iowa, 652; 61 N. W. 485; *Prader v. National, etc., Ass'n*, 95 Iowa, 149; 63 N. W. 601; *Traveler's Ins. Co. v. Harvey*, 82 Va. 949; 5 S. E. 553; *Sutherland v. Standard L., etc., Ins. Co.*, 87 Iowa, 505; 54 N. W. 453.

⁶⁴ *Sutherland v. Standard L., etc., Ins. Co.*, 87 Iowa, 505; 54 N. W. 453; *DeVan v. Commercial Travelers, etc., Ins. Co.*, 157 N. Y. 690; 51 N. E. 1090; affirming 92 Hun, 256; 36 N. Y. Supp. 931; *Beard v. Indemnity Ins. Co. (W. Va.)*, 61 S. E. 119.

⁶⁵ *Bobier v. Clay*, 27 Up. Can. 438.

Sec. 1221. Connection with liquor traffic.

Applications not infrequently require the applicant to state whether he is then engaged in the liquor traffic, or even if in the past he has been so engaged, and false statements in this respect will avoid the policy issued thereon. Thus where the question was whether the applicant stated the truth, in answer to a question that he had not been "engaged in or connected with the manufacture or sale of any beer, wine or other intoxicating liquors," but it was shown he was formerly an hotel keeper, selling bottled beer only to his guests, yet keeping no bar, it was held that the policy was void, it providing that it should be void "if the representations made in the application" should "be found in any respect untrue."⁶⁶ But where an applicant maintained a grocery "with a saloon attachment," and in his barroom he filled out his application but did not state he was engaged in the liquor business, though a question called for information on that point, it was held that the policy was not thereby avoided.⁶⁷

Sec. 1222. Condition against engaging in liquor traffic.

Where the by-laws of a beneficial association declared ineligible to membership in the order a person engaged in selling intoxicating liquors as a beverage, and that a member engaging in such traffic forfeited all right as a life benefit member, his certificate thereby becoming null and void without any action on the part of the association, it was held that a member with knowledge of the consequences, and without being misled by the association, who engaged in the saloon business, immediately stood suspended from all rights of membership without action on the part of the governing body of the association.⁶⁸ But where a by-law provided that no person should be admitted to membership who was sell-

⁶⁶ *Dwight v. Germania L. Ins. Co.*, 103 N. Y. 341; 57 Am. Rep. 729.

⁶⁷ *McGurk v. Metropolitan Life Ins. Co.*, 56 Conn. 528.

⁶⁸ *Hexom v. Knights of Macca-bees of the World (Iowa)*, 117 N. W. 19.

ing at retail liquor as a beverage; and any member who should after a stated date enter into such business should stand suspended from all rights to participate in all beneficiary funds of the order, and his beneficiary certificate become void, it was held there was no intention to prevent members already engaged in the saloon business from re-entering it, and such by-law did not preclude a member from re-engaging in the saloon business after a temporarily forced abandonment of it, if he had been engaged in such business when the by-law was adopted.⁶⁹

Sec. 1223. Waiver by insurer.

If an insurance company, with the knowledge that the statements in the application of the insured concerning his habits are false, accept it and issues a policy thereon; ^{69*} or if it, after the policy is issued, with a knowledge of the falsity of the statements in the application, or if it knows the insured is violating his promise not to indulge in the use of intoxicating liquors, accepts the premiums falling due thereon, it will waive its right to set up as a defense his intemperate habits.⁷⁰ What is true of a standard or mutual life insurance company is also true of a benefit association which accepts a member's dues after knowledge to it of his intemperate habits. In the latter instance the court said: "In other words, facts which are well known or might have been known upon due inquiry, and which, had action been taken thereon by the order, might have resulted in the suspension or expulsion of a member and cancellation of his certificate of life insurance, cannot be ignored after his death, and then be urged to defeat the provision made for his widow or other beneficiary."⁷¹ But if a

⁶⁹ Grand Lodge A. P. O. U. W. v. Oetzel, 139 Ill. App. 4.

^{69*} Pomeroy v. Rocky Mountain Ins. Co., 9 Colo. 295; 59 Am. Rep. 144.

⁷⁰ Aetna Life Ins. Co. v. Hanna, 81 Tex. 487; 17 S. W. 35; Newman v. Covenant Mutual Ass'n, 76

Iowa, 56; 40 N. W. 87; 14 Am. St. 196; Continental Life Ins. Co. v. Thoena, 26 Ill. App. 495; McGurk v. Metropolitan Life Ins. Co., 56 Conn. 528.

⁷¹ Grand Lodge v. Brand, 29 Neb. 644.

policy expressly provide that a local agent cannot waive its printed conditions, then knowledge by him of the insured's intemperate habits is not such knowledge on the part of the insuring company as will constitute a waiver.⁷² Thus where the by-laws of a beneficial association provided that if a member engaged in the retail liquor traffic he should forfeit his membership and all rights thereunder be cancelled without action on the part of the governing body of the association; and a member paid his dues six months in advance, and then engaged in the saloon business, whereupon the recorder of the local lodge, who was secretary and treasurer thereof, told him he had better "drop out" while at such business, and he said he did not know how long he would be in it; that he might be in it only a short time, and when he quit he would go right on again; and it was the duty of such recorder to enter the member's suspension on his engaging in such business and report his suspension to the supreme office, it was held he acted in excess of his authority in receiving dues from the member and forwarding them, that his action was a fraud upon the association, participated in by such member, so that the knowledge of the agent not being the knowledge of the supreme office or lodge, there was no waiver of the forfeiture by the receipt and retention of the dues. In such instance it was also held that a return or offer to return the money received as dues after the association learned the facts, was not necessary in order to defend against an action to recover on his beneficial certificate because of his death, it not appearing that there was any person authorized to receive the money.⁷³

⁷² *Cook v. Standard Life, etc., Ins. Co.*, 84 Mich. 12; 47 N. W. 568.

Where a company had the right to cancel a policy because of the intemperate habits of the insured, a delay of thirty-five days in cancelling it, after knowledge of his habits had been brought home to it, was held not to be a waiver of

its right to make the cancellation. *Andreveno v. Mutual Reserve, etc., Ass'n*, 19 Ins. L. Jr. 668.

⁷³ *Hexom v. Knights of Maccabees of the World (Iowa)*, 117 N. W. 19. Objections upon other grounds than intoxication of the member was not a waiver, if made when in ignorance of his habits.

Sec. 1224. Physician of insurer to determine cause of death.

Where a policy provided that if, in the opinion of the surgeon-in-chief of the insurance company the insured did not die of intemperance or of any disease produced or aggravated by intemperance, the policy could be paid off, it was held that the clause was valid, was a condition precedent; and in an action thereon its performance must be averred or its non-performance accounted for. It appeared that the surgeon of the company was a stockholder in it, and that his dividends would be affected by the payment of claims, and the fact of his interest was concealed from the insured at the time the policy was issued. This was held a sufficient excuse for the non-performance of such condition precedent, and a recovery on the policy was authorized.⁷⁴

Sec. 1225. Province of jury and court.

Whether or not the insured's habits were temperate is a question of fact;⁷⁵ and the same is true on the question whether he was so intemperate as to impair his health;⁷⁶ or whether his death was caused by his intoxication;⁷⁷ or whether he had been addicted to the use of intoxicating liquors;⁷⁸ or whether his death took place while he was intoxicated.⁷⁹ And while these are all questions of fact for the jury to pass upon, yet the courts will not permit the verdict to stand if clearly

⁷⁴ Campbell v. American Popular Life Ins. Co., 1 MacArthur, 471.

⁷⁵ Northwestern Life Ins. Co. v. Muskegon, 122 U. S. 501; 7 Sup. Ct. 1221; Scotland Life Ass'n v. McBlane, 9 Irish Eq. 176; McGinley v. U. S. Life Ins. Co., 8 Daly, 390; 7 Ins. L. Jr. 791; affirmed, 77 N. Y. 495; Promoters Ins. Co. v. Barrie, 5 Murray (S. C.), 135.

⁷⁶ Mutual Life Ins. Co. v. Thomson, 94 Ky. 253; 22 S. W. 87; Aetna Life Ins. Co. v. Hanna, 81 Tex. 487; 17 S. W. 35.

⁷⁷ Maier v. Massachusetts Ben. Ass'n, 107 Mich. 687; 65 N. W. 552; Meacham v. N. Y. St. Mut. Ben. Ass'n, 120 N. Y. 237; 24 N. E. 283; Aetna L. Ins. Co. v. Word, 140 U. S. 76; 11 Sup. Ct. 720; Aetna L. Ins. Co. v. Davey, 123 U. S. 739; 8 Sup. Ct. 331.

⁷⁸ Van Valkenburgh v. American Popular Ins. Co., 70 N. Y. 605.

⁷⁹ Sutherland v. Standard L., etc., Ins. Co., 87 Iowa, 505; 54 N. W. 453; Fellis v. U. S. Mut. Acc. Ass'n, 94 Iowa, 435; 62 N. W. 807.

against the weight of the evidence.⁸⁰ But the meaning and intent of clauses or stipulations in the application and in the policy must be interpreted by the court and not by the jury.⁸¹

Sec. 1226. Burden to show intoxication.

The burden to show that the insured was intoxicated to such an extent as to be a violation of the terms of the policy, or to show that he had made false statements concerning his habits of intoxication in the past is always upon the insurer; for the presumption is that the insured has not become intemperate or had not made false statements as to his habits in the past.⁸² The burden of showing intoxication to the requisite degree to avoid the policy does not shift.⁸³

Sec. 1227. Evidence to show intemperate habits.

A witness may state that the insured had the appearance of a person under the influence of intoxicating liquors. Such a statement is not an opinion, but a fact.⁸⁴ So a witness may be asked if he ever saw the insured under the influence of

⁸⁰ *Miller v. Mutual Bene. Ins. Co.*, 34 Iowa, 222; *Miller v. Mutual Ben. Ins. Co.*, 39 Iowa, 304; *Dwight v. Germania Life Ins. Co.*, 103 N. Y. 341; 8 N. E. 654; 57 Am. Rep. 729; *Mutual Ben. L. Ins. Co. v. Holterhoff*, 2 Cin. Sup. Ct. Rep. 379; *Cook v. Standard Life, etc., Ins. Co.*, 84 Mich. 12; 47 N. W. 568.

⁸¹ *Dwight v. Germania Life Ins. Co.*, 103 N. Y. 341; 8 N. E. 654; 57 Am. Rep. 729.

⁸² *Boisblanc v. Louisiana Eq. L. Ins. Co.*, 34 La. Ann. 1167; *Sutherland v. Standard Life, etc., Ins. Co.*, 87 Iowa, 505; 54 N. W. 453; *Shader v. Railway Passenger Ass'n Co.*, 5 T. & C. 643; affirmed, 66 N. Y. 441; 23 Am. Rep. 65; *Newman v. Covenant Mut. Ins. Ass'n*, 76 Iowa, 56; 40 N. W. 87; 14 Am. Rep. 196; *Van Valken-*

burgh v. American Popular Life Ins. Co., 70 N. Y. 605. See *Miller v. Mut. Ben. L. Ins. Co.*, 34 Iowa, 222; 1 Ins. L. Jr. 747; and *New York Life Ins. Co. v. Graham*, 2 Duv. 506.

⁸³ *New York Life Ins. Co. v. LaBoiteaux*, 4 Am. L. Rep. 1.

In an English case the defendant company pleaded that the insured was a man of intemperate habits, to which the plaintiff replied that the statements in the answer were not true. It was held that this gave the plaintiff the open and close, because there was an affirmative on both sides. *Craig v. Fenn*, 1 C. & M. 43; 41 E. C. L. 29.

⁸⁴ *Cook v. Standard Life, etc., Ins. Co.*, 84 Mich. 12; 47 N. W. 568.

liquors, where it is intended to use his testimony as a link in the chain of evidence tending to prove intemperate habits.⁸⁵ But where the condition in the policy was such that it forbade the insured becoming "so far intemperate as to seriously or permanently impair his health," it was held that evidence he was a "hard drinker" could not be given, unless an offer was made to show his drinking affected his health.⁸⁶ And where the question of the insured's drinking habits are raised as a defense, the certificate of the examining physician as to the cause of his death may not be read in evidence,⁸⁷ but if it is, and the physician then as a witness explains it, no available error has been committed.⁸⁸ The defendant insurer may show the insured's general reputation concerning his intemperate habits in the community where he lived, when the defense is that he had made false statements in his application concerning his habits of intoxication.⁸⁹ And where the wife is the beneficiary in the policy and brings suit upon it, her verified petition for a divorce setting forth that her husband, the insured, was an habitual drunkard during the time he made the alleged false representations concerning his health, is admissible in evidence, and of itself is enough to defeat her in her cause of action.⁹⁰ After the defendant has put in evidence concerning the insured's intemperate habits, the court may also permit the plaintiff to show his habits.⁹¹

⁸⁵ *United Brethren Mut. Aid Soc. v. O'Hara*, 120 Pa. St. 256; 13 Atl. 932.

⁸⁶ *Odd Fellows Mut. L. Ins. Co. v. Rohkopp*, 94 Pa. St. 59.

⁸⁷ *Cook v. Standard Life, etc., Ins. Co.*, 84 Mich. 12; 47 N. W. 568.

⁸⁸ *Davey v. Aetna Life Ins. Co.*, 38 Fed. 650.

⁸⁹ *Neudeck v. Grand Lodge*, 1 Mo. App. 330.

Where the defense was that the insured fell from a window while drunk, it was held not proper to show that on a previous occasion, while drunk, he had attempted to

jump from the same window. *Travelers Ins. Co. v. Harvey*, 82 Va. 949; 5 S. E. 553.

⁹⁰ *Furnis v. Mutual L. Ins. Co. (N. Y.)*, 46 N. Y. Super. Ct. 467.

⁹¹ *Maier v. Massachusetts Ben. Ass'n*, 107 Mich. 687; 65 N. W. 552.

Where the issue is whether an insured was intoxicated at a particular time, his appearance of intoxication or its absence may be shown both before and after that time by those who saw him. *Beard v. Indemnity Ins. Co. (W. Va.)*, 64 S. E. 119.

CHAPTER XLI.

MISCELLANEOUS.

SECTION.

- 1228. Jurors in a criminal case using intoxicating liquors.
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SECTION.

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Sec. 1228. Jurors in a criminal case using intoxicating liquors.

The mere drinking of intoxicating liquor by members of the jury in a criminal case is not cause for a new trial, where it does not appear they were in any way influenced by its use.¹ This is particularly true if the jurors indulged in the

¹ State v. Taylor, 134 Mo. 109; 35 S. W. 92; State v. Reed, 35 Pac. 706; May v. People, 8 Colo. 210; 6 Pac. 816; State v. Livingston, 64 Iowa, 560; 21 N. W. 34; People v. Deegan, 88 Cal. 602; 26 Pac. 500; Pope v. State, 36 Miss. 121; State v. Morphy, 33 Iowa, 270; 11 Am. Rep. 122; State v. Tatlow, 34 Kan. 10; 8 Pac. 267; State v.

Broussard, 41 La. Ann. 81; 5 So. 647; Creek v. State, 24 Ind. 151; Kee v. State, 28 Ark. 155; Territory v. Hart, 7 Mont. 489; 14 Pac. 768; Harris v. State, 61 Miss. 304; Thompson v. Commonwealth, 8 Gratt. 637; People v. Pscherhoder, 64 Hun, 483; 19 N. Y. Supp. 483; State v. Sparrow, 3 Murph. (N. C.) 487; Payne v. State, 66 Ark.

use of liquor with the consent of the defendant or his counsel.² Even in a capital case their use, it not appearing that the defendant was prejudiced by such use, is not grounds sufficient for a new trial.³ But if used by a juror to such an extent as to impair his faculties and unfit him for an intelligent consideration of the case, it constitutes such misconduct on his part as to invalidate the verdict, unless no prejudice to accused be clearly shown.⁴ Thus where, during an adjournment, a juror was taken sick with symptoms of alcoholism at the hotel where the jury was kept, and a physician being called prescribed champagne and spirits, which were administered, and there was no evidence he took any other

545; 52 S. W. 276; *State v. Smith*, 132 Iowa, 645; 109 N. W. 115; *Territory v. Ferris*, 15 Hawaii, 139; *Brown v. State*, 45 Tex. Cr. App. 139; 75 S. W. 33; *United States v. Gilbert*, Fed. Cas. No. 15204; 2 Sum. 19; *People v. San-some*, 98 Cal. 235; 33 Pac. 202; *People v. Bemmerly*, 98 Cal. 299; 33 Pac. 263; *People v. Leary*, 105 Cal. 486; 39 Pac. 24; *Jones v. People*, 6 Colo. 452; 45 Am. Rep. 526; *State v. Harrigan*, 9 Houst. 369; 31 Atl. 1052; *Westmoreland v. State*, 45 Ga. 225; *Davis v. People*, 19 Ill. (9 Peck) 74; *Davis v. State*, 35 Ind. 496; 9 Am. Rep. 760; *Pratt v. State*, 56 Ind. 179; *State v. Bruce*, 48 Iowa, 530; 30 Am. Rep. 403; *State v. Caulfield*, 23 La. Ann. 148 [1888]; *State v. Bellow*, 42 La. Ann. 586; 7 South. 782; *Russell v. State*, 53 Miss. 367; *Green v. State*, 59 Miss. 501; *State v. West*, 69 Mo. 401; 33 Am. Rep. 506; *State v. Baber*, 74 Mo. 292; 41 Am. Rep. 314; *State v. Washburn*, 91 Mo. 571; 4 S. W. 274; *Territory v. Burgess*, 8 Mont. 57; 19 Pac. 558; 1 L. R. A. 808; *State v. Jones*, 7 Nev. 408; *State*

v. Cucuel, 31 N. J. Law (2 Vroom) 249; *State v. Bailey*, 100 N. C. 528; 6 S. E. 372; *State v. Dougherty*, 1 Ohio Dec. 37; 1 West. Law J. 271; *Commonwealth v. Cleary*, 148 Pa. St. 26; 23 Atl. 1110; 30 Wkly. Notes, Cas. 1 [1893]; *Commonwealth v. Salyards (O. & T.)*, 13 Pa. Co. Ct. R. 470; *Stone v. State*, 23 Tenn. (4 Humph.) 27 [1851]; *Rowe v. State*, 30 Tenn. (11 Humph.) 491; (Tex. 1885) *Allen v. State*, 17 Tex. App. 637 [1888]; *Rider v. State*, 26 Tex. App. 334; 9 S. W. 688; (Wis. 1877) *Roman v. State*, 41 Wis. 312. *Contra*, see *State v. Baldy*, 17 Iowa, 39; *State v. Bul-lard*, 16 N. H. 139; *People v. Douglass*, 4 Cow. 26; 15 Am. Dec. 332; *Jones v. State*, 13 Tex. 168.

² *United States v. Gilbert*, 2 Sum. 19; Fed. Cas. No. 15204; *Harris v. State*, 61 Miss. 304; *State v. Salverson*, 87 Minn. 40; 91 N. W. 1.

³ *Territory v. Ferris*, 15 Hawaii, 139.

⁴ *State v. Salverson*, 87 Minn. 40; 91 N. W. 1.

stimulants after the case had been submitted, but it was shown that during the consideration of the case in the jury room his mind was clear and he exhibited none of the effects of intoxicating liquors, it was held that no ground for setting aside the verdict had been shown.⁵ Nor is it sufficient to set aside the verdict that the jury, during the trial, went to a saloon with the sheriff and each juror took a glass of liquor, unless it be made to appear that the defendant was thereby prejudiced,⁶ even at the invitation of a witness for the prosecution as an act of courtesy.⁷ Even where a juror was drunk during a recess of the court, a new trial was refused, he having recovered before the trial was resumed.⁸ Thus where it was shown one of the jurors drank intoxicating liquors during the trial, becoming drunk during recess, but it was also shown that he was rational at all times while sitting on the trial and deliberating on his verdict, a new trial was refused.⁹ To raise any question of the misconduct of the juror in this respect it must be shown that the liquor used was intoxicating.¹⁰ But the doctrine that the jurors may make a moderate use of intoxicating liquors during the trial will not be extended to an instance where some of the jurors consumed an inordinate amount of intoxicating liquors, within a few hours, from which they felt sick at the time the verdict was found.¹¹ So where liquors were furnished the jury at the hotel where they were kept, and they drank so much they attracted the attention of the police, sang songs, used bad language, and acted in a noisy and riotous manner, it was held that a verdict of guilty should be set aside.¹² And where it was shown

⁵ *People v. Pscherhoder*, 64 Hun, 483; 19 N. Y. Supp. 483.

⁶ *Kee v. State*, 28 Ark. 155; *Creek v. State*, 24 Ind. 151; *State v. Morphy*, 33 Iowa, 270; 11 Am. Rep. 122.

⁷ *Thompson v. Commonwealth*, 8 Gratt. 637. But see *People v. Hull*, 86 Mich. 449; 48 N. W. 288.

⁸ *State v. Tatlow*, 34 Kan. 10; 8 Pac. 267; *People v. Deegan*, 88 Cal. 602; 26 Pac. 500.

⁹ *People v. Deegan*, 88 Cal. 602; 26 Pac. 500.

¹⁰ *State v. Morphy*, 33 Iowa, 270; 11 Am. Rep. 122.

¹¹ *State v. Broussard*, 41 La. Ann. 81; 5 So. 647.

¹² *State v. Demarest*, 41 La. Ann. 413; 6 So. 654; *Gamble v. State*, 44 Fla. 429; 33 So. 471; 60 L. R. A. 547.

that during a trial of eleven days the jury ordered large quantities of beer, wine and whisky, at their own expense, some of it after the submission of the case to them, without permission of the court and without the accused's knowledge, a new trial was ordered by the appellate court.¹³ In nearly all the cases it is held that the burden is on the defendant to show he was prejudiced by the juror's drinking the liquors; but on the other hand, it is held sufficient for him to show that the juror drank the liquor, especially in a capital case, and then the burden is on the State to show his drinking did not affect the result of the trial.¹⁴ Even though the verdict be a doubtful result upon the evidence, if it be shown that the defendant was not affected by the juror's drinking during the trial, it will not be set aside.¹⁵ But in a capital case one evening after the separation of the jurors for the night, one of them became drunk, yet the next day appeared in his place, not obviously drunk, and there was some evidence of the defendant's insanity, a new trial was ordered by the appellate court.¹⁶

¹³ *People v. Gray*, 61 Cal. 164; 44 Am. Rep. 549.

It has been held that the jury might take the bottle of liquor with them to their room which contained the liquor alleged to have been improperly sold. *Phillips v. State*, 156 Ala. 140; 47 So. 245.

¹⁴ *Dolan v. State*, 40 Ark. 454; *State v. Madigan*, 57 Minn. 425; 59 N. W. 490; *McClendon v. State* (Ark.), 51 S. W. 1062; *Gamble v. State*, 44 Fla. 429; 33 So. 471; *Creek v. State*, 24 Ind. 151; *State v. Greer*, 22 W. Va. 800 (secret drinking in the jury room); *Stewart v. State*, 31 Tex. Cr. Rep. 153; 19 S. W. 908.

In a capital case the jurors were kept in a hotel. They drank ten or twelve bottles of beer and had one bottle of whisky. None of them were intoxicated. It was

held that the burden was on the State to show the defendant had not been prejudiced by their conduct. *Gamble v. State*, 44 Fla. 429; 33 So. 471; 60 L. R. A. 547.

¹⁵ *Creek v. State*, 24 Ind. 151.

¹⁶ *Brown v. State*, 137 Ind. 240; 36 N. E. 1108; 45 Am. St. 180.

In Texas a statute provides that, if during a trial, one or more of the jurors die or be disabled from sitting, not exceeding three, the remainder may render a verdict. During a trial one of the jurors became drunk, and the judge, finding he was very drunk and had no idea of the case, discharged him and ordered the trial to proceed with eleven jurors. The drunken juror stated he would be sober in five minutes, or at least by the next morning. The action of the court in ordering the case

But there are cases which do not follow the general rule that the mere drinking of intoxicating liquors will be sufficient to set aside the verdict. The rule has thus been stated in Indiana: "It seems well settled in this State, as well as in other jurisdictions, that drinking intoxicating liquors during the recess of the court is not such misconduct of the jury as vitiates the verdict, unless the drinking is of such an extent as to produce intoxication; but where a juror drinks to such an extent as to become intoxicated, such conduct renders the verdict invalid, and the court upon proof of such misconduct should set it aside and grant a new trial."¹⁷ "While it does not appear," continued the court, "that he was still intoxicated when he took his seat in the jury box on the next morning, we have no means of knowing the extent to which his mental faculties were beclouded by the previous night's debauch. It is enough to say that the appellant was entitled to have this juror consider and pass upon his case unimpaired by drunkenness during the progress of the trial. The record in the cause is not of such a character as to warrant us in saying that the intoxication of the juror did not injuriously affect the appellant." "It is but too true," said the Supreme Court of Texas, "that it [intoxicating liquor] will make a man bold and reckless, not only of consequences personally, but also of the rights of those whose life and most valuable interests, property and reputation are at stake; and its effects are so very different on different men that it would be dangerous in the extreme to attempt to lay down any rule by which it could or should be determined whether a juror had drunk too much or not; and

to proceed was held not to be error. *Rutledge v. Elendorf* (Tex.), 116 S. W. 156.

Where a juror was drunk during the trial, it was held that there was not a trial by a jury of twelve jurors, was entitled to have, but one by a jury of eleven; and that there must be a new trial. *State v. Ned*, 105 La. 696; 30 So. 126; 54 L. R. A. 933.

¹⁷ *Brown v. State*, 137 Ind. 240; 36 N. E. 1108; 45 Am. St. 180; citing *Creek v. State*, 24 Ind. 151; *Davis v. State*, 35 Ind. 496; *Huston v. Vail*, 51 Ind. 299; *Pratt v. State*, 56 Ind. 179; *Carter v. Ford*, etc., Co., 85 Ind. 180; *Pelham v. Page*, 6 Ark. 535; *State v. Cucuel*, 24 N. J. L. 249; *Jones v. State*, 13 Tex. 168.

the only safe rule is to exclude it entirely.”¹⁸ But proof that a person called as a juror had drunk an undisclosed quantity of whisky just before being called as a juror, nothing indicating he became drunk, is not sufficient to authorize the setting aside of the verdict.¹⁹ But the use of liquors in the jury room during the time the jury were deliberating upon their verdict is regarded with far more suspicion than their use during the progress of the trial and before the case is finally submitted to them for their consideration. It is cause for setting aside the verdict, it has been held, even though it be not shown any of the jurors were intoxicated.²⁰ Even where a statute provided that a new trial should not be granted when a juror’s misconduct did not prevent a fair consideration of the case, it was held not necessary to show the defendant was actually injured by a juror’s use of liquor in the jury room.²¹ Especially is this true if the juror drinks

¹⁸ Jones v. State, 13 Tex. 168.

“The drinking of intoxicating liquors by one or more of the jurors, during the discharge of their duties as such, constituted sufficient ground for setting aside the verdict and ordering a new trial. The view we take of the case as of the duty of determining whether the charge of intoxication is sustained by the record. And we are glad to escape so unpleasant an investigation, which might result in convincing us that the administration of the law of our State has been disgraced by the drunkenness of those appointed to decide, in a court of justice, upon the rights of their fellow citizens. We had hoped that such things were of the past, and would only be remembered as rare instances existing in the traditions of frontier days.” Ryan v. Harrow, 27 Iowa, 494.

So where the court ordered the jury kept together, and during the

trial the sheriff in charge of them took one of their number to a saloon, where he procured a drink of whisky, and then returned him to the place of custody of the jury, it was held that a verdict of guilty must be set aside, such act raising a conclusive presumption of prejudice against the defendant which could not be rebutted by the testimony of the jurors that the juror in question was the last to consent to a verdict of guilty. State v. Strodemier, 41 Wash. 159; 83 Pac. 22; State v. Jones, 7 Nev. 408.

¹⁹ State v. Andre (S. D.), 84 N. W. 783; Carleton v. State, 43 Neb. 373; 61 N. W. 699.

²⁰ People v. Gray, 61 Cal. 164; 44 Am. Rep. 549; Weis v. State, 22 Ohio St. 486; Gamble v. State, 44 Fla. 429; 33 So. 471; 60 L. R. A. 547.

²¹ People v. Lee Chuck, 78 Cal. 317; 20 Pac. 719.

enough to be under its influence.²² But even here it has been held that the use of liquor in the jury room must be in sufficient quantity to affect the verdict.²³ This is especially true if the liquor was supplied with meals,²⁴ or as a medicine under the direction of a physician.²⁵ And it has been held that the burden is on the State to show that the accused was not injured by the drinking.²⁶ Where a juror took a drink upon the premises he was viewing as a jurymen, at the bar of the principal witness for the prosecution, it was held that a new trial must be granted,²⁷ and so, too, where the prosecuting attorney furnished the liquor to the jurors during the trial.²⁸ On a motion for a new trial on the ground that the jurors drank liquors during the trial, both the accused and his counsel must show by their sworn testimony they were ignorant of the conduct of the jury until after the return of their verdict,²⁹ and if either of them have knowledge of such misconduct at any time before the return of the verdict, and fail to then bring the matter before the court, such misconduct will not avail them on a motion for a new trial.³⁰

Sec. 1229. Jurors in civil cases using intoxicating liquors.

To entitle a party in a civil case to a new trial on the ground that a juror used intoxicating liquor during the trial, he must show that the drinking improperly influenced the

²² *Weis v. State*, 22 Ohio St. 486; *State v. Jenkins*, 116 N. C. 972; 20 S. E. 1021.

²³ *State v. Upton*, 20 Mo. 397; *Pope v. State*, 36 Miss. 121; *State v. Sparrow*, 3 Murph. (N. C.) 487; *McClandon v. State* (Ark.), 51 S. W. 1062; *Stewart v. State*, 31 Tex. Cr. Rep. 153; 19 S. W. 908.

²⁴ *People v. Sansome*, 98 Cal. 235; 33 Pac. 202; *State v. Sparrow*, 3 Murph. (N. C.) 487.

²⁵ *Pope v. State*, 36 Miss. 121; *State v. Morphy*, 33 Iowa, 270; 11 Am. Rep. 122.

²⁶ *State v. Greer*, 22 W. Va. 800; *Gamble v. State*, 44 Fla. 429; 33 So. 471; 60 L. R. A. 547.

In Massachusetts, at an early day, it was held that cider might be furnished the jury, but not spirituous liquors. *Commonwealth v. Roby*, 12 Pick. 496. See *Tripp v. Bristol Co.*, 2 Allen, 556.

²⁷ *People v. Hull*, 86 Mich. 449; 49 N. W. 288.

²⁸ *People v. Montague*, 71 Mich. 447; 39 N. W. 585. See *Grottkau v. State*, 70 Wis. 462; 36 N. W. 31.

²⁹ *Harris v. State*, 61 Miss. 304; *State v. Morphy*, 33 Iowa, 270; 11 Am. Rep. 122.

³⁰ *Grottkau v. State*, 70 Wis. 462; 36 N. W. 31.

juror, and that he was not aware of the juror's misconduct before the verdict was returned.³¹ Thus the drinking by a juror of two glasses of beer after court adjourned and eleven hours before another session, was held not to entitle a party to a new trial;³² and so where a juror took a small quantity of liquor at night for medicinal purposes.³³ So drinking after the verdict has been found and sealed up, during a separation of the jurors under leave of the court is not such misconduct as will entitle the losing party to a new trial.³⁴ To entitle a party to a new trial it must be shown that the juror was so under the influence of the liquor that he was incapable of properly deciding the cause;³⁵ even where the drinking takes place after retirement to consider the verdict.³⁶ Proof of mere drinking of liquor does not of itself show the juror was not thereby incapacitated to properly perform his duty.³⁷ Thus where a party, on information and belief,

³¹ Alabama Lumber Co. v. Cross, 152 Ala. 562; 44 So. 563; Nichols v. Nichols, 136 Mass. 256; Arizona Prince Copper Co. v. Copper Queen Mining Co., 7 Pac. 718; St. Paul Fire & Marine Ins. Co. v. Kelly, 43 Kan. 741; 23 Pac. 1046; Brookhaven, etc., Co. v. Illinois Cent. R. Co., 68 Miss. 432; 10 So. 66; Ewing v. Lunn, 21 So. 55; 115 N. W. 527; Carter v. Ford Glass Co., 85 Ind. 180; Gilmer v. Cameron, 1 Ga. Dec. 142, pt. 1; Sanitary Dist. of Chicago v. Cullerton, 147 Ill. 385; 35 N. E. 723; Ipswitch v. Fernandez, 84 Cal. 639; 24 Pac. 298; Richardson v. Foster, 73 Miss. 12; 18 So. 573; 55 Am. St. 481; Wilson v. Abrahams, 1 Hill (N. Y.), 207; Gilmanton v. Ham, 38 N. H. 108; Hanrahan v. Ayers, 10 N. Y. Misc. Rep. 435; 31 N. Y. Supp. 458; McLaughlin v. Hinds, 151 Ill. 403; 38 N. E. 136; affirming 47 Ill. App. 598; Appeal of Merriman, 108 Mich. 454; 66 N. W. 372; Gordon v. Louisville, etc.,

R. Co., 29 S. W. 321; Larimer v. Kelly, 13 Kan. 78; Perry v. Bailey, 12 Kan. 539; O'Neil v. Keokuk, etc., R. Co., 45 Iowa, 456; Van Buskirk v. Daugherty, 44 Iowa, 42.

³² Van Buskirk v. Daugherty, 44 Iowa, 42; Carter v. Ford Plate Glass Co., 85 Ind. 180.

³³ O'Neill v. Keokuk, etc., R. Co., 45 Iowa, 546; Nichols v. Nichols, 136 Mass. 256; Gilmanton v. Ham, 38 N. H. 108.

³⁴ Larimer v. Kelly, 13 Kan. 78.

³⁵ Gordon v. Louisville, etc., R. Co., 29 S. W. 321; Perry v. Bailey, 12 Kan. 539; Wilson v. Abrahams, 1 Hill (N. Y.), 207.

³⁶ Hanrahan v. Ayers, 10 N. Y. Misc. Rep. 435; 31 N. Y. Supp. 458.

The mere fact that the jury had liquors in the jury room of which they did not drink is no cause for a new trial. Gilmer v. Cameron, 1 Ga. Dec. 142, pt. 1.

³⁷ Perry v. Bailey, 12 Kan. 539.

charged that one of the jurors was so intoxicated during the delivery of the charge and afterwards that he was not able to discharge his duties; and the trial court in passing upon the motion for a new trial said that it must be conceded that the juror was intoxicated, but also said that the intoxication "was patent to all parties"; and the juror denied fully and specifically all the charges of intoxication, it was held that the order denying a new trial should be sustained.³⁸ On the contrary it is held that if a juror drinks intoxicating liquor during the trial, even in a moderate quantity, a new trial must be granted.³⁹ Especially is this true if the liquors be drank in the jury room,⁴⁰ or where the juror drank, though at his own expense, with the attorney of the successful party.⁴¹ According to this line of cases it is not necessary to show the drinking affects the verdict, or even probably did so.⁴² Where

³⁸ Ipswitch v. Fernandez, 84 Cal. 639; 24 Pac. 298.

This case in a measure turned upon the fact that the moving party knew of the intoxication before the verdict was returned, and took no steps to have set aside the submission of the case. In such an event the complaining party is not entitled to a new trial; for he cannot sit still and "gamble" on the result of a verdict in his favor, and then successfully complain if he be defeated. Richardson v. Foster, 73 Miss. 12; 18 So. 573; 55 Am. St. 481. In this last case the juror during the trial was fined by the court for intoxication.

³⁹ Brant v. Fowler, 7 Cow. 562; Hopkins v. Knapp, etc., Co., 92 Iowa, 212; 60 N. W. 620; Mobile, etc., R. Co. v. Davis, 130 Ill. 146; 22 N. E. 850; reversing 31 Ill. App. 490; Leighton v. Sargent, 31 N. H. 119; 64 Am. Dec. 323; Churchill v. Alpena Circuit Judge, 56 Mich. 536; 23 N. W. 211; Pel-

ham v. Page, 6 Ark. 535; Gray v. McDaniel, 4 Har. 367.

⁴⁰ Ryan v. Harrow, 27 Iowa, 494; 1 Am. Rep. 302; Greg v. McDaniel, 4 Har. 367; Leighton v. Sargent, 31 N. H. 119; 64 Am. Dec. 323; Hopkins v. Knapp, etc., Co., 92 Iowa, 212; 60 N. W. 620; Patrick v. Victor Knitting Mills Co., 37 N. Y. Supp. Div. 7; 55 N. Y. Supp. 340.

⁴¹ Mobile, etc., R. Co. v. Davis, 130 Ill. 146; 22 N. E. 850; reversing 31 Ill. App. 490.

⁴² Fairchild v. Snyder, 43 Iowa, 23; Hopkins v. Knapp, etc., Co., 92 Iowa, 212; 60 N. W. 620 (court found liquor was drunk as a beverage and not as a medicine, as the juror claimed); Leighton v. Sargent, 31 N. H. 119; 64 Am. Dec. 323 (no indications shown, and no suspicions entertained by the other jurors, that the juror drinking was under any influence from the use of the liquor. Officer furnished liquor at juror's request because of his alleged illness.)

the jury retired to consider their verdict, and while on their way to supper they stopped and nearly all drank intoxicating liquors, and during the evening a quart bottle filled with wine and whisky was taken to the jury room from which several of them drank, and still later another bottle was produced from which several likewise drank, and several before breakfast the next morning drank brandy at the bar, it was held that a new trial must be granted the plaintiff, notwithstanding the fact that the jury had stood eleven for the defendant before they began drinking from the quart bottle.⁴³

Sec. 1230. Treating jurors.

For a party to treat a juror to intoxicating liquors (or even to other refreshments) is such misconduct as requires that a new trial be granted the opposite party if the verdict be adverse to him.⁴⁴ But the verdict will not be set aside if the jurors drank (or ate) at the expense of both parties,⁴⁵ or of their attorneys.⁴⁶ Where a statute provided that "if a party obtaining a verdict in his favor shall, during the term of court in which such verdict is obtained, give to any of the jurors in the case, knowing him to be such, any victuals or drink, or procure the same to be done, by way of treat, *either before or after such verdict*, on proof thereof being made, the verdict shall be set aside and a new trial granted," it was

⁴³ Patrick v. Victor Knitting Mills Co., 37 N. Y. App. Div. 7; 55 N. Y. Supp. 340.

It has been held that the circulation of liquors among the jurors while sitting as a jury, even with the consent of the parties, was cause for a new trial. Pelham v. Page, 6 Ark. 535; but the soundness of this case may well be doubted.

Taking out a bill of exceptions and filing a stay bond is not a waiver of the right to insist upon a new trial because of the misconduct of the jury. Churchill v. Al-

pena Circuit Judge, 56 Mich. 536; 23 N. W. 211.

⁴⁴ Sexton v. Lelievre, 4 Cold. 11; Bender v. Bueher, 8 Ohio Cir. Ct. Rep. 244; Pittsburg, etc., Ry. Co. v. Porter, 32 Ohio St. 328; Drake v. Newton, 3 Zab. (N. J.) 111; Perry v. Baley, 12 Kan. 539; Pelham v. Page, 6 Ark. 535.

⁴⁵ Dennison v. Collins, 1 Cow. 111; Arizona Prince Copper Co. v. Copper Queen Co., 7 Pac. 718.

⁴⁶ McLaughlin v. Hinds, 151 Ill. 403; 38 N. E. 136; affirming 47 Ill. App. 598.

held that if the successful party, after the return of the verdict, treat some of the jurors to cigars a new trial must be granted.⁴⁷ But where no such a statute was in force, and twenty-four hours after the return of their verdict the jurors then met the successful plaintiff and took several glasses of beer with him, for which he did not pay, and no reference was made to the case, it was held that a new trial would not be granted.⁴⁸ So in a case against a town it is not cause for a new trial that one of the inhabitants of such town treated the jurors.⁴⁹ So the fact that an old juror who was used to liquor, at the request of a friend was supplied by the successful litigant with a single draught of liquor was held not to require the granting of a new trial, the evidence clearly showing the liquor was not given with any intent to influence the juror's mind.⁵⁰ Where the court was well satisfied with the verdict it was held that a new trial would not be granted merely because the successful party had given a juror a drink, but made no reference to the case.⁵¹ And so it was said that a new trial would not be granted if it be clearly shown that the treating was not intended to influence the juror's action, and that it had no influence on his mind.⁵²

Sec. 1231. Prohibitionist as a juror.

The fact that a person called as a juror to try a case of a violation of the liquor laws is a strong prohibitionist, if it be shown by examination that he has no prejudice against the defendant, and is willing to give him a fair trial does not disqualify him to serve as a juror.⁵³

⁴⁷ Baker v. Jacobs, 64 Vt. 197;
23 Atl. 588.

⁴⁸ St. Paul Fire, etc., Ins. Co. v.
Kelly, 43 Kan. 741; 23 Pac. 1046.

⁴⁹ Carlisle v. Town v. Sheldon.
38 Vt. 440.

⁵⁰ Brookhaven Lumber & Mfg.
Co. v. Illinois Cent. R. Co., 68
Miss. 432; 10 So. 66.

⁵¹ McCarty v. McCarty, 4 Rich.
L. (S. C.) 594.

⁵² Pittsburg, etc., Ry. Co. v. Por-
ter, 32 Ohio St. 328; Marsh v.
Clark Co., 27 Wkly. L. Bull. 56.

⁵³ State v. Tomlinson, 7 N. D.
294; 74 N. W. 995.

Sec. 1232. Jury on trial of a liquor nuisance.

A statute permitting the enjoining of a liquor nuisance and providing for the punishment of anyone violating a decree of injunction as a contempt, is valid, although upon such contempt proceedings it deprive the defendant therein of the right of trial by jury.⁵⁴ So a statute depriving the accused of the right of trial by jury in a proceeding to declare a place a liquor nuisance is constitutional.^{54*}

Sec. 1233. Drunken counsel at trial.

Owing to the drunken condition of defendant's counsel during the examination of the first witness at a trial upon a charge of larceny, the court suspended the trial, and notified both the defendant and his counsel that the latter would not be allowed to appear in the case in such condition, and that he, the defendant, had better arrange for a proper defense. When the session of the court was resumed the defendant appeared with the same counsel, and the trial proceeded without any reference to his counsel's incapacity. It was held not error to refuse a new trial to the defendant on the ground that his attorney was drunk (which was true) during the trial, and that the refusal was not an abuse of discretion.⁵⁵

Sec. 1234. Defendant in criminal prosecution drunk.

Where the defendant in a criminal prosecution was so drunk at his trial upon a charge of having committed a felony that he was not able to understand the facts of his case, and could not communicate intelligently with his counsel, a new trial was granted.⁵⁶

⁵⁴ State v. Murphy, 71 Vt. 127; 41 Atl. 1037.

^{54*} Stahl v. Lee, 71 Kan. 511; 80 Pac. 983; Cowdery v. State, 71 Kan. 450; 80 Pac. 953; Kirkland v. State, 72 Ark. 171; 78 S. W. 770. |

⁵⁵ Territory v. Clark, 79 Pac. 708.

⁵⁶ Taffe v. State, 23 Ark. 34. The court considered that the accused was in the same condition as if he had been insane, and applied to the case the rule laid down by Blackstone that an insane man could not be put upon trial.

Sec. 1235. Intoxicated witness.

The fact that a witness was intoxicated on the occasion concerning which he is called to testify does not disqualify him, the fact of his intoxication only going to his credibility and not to his competency;⁵⁷ and the fact of his intoxication at that time is relevant, and may be shown without first asking him on cross-examination whether he was intoxicated.⁵⁸ The fact of his intoxication at the time of which he testifies may be proven by direct testimony or by his acts and conduct; but it cannot be shown, it has been held, by evidence of the amount of intoxicating liquors he had previously drunk.⁵⁹ As effecting the credibility of a witness it may always be shown by the party not producing him that he was intoxicated at the time the events took place of which he testifies, even in a criminal case;⁶⁰ but he is entitled to belief if his recollection of the events be clear, or if he is corroborated by other witnesses.⁶¹ And where the matter concerning which he testifies is as to the capacity of a testator to execute a will, the opposing party may always show that at the time of which he testifies he was in such an intoxicated condition as not to be capable of judging of the mental condition of the testator.⁶² So where the defendant sold furniture to the plaintiff, taking back a mortgage for the unpaid part of the purchase money, and he then seized the furniture, and the plaintiff sued for a conversion, as well as for abuse, insults and damages to his premises, it was held that he might show the defendant was

⁵⁷ *State v. Sejours*, 113 La. 676; 37 So. 599; *State v. Castello*, 62 Iowa, 404; 17 N. W. 605.

⁵⁸ *Bliss v. Beck*, 80 Neb. 290; 114 N. W. 162.

⁵⁹ *Tuttle v. Russell*, 2 Day, 201; 2 Am. Dec. 89.

⁶⁰ *Willis v. State*, 43 Neb. 102; 61 N. W. 254; *Van Loan v. Willis*, 13 Daly, 281; *State v. Rollins*, 113 N. C. 722; 18 S. E. 394; *Fleming v. State*, 5 Humph. 564; *Mace v. Reed*, 89 Wis. 440; 62 N. W. 186; *Eldridge v. State*, 27 Fla. 162; 9

So. 448; *McDowell v. Preston*, 26 Ga. 528; *State v. Grant*, 79 Mo. 113; 49 Am. Rep. 218; *People v. Webster*, 139 N. Y. 73; 34 N. E. 730; affirming 68 Hun, 11; 22 N. Y. Supp. 634; *Jorce v. Parkhurst*, 150 Mass. 243; 22 N. E. 899; *Sisson v. Conger*, 1 T. & C. (N. Y.) 564.

⁶¹ *State v. Castello*, 62 Iowa, 404; 17 N. W. 605.

⁶² *Sisson v. Conger*, 1 T. & C. 564.

intoxicated at the time he took the furniture, as affecting the reliance to be placed upon his version of the transaction.⁶³ So one who uses opium as a drug is a competent witness, and the habit does not discredit him in the absence of proof that his mind is affected by its use, it has been held;⁶⁴ but on the other hand, it has been held that his habit in the use of drugs could be shown, and its extent, as an impeachment of his credibility,⁶⁵ and that the jury should be carefully cautioned as to the credence to be given his testimony.⁶⁶ In the first line of cases it is held that his habit in the use of opium cannot be shown unless it also be shown that its use impaired his mind generally.⁶⁷ Evidence of intemperate habits is inadmissible to impeach a witness or the character of a witness for truth,⁶⁸ it has been held; but it has also been held that evidence that he was a common drunkard is admissible to impeach his testimony.⁶⁹ The fact that he has been found to be an habitual drunkard, and a guardian appointed for his estate, does not render a person incompetent as a witness.⁷⁰ It may be shown that at the time a witnesses's deposition was taken he was drunk or under the influence of opium or a deleterious drug.⁷¹ If a person is drunk at the time he is offered as a witness, his drunkenness goes to his credibility,⁷² but whether his intoxication is so great as to render him incompetent to testify is a question for the trial court, and whether he shall be sworn and permitted to testify rests within the discretion of such court.⁷³ To prove the witness

⁶³ Van Loan v. Willis, 13 Daly, 281.

⁶⁴ McDowell v. Preston, 26 Ga. 528; Eldridge v. State, 27 Fla. 162; 9 So. 448.

⁶⁵ People v. Webster, 139 N. Y. 73; 34 N. E. 730; affirming 68 Hun, 11; 22 N. Y. Supp. 634.

⁶⁶ State v. White, 10 Wash. 611; 39 Pac. 160; 41 Pac. 442

⁶⁷ Eldridge v. State, 27 Fla. 162; 9 So. 448. See McDowell v. Preston, 26 Ga. 528

⁶⁸ Hoitt v. Moulton, 1 Fost. (N. H.) 586; Thayer v. Boyle, 30 Me. 475.

⁶⁹ State v. Grant, 79 Mo. 113; 49 Am. Rep. 218.

⁷⁰ Gebhart v. Shindle, 15 Serg. & R. 235.

⁷¹ McDowell v. Preston, 26 Ga. 528.

⁷² Myers v. State (Tex. Cr. App.), 39 S. W. 111.

⁷³ Hartford v. Palmer, 16 Johns. 143; Gould v. Crawford, 2 Pa. (Barr) 89.

was drunk at the time of which he testifies, the amount of intoxicating liquor he had just drunk may be shown.⁷⁴ If a witness be so drunk as to be incompetent to testify, the person producing him should show to the court the importance of his testimony and ask a continuance until he could be produced in a sober condition; and if he do not, no error is committed by the court in refusing to allow him to testify and sending him to jail because of his drunken condition.⁷⁵

Sec. 1236. Presumption a person is sober.

The presumption is that the person in question was sober at the time his habits are drawn in question, and he who asserts he was then drunk has the burden to show he was in that condition. But if it be shown he was shortly before that time intoxicated, especially if greatly so, the court or jury may infer that his intoxication was caused by drinking intoxicating liquors; and if it be proven he took one drink, and his whereabouts and abstinence from the use of liquor be not shown, but it be shown he had an opportunity to obtain liquors, it may be found and inferred without further proof he drank more liquor.⁷⁶ So if it be shown that a defendant drank liquor six or seven times on six different days in three months, and there be no evidence to show his condition on other days during the period, he cannot insist that he must be presumed to have been sober on such other days.⁷⁷

Sec. 1237. Pardon.

A pardon of a conviction of having sold intoxicating liquors without a license upon condition that the person pardoned would not again so sell them is valid; and upon a second conviction of so selling (upon his plea of guilty, at least) the pardon thereby becomes void, and the enforcement of the first conviction without further proceedings is such an irreg-

⁷⁴ Fleming v. State, 5 Humph. (Tenn.) 564.

⁷⁵ Fox v. Territory, 2 Wash. T 297; 5 Pac. 603.

⁷⁶ Hoagland v. Canfield, 160 F. 146.

⁷⁷ Commonwealth v. McNamee, 112 Mass. 285.

ularity merely as furnishes no grounds for his discharge on a writ of *habeas corpus*.⁷⁸ Where a statute provided that the governor of the State might settle all the State's demands for inspection fees on beer accruing up to a specified date, which accrued under a prior statute requiring inspection of beer, upon the payment into the State treasury of a certain sum per barrel, and that every person complying with its provisions should be relieved from all fines and penalties incurred under such inspection statute up to such date, and barred all prosecutions of violations prior to the date specified, it was held that the act was a general amnesty to all persons complying with its provisions; that the State was estopped to prosecute for violations of the inspection law covered by such payments; that it was not the subject of waiver, and that it need not be pleaded in bar of a prosecution for a violation of the inspection statute to which it applied.⁷⁹

Sec. 1238. Drunken officer.

Statutes frequently provide that an officer who becomes drunk during the business hours of his office may be removed from office and his title thereto declared forfeited. Such a statute, as we have seen, is constitutional.⁸⁰ And where a

⁷⁸ *Ex parte* Brady, 70 Ark. 376; 68 S. W. 34. See *People v. Moore*, 62 Mich. 496; 29 N. W. 80; and *People v. Potter*, 1 Parker Cr. Rep. 47.

As to validity of conditional pardons, see *People v. Marsh*, 125 Mich. 410; 84 N. W. 472; 7 Detroit Leg. N. 555; 51 L. R. A. 461; *Fuller v. State*, 122 Ala. 32; 45 L. R. A. 502; 25 So. 146; *Ex parte* Hawkins, 61 Ark. 321; 30 L. R. A. 736; 33 S. W. 106; *Ex parte* Marks, 64 Cal. 29; 28 P. 109; 49 Am. Rep. 684; *People v. Monroe*, 26 Colo. 232; 57 P. 696; *State v. Wolfer*, 53 Minn. 135; 19 L. R. A.

783; 54 N. W. 1065; *In re* Whalen, 47 N. Y. St. Rep. 313; 19 N. Y. 915; *People v. Burns*, 77 Hun, 92; 28 N. Y. S. 300; *Huff v. Dyer*, 4 Ohio Cir. Ct. R. 595; *Taylor v. State* (Tex. Cr. App.), 51 S. W. 1106; *State v. Board of Corrections*, 16 Utah, 478; 52 P. 1090.

⁷⁹ *State v. Eby*, 170 Mo. 497; 71 S. W. 52.

⁸⁰ *State v. Brown* (Okla.), 103 Pac. 762; *People v. Bell* (N. Y.), 86 N. E. 1130; affirming 125 N. Y. App. Div. 205; 109 N. Y. Supp. 90; *State v. Welsh*, 109 Iowa, 19; 79 N. W. 369; *In re Peters*, 10 Kulp. 93.

statute provided for the punishment of any officer who should "whilst in the discharge of the duties of his office be in a state of intoxication produced by the use of" intoxicating liquors, or who should "by the use of such liquors be unable or incompetent or disqualified to discharge any of the duties of his office," any officer, it was held, who at any time became so drunk as to disqualify him from the discharging of his office was guilty of a violation of its provisions, although he was never drunk while attempting to perform any official act.⁸¹

Sec. 1239. Drunken pupil, suspending from school.

Where a statute authorized the directors of a school district to suspend any pupil for gross immorality, refractory conduct or insubordination, it was held that a pupil who had been drunk and disorderly in violation of an ordinance of the town, might be temporarily suspended from the school, although the offense was not committed in or about the school.⁸²

Sec. 1240. Drunken seaman.

The master of a ship may prohibit absolutely the use of intoxicating liquors by the seamen and members of the crew while on board his ship; and if a seaman become intoxicated in violation of the orders of the master, he may be discharged before the expiration of his term, especially if his intoxicated condition prevented his executing a proper order with the required promptness.⁸³

Sec. 1241. Bankruptcy.

Under the laws and regulations of the city of Boston, the liquor license of a liquor dealer making an assignment in bankruptcy passes to his trustee in bankruptcy and may be

⁸¹ Johnson v. Commonwealth, 111 Ky. 630; 64 S. W. 467; 23 Ky. L. Rep. 856; State v. Savage, 89 Ala. 1; 7 So. 70; 7 L. R. A. 427.

⁸² Douglass v. Campbell (Ark.), 116 S. W. 211.

⁸³ The Bertha, 111 Fed. 550.

disposed of by him for the benefit of the bankrupt's estate.⁸⁴ Under the bankrupt law requiring the trustee to pay "all taxes legally due and owing by the bankrupt" in advance of the payment of dividends to the creditors, the "mulet tax" of Iowa is not such a tax as the trustee is required to pay, because it is merely a charge or license exacted for carrying on the liquor business.⁸⁵

Sec. 1242. Slander.

It is a slander to falsely charge that a person has been convicted of being drunk.⁸⁶ A liquor firm is not liable for the slanderous statements of its traveling salesman concerning the liquor business of a rival concern, unless it authorized him to make them or ratified them after they were made.⁸⁷

Sec. 1243. Trade-mark.

Where an applicant to have the words "Poplar Log" or "Old Poplar Log," as applied to whisky, registered as a trade-mark, which words he showed by his books and disinterested witnesses he had used for years, and had also originated the brand of whisky known by that name, selling it labeled as such quite extensively, it was held that he was entitled to have the words registered as a trade-mark.⁸⁸

Sec. 1244. C. O. D. interstate shipments—U. S. Statute.

By act of March 4, 1909, it is provided that "any railroad company, express company or other common carrier, or any other person who, in connection with the transportation of any spirituous, vinous, malted, fermented or other intoxicating liquor of any kind from one State, Territory or dis-

⁸⁴ *In re Brodbine*, 93 Fed. 643.

⁸⁵ *In re Ott*, 95 Fed. 274, citing *Smith v. Skow*, 97 Iowa, 640; 66 N. W. 893.

In Canada an innkeeper is not a "trader" within the meaning of the Insolvent Act of 1869. *Harman v.*

Clarkson, 22 Can. Pl. C. (Can.) 291.

⁸⁶ *O'Neal v. Adams* (Iowa), 122 Pac. 976.

⁸⁷ *Duquesne Distilling Co. v. Greenbaum* (Ky.), 121 S. W. 19.

⁸⁸ *Somers v. Newman*, 31 App. D. C. 193.

trict of the United States or place non-contiguous to, but subject to the jurisdiction thereof, into any other State, Territory or district of the United States or place non-contiguous to, but subject to the jurisdiction thereof, or from any foreign country into any State, Territory or district of the United States, or place non-contiguous to, but subject to the jurisdiction thereof, shall collect the purchase price or any part thereof, before, on or after delivery, from the consignee or from any other person, or shall in any manner act as the agent of the buyer or seller of any such liquor, for the purpose of buying or selling or completing the sale thereof, saving only in the actual transportation and delivery of the same, shall be fined not more than five thousand dollars.”⁸⁹

Sec. 1245. Labeling packages of liquor shipped into another State—U. S. statute.

On March 4, 1909, Congress enacted a statute which requires all interstate packages of spirituous, vinous, malted, fermented or other intoxicating liquors of any kind to be so labeled on the outside as to plainly show the name of the consignee, the nature of its contents and the quantity contained therein. It is as follows: “Whoever shall knowingly ship or cause to be shipped, from one State, Territory or district of the United States, or place non-contiguous to but subject to the jurisdiction thereof, into any other State, Terri-

⁸⁹ Crimes Act, Chap. 1, § 239.

For the Wilson statute, see §§ 198, 199, 202. The above section does not modify the Wilson law, or the right to ship liquors into a prohibition State. It simply prevents an interstate carrier or its agents collecting the purchase price of the liquors shipped, or in any manner acting as the “agent of the buyer or seller” of the liquor shipped, “for the purpose of buying or selling or completing” its sale. When the liquor is delivered to the carrier in the

non-prohibition State, the sale is completed; and such carrier is in no wise the agent of either the seller or buyer, unless it undertakes to collect the price of the liquors, or unless it enters into an agreement to act as the agent of such buyer or seller. We do not understand that, in acting merely as a common carrier of the liquors, the carrier is acting as the agent of either the buyer or seller, or is completing the sale within the sense the term “agent” or “completing” is used in this statute.

tory or district of the United States, or place non-contiguous to but subject to the jurisdiction thereof, or from any foreign country into any State, Territory or district of the United States, or place non-contiguous to but subject to the jurisdiction thereof, any package of or package containing any spirituous, vinous, malted, fermented or other intoxicating liquor of any kind, unless such package be so labeled on the outside cover as to plainly show the name of the consignee, the nature of its contents and the quantity contained therein, shall be fined not more than five thousand dollars; and such liquor shall be forfeited to the United States, and may be seized and condemned by like proceedings as those provided by law for the seizure and forfeiture of property imported into the United States contrary to law.”⁹⁰

Sec. 1246. Agent of common carriers delivering liquors to persons not consignee—U. S. statute.

By act of Congress, approved March 4, 1909, it is provided that “any officer, agent or employe of any railroad company, express company or other common carrier, who shall knowingly deliver or cause to be delivered to any person other than the person to whom it has been consigned, unless upon the written order in each instance of the *bona fide* consignee, or to any fictitious person, or to any person under a fictitious name, any spirituous, vinous, malted, fermented or other intoxicating liquor of any kind which has been shipped from one State, Territory or district of the United States, or place non-contiguous to but subject to the jurisdiction thereof, into any other State, Territory or district of the United States, or place non-contiguous to but subject to the jurisdiction thereof, or from any foreign country into any State, Territory or district of the United States, or place non-contiguous to but subject to the jurisdiction thereof, shall be fined not more than five thousand dollars, or imprisoned not more than two years, or both.”⁹¹

⁹⁰ Crimes Act, Chap. 1, § 240.
Shipping liquor under false brand,
§ 211.

⁹¹ Crimes Act, Chap. 1, § 238.
Shipping liquor under a false
brand is an offense, § 211.

APPENDIX A.

THE FOOD AND DRUGS ACT, JUNE 30, 1906.

[34 U. S. Stat. at Large, p. 768]

AN ACT for preventing the manufacture, sale or transportation of adulterated or misbranded or poisonous or deleterious foods, drugs, medicines and liquors, and for regulating traffic therein and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That it shall be unlawful for any person to manufacture within any Territory or the District of Columbia any article of food or drug which is adulterated or misbranded, within the meaning of this act; and any person who shall violate any of the provisions of this section shall be guilty of a misdemeanor, and for each offense shall, upon conviction thereof, be fined not to exceed five hundred dollars or shall be sentenced to one year's imprisonment, or both such fine and imprisonment, in the discretion of the court, and for each subsequent offense and conviction thereof shall be fined not less than one thousand dollars or sentenced to one year's imprisonment, or both such fine and imprisonment, in the discretion of the court.

Sec. 2. That the introduction into any State or Territory or the District of Columbia from any other State or Territory or the District of Columbia, or from any foreign country, or shipment to any foreign country of any article of food or drugs which is adulterated or misbranded, within the meaning of this act, is hereby prohibited; and any person who shall ship or deliver for shipment from any State or Territory or

the District of Columbia to any other State or Territory or the District of Columbia, or to a foreign country, or who shall receive in any State or Territory or the District of Columbia from any other State or Territory or the District of Columbia, or foreign country, and having so received, shall deliver, in original unbroken packages, for pay or otherwise, or offer to deliver to any other person, any such article so adulterated or misbranded within the meaning of this act, or any person who shall sell or offer for sale in the District of Columbia or the Territories of the United States any such adulterated or misbranded foods or drugs, or export or offer to export the same to any foreign country, shall be guilty of a misdemeanor, and for such offense be fined not exceeding two hundred dollars for the first offense, and upon conviction for each subsequent offense not exceeding three hundred dollars or be imprisoned not exceeding one year, or both, in the discretion of the court: *Provided*, That no article shall be deemed misbranded or adulterated within the provisions of this act when intended for export to any foreign country and prepared or packed according to the specifications or directions of the foreign purchaser when no substance is used in the preparation or packing thereof in conflict with the laws of the foreign country to which said article is intended to be shipped; but if said article shall be in fact sold or offered for sale for domestic use or consumption, then this proviso shall not exempt said article from the operation of any of the other provisions of this act.

Sec. 3. That the Secretary of the Treasury, the Secretary of Agriculture and the Secretary of Commerce and Labor shall make uniform rules and regulations for carrying out the provisions of this act, including the collection and examination of specimens of foods and drugs manufactured or offered for sale in the District of Columbia, or in any Territory of the United States, or which shall be offered for sale in unbroken packages in any State other than that in which they shall have been respectively manufactured or produced, or which shall be received from any foreign country, or intended for shipment to any foreign country, or which may be submitted for

examination by the chief health, food or drug officer of any State, Territory or the District of Columbia, or at any domestic or foreign port through which such product is offered for interstate commerce, or for export or import between the United States and any foreign port or country.

Sec. 4. That the examinations of specimens of foods and drugs shall be made in the Bureau of Chemistry of the Department of Agriculture, or under the direction and supervision of such Bureau, for the purpose of determining from such examinations whether such articles are adulterated or misbranded within the meaning of this act; and if it shall appear from any such examination that any of such specimens is adulterated or misbranded within the meaning of this act, the Secretary of Agriculture shall cause notice thereof to be given to the party from whom such sample was obtained. Any party so notified shall be given an opportunity to be heard, under such rules and regulations as may be prescribed as aforesaid, and if it appears that any of the provisions of this act have been violated by such party, then the Secretary of Agriculture shall at once certify the facts to the proper United States district attorney, with a copy of the results of the analysis or the examination of such article duly authenticated by the analyst or officer making such examination, under the oath of such officer. After judgment of the court, notice shall be given by publication in such manner as may be prescribed by the rules and regulations aforesaid.

SEC. 5. That it shall be the duty of each district attorney to whom the Secretary of Agriculture shall report any violation of this Act, or to whom any health or food or drug officer or agent of any State, Territory, or the District of Columbia shall present satisfactory evidence of any such violation, to cause appropriate proceedings to be commenced and prosecuted in the proper courts of the United States, without delay, for the enforcement of the penalties as in such case herein provided.

SEC. 6. That the term "drug," as used in this Act, shall include all medicines and preparations recognized in the United States Pharmacopœia or National Formulary for in-

ternal or external use, and any substance or mixture of substances intended to be used for the cure, mitigation, or prevention of disease of either man or other animals. The term "food," as used herein, shall include all articles used for food, drink, confectionery, or condiment by man or other animals, whether simple, mixed, or compound.

SEC. 7. That for the purposes of this Act an article shall be deemed to be adulterated:

In case of drugs:

First. If, when a drug is sold under or by a name recognized in the United States Pharmacopœia or National Formulary, it differs from the standard of strength, quality, or purity, as determined by the test laid down in the United States Pharmacopœia or National Formulary official at the time of investigation: *Provided*, That no drug defined in the United States Pharmacopœia or National Formulary shall be deemed to be adulterated under this provision if the standard of strength, quality, or purity be plainly stated upon the bottle, box, or other container thereof although the standard may differ from that determined by the test laid down in the United States Pharmacopœia or National Formulary.

Second. If its strength or purity fall below the professed standard or quality under which it is sold.

In the case of confectionery:

If it contain terra alba, barytes, tale, chrome yellow, or other mineral substance or poisonous color or flavor, or other ingredient deleterious or detrimental to health, or any vinous, malt, or spirituous liquor or compound or narcotic drug.

In the case of food:

First. If any substance has been mixed and packed with it so as to reduce or lower or injuriously affect its quality or strength.

Second. If any substance has been substituted wholly or in part for the article.

Third. If any valuable constituent of the article has been wholly or in part abstracted.

Fourth. If it be mixed, colored, powdered, coated, or stained in a manner whereby damage or inferiority is concealed.

Fifth. If it contain any added poisonous or other added deleterious ingredient which may render such article injurious to health: *Provided*, That when in the preparation of food products for shipment they are preserved by any external application applied in such manner that the preservative is necessarily removed mechanically, or by maceration in water, or otherwise, and directions for the removal of said preservative shall be printed on the covering or the package, the provisions of this Act shall be construed as applying only when said products are ready for consumption.

Sixth. If it consists in whole or in part of a filthy, decomposed, or putrid animal or vegetable substance, or any portion of an animal unfit for food, whether manufactured or not, or if it is the product of a diseased animal, or one that has died otherwise than by slaughter.

SEC. 8. That the term "misbranded," as used herein, shall apply to all drugs, or articles of food, or articles which enter into the composition of food, the package or label of which shall bear any statement, design, or device regarding such article, or the ingredients or substances contained therein which shall be false or misleading in any particular, and to any food or drug product which is falsely branded as to the State, Territory, or country in which it is manufactured or produced.

That for the purposes of this Act an article shall also be deemed to be misbranded:

In case of drugs:

First. If it be an imitation of or offered for sale under the name of another article.

Second. If the contents of the package as originally put up shall have been removed, in whole or in part, and other

contents shall have been placed in such package, or if the package fail to bear a statement on the label of the quantity or proportion of any alcohol, morphine, opium, cocaine, heroin, alpha or beta eucaine, chloroform, cannabis indica, chloral hydrate, or acetanilide, or any derivative or preparation of any such substances contained therein.

In the case of food :

First. If it be an imitation of or offered for sale under the distinctive name of another article.

Second. If it be labeled or branded so as to deceive or mislead the purchaser, or purport to be a foreign product when not so, or if the contents of the package as originally put up shall have been removed in whole or in part and other contents shall have been placed in such package, or if it fail to bear a statement on the label of the quantity or proportion of any morphine, opium, cocaine, heroin, alpha or beta eucaine, chloroform, cannabis indica, chloral hydrate, or acetanilide, or any derivative or preparation of any such substances contained therein.

Third. If in package form, and the contents are stated in terms of weight or measure, they are not plainly and correctly stated on the outside of the package.

Fourth. If the package containing it or its label shall bear any statement, design, or device regarding the ingredients or the substances contained therein, which statement, design, or device shall be false or misleading in any particular: *Provided,* That an article of food which does not contain any added poisonous or deleterious ingredients shall not be deemed to be adulterated or misbranded in the following cases:

First. In the case of mixtures or compounds which may be now or from time to time hereafter known as articles of food, under their own distinctive names, and not an imitation of or offered for sale under the distinctive name of another article, if the name be accompanied on the same label or brand with a statement of the place where said article has been manufactured or produced.

Second. In the case of articles labeled, branded, or tagged so as to plainly indicate that they are compounds, imitations, or blends, and the word "compound," "imitation," or "blend," as the case may be, is plainly stated on the package in which it is offered for sale: *Provided*, That the term blend as used herein shall be construed to mean a mixture of like substances, not excluding harmless coloring or flavoring ingredients used for the purpose of coloring and flavoring only: *And provided further*, That nothing in this Act shall be construed as requiring or compelling proprietors or manufacturers of proprietary foods which contain no unwholesome added ingredient to disclose their trade formulas, except in so far as the provisions of this Act may require to secure freedom from adulteration or misbranding.

SEC. 9. That no dealer shall be prosecuted under the provisions of this Act when he can establish a guaranty signed by the wholesaler, jobber, manufacturer, or other party residing in the United States, from whom he purchases such articles, to the effect that the same is not adulterated or misbranded within the meaning of this Act, designating it. Said guaranty, to afford protection, shall contain the name and address of the party or parties making the sale of such articles to such dealer, and in such case said party or parties shall be amenable to the prosecutions, fines, and other penalties which would attach, in due course, to the dealer under the provisions of this Act.

SEC. 10. That any article of food, drug, or liquor that is adulterated or misbranded within the meaning of this Act, and is being transported from one State, Territory, District, or insular possession to another for sale, or, having been transported, remains unloaded, unsold, or in original unbroken packages, or if it be sold or offered for sale in the District of Columbia or the Territories, or insular possessions of the United States, or if it be imported from a foreign country for sale, or if it is intended for export to a foreign country, shall be liable to be proceeded against in any district court of the United States within the district where the same is found, and seized for confiscation by a process of libel for condemna-

tion. And if such article is condemned as being adulterated or misbranded, or of a poisonous or deleterious character, within the meaning of this Act, the same shall be disposed of by destruction or sale, as the said court may direct, and the proceeds thereof, if sold, less the legal costs and charges, shall be paid into the Treasury of the United States, but such goods shall not be sold in any jurisdiction contrary to the provisions of this Act or the laws of that jurisdiction: *Provided, however,* That upon the payment of the costs of such libel proceedings and the execution and delivery of a good and sufficient bond to the effect that such articles shall not be sold or otherwise disposed of contrary to the provisions of this Act, or the laws of any State, Territory, District, or insular possession, the court may by order direct that such articles be delivered to the owner thereof. The proceedings of such libel cases shall conform, as near as may be, to the proceedings in admiralty, except that either party may demand trial by jury of any issue of fact joined in any such case, and all such proceedings shall be at the suit of and in the name of the United States.

SEC. 11. The Secretary of the Treasury shall deliver to the Secretary of Agriculture, upon his request from time to time, samples of foods and drugs which are being imported into the United States or offered for import, giving notice thereof to the owner or consignee, who may appear before the Secretary of Agriculture, and have the right to introduce testimony, and if it appear from the examination of such samples that any article of food or drug offered to be imported into the United States is adulterated or misbranded within the meaning of this Act, or is otherwise dangerous to the health of the people of the United States, or is of a kind forbidden entry into, or forbidden to be sold or restricted in sale in the country in which it is made or from which it is exported, or is otherwise falsely labeled in any respect, the said article shall be refused admission, and the Secretary of the Treasury shall refuse delivery to the consignee and shall cause the destruction of any goods refused delivery which shall not be exported by the consignee within three months

from the date of notice of such refusal under such regulations as the Secretary of the Treasury may prescribe: *Provided*, That the Secretary of the Treasury may deliver to the consignee such goods pending examination and decision in the matter on execution of a penal bond for the amount of the full invoice value of such goods, together with the duty thereon, and on refusal to return such goods for any cause to the custody of the Secretary of the Treasury, when demanded, for the purpose of excluding them from the country, or for any other purpose, said consignee shall forfeit the full amount of the bond: *And provided further*, That all charges for storage, cartage, and labor on goods which are refused admission or delivery shall be paid by the owner or consignee, and in default of such payment shall constitute a lien against any future importation made by such owner or consignee.

SEC. 12. That the term "Territory" as used in this Act shall include the insular possessions of the United States. The word "person" as used in this Act shall be construed to import both the plural and the singular, as the case demands, and shall include corporations, companies, societies and associations. When construing and enforcing the provisions of this Act, the act, omission, or failure of any officer, agent, or other person acting for or employed by any corporation, company, society, or association, within the scope of his employment or office, shall in every case be also deemed to be the act, omission, or failure of such corporation, company, society, or association as well as that of the person.

SEC. 13. That this Act shall be in force and effect from and after the first day of January, nineteen hundred and seven.

Approved, June 30, 1906.

APPENDIX B.

INTERSTATE SHIPMENTS OF LIQUORS.

AN ACT To codify, revise and amend the penal laws of the United States.

Be it enacted by the Senate and the House of Representatives of the United States of America in Congress assembled,
That the penal laws of the United States be, and they hereby are, codified, revised, and amended, with title, chapters, headnotes, and sections, entitled, numbered, and to read as follows:

* * * * *

SEC. 238. Any officer, agent, or employe of any railroad company, express company, or other common carrier, who shall knowingly deliver or cause to be delivered to any person other than the person to whom it has been consigned, unless upon the written order in each instance of the *bona fide* consignee, or to any fictitious person, or to any person under a fictitious name, any spirituous, vinous, malted, fermented, or other intoxicating liquor of any kind which has been shipped from one State, Territory, or District of the United States, or place non-contiguous to but subject to the jurisdiction thereof, into any other State, Territory, or District of the United States, or place non-contiguous to but subject to the jurisdiction thereof, or from any foreign country into any State, Territory, or District of the United States, or place non-contiguous to but subject to the jurisdiction thereof, shall be fined not more than five thousand dollars, or imprisoned not more than two years, or both.

SEC. 239. Any railroad company, express company, or other common carrier, or any other person who, in connection

with the transportation of any spirituous, vinous, malted, fermented, or other intoxicating liquor of any kind, from one State, Territory, or District of the United States, or place non-contiguous to but subject to the jurisdiction thereof, into any other State, Territory, or District of the United States, or place non-contiguous to but subject to the jurisdiction thereof, or from any foreign country into any State, Territory, or District of the United States, or place non-contiguous to but subject to the jurisdiction thereof, shall collect the purchase price or any part thereof, before, on, or after delivery, from the consignee, or from any other person, or shall in any manner act as the agent of the buyer or seller of any such liquor, for the purpose of buying or selling or completing the sale thereof, saving only in the actual transportation and delivery of the same, shall be fined not more than five thousand dollars.

SEC. 240. Whoever shall knowingly ship or cause to be shipped, from one State, Territory, or District of the United States, or place non-contiguous to but subject to the jurisdiction thereof, into any other State, Territory, or District of the United States, or place non-contiguous to but subject to the jurisdiction thereof, or from any foreign country into any State, Territory, or District of the United States, or place non-contiguous to but subject to the jurisdiction thereof, any package of or package containing any spirituous, vinous, malted, fermented, or other intoxicating liquor of any kind, unless such package be so labeled on the outside cover as to plainly show the name of the consignee, the nature of its contents, and the quantity contained therein, shall be fined not more than five thousand dollars; and such liquors shall be forfeited to the United States, and may be seized and condemned by like proceedings as those provided by law for the seizure and forfeiture of property imported into the United States contrary to law.¹

Approved, March 4, 1909.

¹ Crimes Act, Chap. 1, §§ 238-240.

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